

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 20952/08

In the matter between:

INTERCAPE FERREIRA MAINLINER (PTY) LTD AND OTHERS
Applicants

and

MINISTER OF HOME AFFAIRS AND OTHERS Respondents

JUDGMENT

OWEN ROGERS AJ

Introduction

- [1] The applicants own or occupy various premises in the vicinity of Montreal Drive, Airport Industria, Western Cape. The third respondent, Cila Executive Apartments 1 CC (“Cila”), is the owner of a property in the

same area, namely erf 115973 Montreal Drive. The first respondent is the Minister of Home Affairs. The Department of Home Affairs (“the DoHA” or simply “the Department”) occupies erf 115973 and uses it as a refugee reception office (“the refugee office”). The DoHA’s occupation is by virtue of a lease between Cila and the Department of Public Works (“the DoPW”). The Minister of Public Works has been joined as the fourth respondent. The second respondent is the Municipality of Cape Town (“the City”), in whose area the properties fall.

- [2] The applicants launched the present application on 18 December 2008 as one of urgency. They seek an order that the DoHA cease operating the refugee office on erf 115973. They do so on the basis (and seek declaratory orders to the effect) that the operation of the refugee office on the property contravenes the City’s zoning scheme and that it in any event constitutes a common law nuisance. (The applicants also alleged in their founding papers that the operation of the refugee office violated various constitutional rights of the applicants, their employees and invitees, but this was not pressed as a separate cause of action at the hearing.) Initially the Minister of Public Works was not cited. At the first hearing of the application on 10 March 2009 counsel for the Minister of Home Affairs argued that the joinder of the Minister of Public Works was necessary as the DoPW was the lessee of the property. On 13 March 2009 Baartman AJ ruled that such joinder was necessary and postponed the application to allow for such joinder. The costs of that hearing stood over for later determination. The Minister of Public Works was thereafter joined.
- [3] The two Ministers and Cila oppose the application. Mr Albertus SC and Mr Bofilatos appeared for the Ministers. Ms van Zyl filed heads of argument on behalf of Cila but did not appear at the hearing. I was told

that this was due to costs constraints. The applicants were represented by Mr Le Roux SC and Mr Borgström. At the request of the court Mr Katz appeared as an *amicus*, primarily with a view to making submissions as to what order the court could and should make if the applicants established the alleged unlawfulness of the DoHA's conduct of the refugee office but also, more generally, to provide a voice for asylum seekers whose interests could be affected by the relief sought by the applicants. Mr Katz's willingness to perform this task at very short notice is much appreciated by the court.

The Montreal Drive enclave

- [4] The area in question ("the Montreal enclave") lies at the apex of the triangle created by the N2 highway and Borchards Quarry Road. The refugee office and the properties owned or occupied by the applicants are accessed by turning off Borchards Quarry Road into Montreal Drive. There are ten erven abutting Montreal Drive to the north-west and seven erven abutting Montreal Drive to the south-east. Another seven erven to the south-east are accessed by two short cul-de-sacs off Montreal Drive (Millpark Close and Morris Close). All the erven in this enclave are zoned as "*General Industrial*".
- [5] Erf 115973 (where the refugee office is located) is the third last erf on the north-west side as one drives down Montreal Drive off Borchards Quarry Road. It is directly opposite the T-junction created by Montreal Drive and Morris Close. Vehicles bound for the refugee office approach and depart from the office in the same way, namely via Borchards Quarry Road.

- [6] In the account which follows of the applicants and their businesses, employee numbers are the numbers of employees working at the particular premises in question.
- [7] The first applicant, Intercape Ferreira Mainliner (Pty) Ltd (“Intercape”), occupies several premises in the Montreal enclave. The first applicant is a luxury bus operator. Its head office (50 employees) is the last property on the south-east side of Montreal Drive (erf 108034) and is diagonally opposite the refugee office. (The fifteenth applicant is the owner of the head office premises.) Intercape occupies two other properties in Morris Close as a workshop maintenance centre for buses (erven 113241 and 113242) and also occupies a property on the north-west side of Montreal Drive (erf 115975) as a call centre (40 employees). (The tenth applicant is the owner of the call centre premises.) There is one property between the refugee office and the call centre premises. Intercape occupies a portion of another property at the entrance to Montreal Drive (erf 114086). It uses this portion as a training centre (40 employees and trainees).
- [8] There is one property, erf 160415, between the refugee office and the Intercape call centre. Erf 160415 (which I gather comprises sectional title units) is occupied by various tenants, among whom are the seventh, eighth, ninth and fourteenth applicants. The seventh applicant carries on business as a funeral parlour (one employee), the eighth applicant as a freight forwarding agent (four employees), the ninth applicant as a transport broker (three employees) and the fourteenth applicant as a property investment broker (one employee). (The eighth and fourteenth applicants also own their respective units.)

- [9] The second last property on the south-east side of Montreal Drive is erf 113246. Like the Intercap head office, erf 113246 lies diagonally opposite the reception centre but on the other side of Morris Close. Erf 113246 is occupied by the sixth applicant, an ice-cream manufacturer and distributor (40 employees). (Erf 113246 is owned by the eighteenth applicant.)
- [10] The third last property on the south-east side of Montreal Drive is erf 113247. It is occupied by the twelfth applicant, an overland tour operator (50 employees).
- [11] The thirteenth applicant occupies erf 113240 (at the end of Morris Close) as a woodwork joinery (40 employees). (This property is owned by the nineteenth applicant.)
- [12] These are the applicants whose premises are situated closest to the refugee office. The remaining applicants occupy or own properties further away on the south-east side of Montreal Drive. The twentieth applicant occupies erf 113234 where it conducts business as a fuel station (16 employees). The remaining properties connected with the applicants in this case are all in Millpark Close. The second applicant occupies erf 113236 where it conducts business in the sale of second-hand buses and trucks (two employees). (This property is owned by the sixteenth applicant.) The third applicant occupies a portion of erf 114086 (the other portion housing Intercap's training centre). The third applicant is a rebuilder and refurbisher of passenger coaches (19 employees). (The sixteenth applicant also owns erf 114086.) The fourth applicant occupies erf 113237 and is a tyre retailer (16 employees). (The seventeenth

applicant is the owner of this property.) The second to fourth applicants are associated companies of Intercape.

- [13] Leaving aside the refugee office, there are 23 erven in the Montreal enclave. The occupiers of 13 of these erven are applicants. Some of the owners of these 13 erven have also joined as applicants.

The Cape Town refugee reception office

- [14] In terms of the Immigration Act 13 of 2002 (“the Immigration Act”) a person is “*an illegal foreigner*” if he is a “*foreigner*” (ie not a South African citizen) and is in the Republic in contravention of the Act. In terms of s23 a foreigner who claims to be an asylum seeker may be issued with an asylum transit permit valid for fourteen days.
- [15] In order to acquire the right to remain in South Africa for a longer period, the asylum seeker must follow the procedures set out in the Refugees Act 130 of 1998 (“the Refugees Act”). In terms of s21 of the Refugees Act the asylum seeker must apply for asylum. If the s21 application is granted, the person is a “*refugee*” as defined in the Act and has the rights and obligations set out in Chapter 5 of the Act. Because a s21 application may take some time to adjudicate, the person applying for asylum in terms of s21 must, in terms of s22, be issued with an asylum seeker permit. The latter permit entitles the asylum seeker to sojourn in the Republic temporarily pending the adjudication of his s21 application.
- [16] Although one would, in the light of the statutory regime, expect asylum seekers to be persons in possession of a transit permit issued in terms of s23 of the Immigration Act, I was informed by the *amicus* and by the

Ministers' counsel that the vast majority of persons seeking asylum status under s21 of the Refugees Act are foreigners who have entered the country illegally without obtaining transit permits.

- [17] Applications for asylum status must be made to a refugee reception officer at a refugee reception office. In that regard, s8(1) stipulates that the Director-General of the DoHA "*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*".
- [18] The Director-General has established five refugee reception offices – one for each of Pretoria, Johannesburg, Durban, Port Elizabeth and Cape Town. The refugee offices process applications in accordance with centrally determined policies and procedures. The Cape Town refugee office was initially located at Customs House on the Cape Town Foreshore. Owing to the increase in applications in recent years and the resultant development of huge backlogs in the Cape Town office, the Department in September 2005 appointed a Backlog Project Team ("the BPT"). Because of space constraints at Customs House, the Department secured 1077 m² of office space at erf 115973 (the Montreal premises) in terms of a five-year lease commencing 1 January 2006 ("the 2006 lease"). The lease was concluded between Cila and the DoPW. Although the lease began on 1 January 2006 the BPT only moved into the premises in July 2006.
- [19] At the time of the conclusion of the 2006 lease the rest of the Montreal premises (1185 m²) was already occupied by the DoHA's Civic Services unit in terms of a lease concluded between the DoPW and Cila in August 2001 ("the 2001 lease"). The period of the 2001 lease was three years

from 1 August 2001 with an option to renew for a further two years. The Civic Services unit performs functions unrelated to asylum seekers.

[20] The nature of the activities performed by the BPT at the Montreal premises as from July 2006 is not explained in the papers but those activities do not seem to have involved the attendance at the Montreal premises of significant numbers of asylum seekers. I presume that the BPT was involved in adjudicating s21 applications rather than issuing s22 permits. The activities of Civic Services likewise did not attract large crowds.

[21] Some of the problems at the Cape Town refugee office (then located in Customs House) can be gleaned from the judgment of Van Reenen J in *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C). The said judgment was delivered on 16 January 2006. The *Kiliko* applicants, who issued their application in March 2005, were foreigners who complained of their inability to gain access to the Cape Town refugee office in order apply for asylum. They alleged that the Department's failure to provide them with the necessary facilities and proper opportunities to submit applications was an unlawful violation of the Department's obligations under the Refugees Act and the Constitution. Their affidavits chronicled their unsuccessful attempts to obtain service from the Cape Town Refugee Office (see para 10 of the judgment):

“Their attempts were futile, despite the fact that a number of them slept outside the said offices throughout the night, on different occasions, or arrived there during the early hours of the morning. Each one of them, without fail, on a daily basis, except on or about 9 March 2005, observed that only a limited number of individuals were allowed to enter the Refugee Reception Offices. On that date the 26 persons who succeeded in being admitted were arrested and taken to Pollsmoor Prison but later

released. The Cape Times of 2 March 2005 carried a report of an incident that had taken place the previous day when frustrated asylum seekers inexcusably, but, in the light of the facts recited above, perhaps understandably, forced their way into the Cape Town Refugee Reception Office and had to be physically restrained by officials of the Department. Their actions resulted in injuries that necessitated hospital treatment, having been sustained by a number of those who had forced their way into the building.”

- [22] The applicants’ factual allegations in the *Kiliko* case were not materially challenged (para 14). The Department in its answering papers in *Kiliko* (filed in May 2005) set out some of the policies and strategies to address the problems (see paras 15-17), and some of this material was repeated in the answering papers in the present matter. Among the difficulties which the Department identified at that stage was that the Customs House premises were not large enough and that new premises were being sought. Van Reenen J held that it was implicit in the nature of the remedial steps implemented or envisaged by the Department that the policies and practices of which the applicants in that case complained were “*the result of a lamentable lack of capacity on the part of [the Department] to have taken steps efficiently to handle the volume of applicants for asylum*” (para 29). Part of the relief granted by the court was what Van Reenen J styled a structural interdict in terms whereof the Department was ordered to furnish a report to the court by 3 May 2006 on a variety of matters (the implementation of certain plans, the numbers of officials dealing with asylum applications, the numbers of foreigners daily attending at the refugee office, the number of applications which the Department was capable of processing daily, backlogs, progress in procuring more suitable premises and so forth).

- [23] Reports pursuant to this order were filed in affidavits dated 10 and 31 May 2006. On 8 June 2006 Van Reenen J postponed the matter to 19 March

2007 with a direction for the filing of a further report by 7 February 2007. On 19 March 2007 the *Kiliko* matter was again postponed with a further report to be filed by 31 December 2007. The further report was filed on 31 January 2008. The matter came before Van Reenen J on 4 March 2008, on which occasion he gave a further judgment (not reported). The matter was postponed to 12 December 2008 with a further report to be filed by 5 December 2008. Further reports were filed on 8 December 2008 and 6 March 2009, and on 9 March 2009 Van Reenen discharged the structural interdict.

- [24] Van Reenen's judgment of 9 March 2009 has not been reported. He said that it was clear from what one read in the newspapers that all was not well at the Cape Town refugee office (by then located at the Montreal premises). That would suggest, he observed, that the problems that faced the *Kiliko* applicants in applying for s22 permits had not been fully addressed as yet. However, said Van Reenen J, that was not the evidence before the court. The report dated 8 December 2008 by Mr Sikakane (the director of the Cape Town refugee office and also the Department's principal deponent in the present matter) and the report dated 6 March 2009 by Mr Jurie De Wet (Chief Immigration Services Office, Western Cape) reflected a substantial improvement in the number of s22 permits issued on a daily basis. This was partly attributable to an increase in the staff complement from 9 to 52. Van Reenen J added that it appeared from Mr De Wet's affidavit that the government had resolved to introduce a dispensation in terms whereof nationals from certain countries would be exempted from the provisions of the Refugees Act and that this would substantially reduce the number of asylum seekers. An assurance from counsel that this was not merely a "*pipe dream*" was noted in the

judgment. That undertaking, according to Van Reenen J, had played an important role in his conclusion to discharge the structural interdict.

[25] I shall revert to the *Kiliko* reports in due course. They were not part of the papers filed in the present application but the parties were agreed that I could have regard to them.

[26] As noted, one of the problems identified by the Department in the *Kiliko* case was the lack of adequate space at Customs House. It was said that the DoHA was engaged in discussions with the DoPW to find alternative premises (this was stated in affidavits filed by the Department in May 2005). In the papers in the current matter the DoHA stated that in 2006 it identified an alternative site for the refugee office. This alternative site was the old Maitland School. It had the advantage of proximity to a railway station, buses, taxis and other amenities. The Maitland site belonged to the Western Cape Provincial Government. Unfortunately the plans for the Maitland site had to be abandoned in January 2007 after the City declined to allow the site to be used as a refugee office because the site was located in a residential area. (The Department has not provided documents or further details relating to the unsuccessful attempt to locate the refugee office at the Maitland site. Presumably the City's consent was needed because a rezoning or a consent use or a departure was needed in terms of the applicable zoning scheme).

[27] When the Maitland relocation came to nought, the Department began to explore other possibilities. Three sites were initially investigated. The first site was a portion of the Frenel Building in Voortrekker Road, Woodstock. The site was owned by Metrorail (a division of Transnet Ltd). In the face of objections from other tenants of the Frenel Building,

Metrorail declined to lease the premises to the Department for use as a refugee office. The second site was the top deck of the Cape Town railway station, under the control of Propnet. This option had to be abandoned when Propnet advised the Department that the top deck was to be renovated for the 2010 World Cup Soccer Tournament. The third site was the Nontsumpa Building, located in a residential part of Nyanga. The site was owned by the DoPW. This site was found to be unsuitable because it was too far removed from transport networks.

[28] I pause here to mention that in his affidavit Mr Sikakane states that another objection to the top deck site was that Propnet was not willing to lease the premises for a term of more than five years “*which obviously would not have been a viable option for the Department*”. I infer from this that one of the Department’s requirements for the refugee office was long-term tenure.

[29] Later in 2007 a fourth possibility came under consideration, namely the acquisition of NIB House opposite the Good Hope Centre. In his affidavit in the present matter (dated 25 February 2009) Mr Sikakane says simply: “*However, since the owners of this building are involved in a land claims dispute which is ongoing, acquisition of the building has been put on hold indefinitely.*” He does not say *when* it was decided to put the NIB House acquisition on hold. However, in the Department’s report in the *Kiliko* matter dated 31 January 2008 (in the form of an affidavit by Ms Yolisa Mzamane, assistant director of the Cape Town refugee office) it was said that the Department was hopeful of relocating the refugee office to NIB House by September/October 2008. In the subsequent *Kiliko* report of 12 December 2008 Mr Sikakane said that the NIB House acquisition had been put on hold because of the land claim dispute. The decision to put

the acquisition on hold must thus have occurred some time between February and early December 2008.

[30] A development which had not occurred when the first *Kiliko* judgment was given was a (further) surge in asylum applications in September/October 2007. The Department attributes this surge in the main to the flight of economic refugees from Zimbabwe. This development no doubt put further strain on an already embattled refugee office. At that time (September/October 2007) the refugee office was still located at Customs House (the attempts in 2006-2007 to procure alternative sites had not borne fruit). In an endeavour to deal with the increasing number of applications, the Department as from 16 January 2008 decided on a temporary basis to use its offices at Barrack Street, Cape Town, for processing s22 permits. The Department's immigration inspectorate was located at Barrack Street. The asylum seekers were bussed from Customs House to Barrack Street. Mr Sikakane says of this arrangement: "*This was intended only as a temporary measure since the Department had decided to relocate the Centre [ie the refugee office] from Customs House to the backlog office at Airport Industria, which accordingly occurred in and during February 2008, from which date, all section 22 permits, extensions thereof and status determinations are dealt with at the Centre's present premises [ie the Montreal premises]*".

[31] This somewhat laconic statement might be thought to mean that the Barrack Street arrangement was temporary because the Department had decided to relocate the refugee office permanently at the Montreal premises. However, Ms Mzamane's report to the court in the *Kiliko* matter dated 31 January 2008 makes it clear that as at 31 January 2008 both the Barrack Street and Montreal premises were regarded as

temporary arrangements, the intention being to move into NIB House by September/October 2008. This accords with the fact that, as noted earlier, the Department was evidently wanting to secure long-term occupation, whereas the 2006 lease of the Montreal premises had only three years to run while the 2001 lease had already expired (though it seems to have been informally extended).

[32] The temporary use of the Barrack Street premises is not fully described in the papers. I infer that the crowds of asylum seekers would gather at Customs House and that those who were at the front of the queue and could be processed during the course of the day would be bussed to Barrack Street. That is where (for a short period in January 2008) the s22 permits were issued. I assume that the process of adjudicating the s21 applications continued at Customs House and at the BPT's office at the Montreal premises.

[33] In February 2008 the temporary arrangement at Barrack Street terminated, and the processing of s22 permits shifted to the Montreal premises. Initially this was done from the 1077 m² of office space which had been leased for the BPT in terms of the 2006 lease. In January 2009 the Civic Services unit vacated the 1185 m² of space leased in terms of the 2001 lease, and the refugee office took over this space as well. The 2001 lease (if one assumes that the two-year option was exercised) would have expired on 31 July 2006. There is not evidence of a formal renewal: presumably the lease has been informally extended.

[34] In the case of the Montreal premises, the asylum seekers who can be processed on a daily basis are not bussed to the refugee office from Customs House. The whole operation has shifted to the Montreal

premises and this is where the crowds of asylum seekers who previously thronged Customs House now gather.

Conditions in Montreal enclave since February 2008

Founding papers

- [35] The main founding affidavit (dated 17 December 2008) was made by Mr Ferreira, the managing director of Intercape. Confirmatory affidavits were filed on behalf of the other applicants. Mr Ferreira says that the Department's activities at the Montreal premises up to January 2008 did not seriously interfere with the applicants' businesses but that with the relocation of the refugee office to those premises there was a dramatic change. On working days there are crowds of several hundreds, sometimes four to five hundred (or more). The Department's officials admit only a limited number of persons onto the premises. The rest congregate outside on the pavement and street. There are no toilet facilities for them. Many of them remain there overnight in order to be at the front of the next day's queue. This is accompanied by the inevitable detritus of people forced to sleep on the streets: the remains of food, makeshift materials to provide rudimentary bedding and warmth, human waste, and general litter.
- [36] The daily presence of large crowds of asylum seekers has attracted illegal street vendors who set up shop on the pavements. Their presence has added to the litter generated by the crowds themselves. Criminal elements are also attracted, and asylum seekers in the crowd are from time to time robbed and mugged.

- [37] The frustrations among the crowd or confrontations with criminals often cause eruptions of violence. The Department has security guards who on these occasions try to restore order with batons and pepper spray. When the violence is more serious (which is not infrequent) the police have to be summoned. The use of teargas, pepper spray and even rubber bullets is not uncommon. These incidents may endure for several hours. The crowds will sometimes scatter in all directions, some of them seeking shelter on the premises of Intercap and of other applicants closest to the refugee office.
- [38] There is a constant coming and going of taxis and cars, no doubt to transport asylum seekers to and from the refugee office. This traffic is swelled by the frequent presence of police vehicles, traffic police vehicles and even ambulances. There has been a general breakdown in the observance of traffic laws. Vehicles park where they please (including in front of the refugee office despite such parking being prohibited) or stop (or breakdown) in the middle of the road. Double and even triple parking is common. All this additional traffic jostles for space with the large crowds, with a path opening up in front and then closing up behind each vehicle as it threads its way down the street.
- [39] The large crowds and the additional traffic generate what the applicants describe as an unbearable din. Apart from the noise to be expected from a large crowd, there are blaring car radios and the constant hooting and shouting of taxi drivers. The noise is exacerbated during the not infrequent violent eruptions, as screaming people scatter in various directions and as sirens and megaphones are deployed.

- [40] The crowds on the pavement and street comprise not only persons wanting access to the refugee office (together with street traders and the like). The officials of the refugee office, perhaps from a well-meaning desire to serve more people, have taken to setting up makeshift offices on the pavement where certain categories of asylum seekers can be helped. Megaphones are used by the officials to organise the crowds or to give them information, which adds to the general noise level.
- [41] Those of the applicants whose businesses are closest to the refugee office are naturally the most affected, though all of them complain of unacceptable conditions.
- [42] Noise interference is one element of the complaint. The source of the noise is barely 10 to 15 metres from the closest of the applicants' premises. Mr Ferreira of Intercap has his office on the corner of Morris Close and Montreal Drive overlooking the entrance to the refugee office. He says that it is not possible to work productively in such an environment: "*The noise is constant, only the levels vary*".
- [43] Another element of the complaint concerns health. The absence of toilet facilities and the litter result in unhygienic conditions on the pavements and streets, and attract stray animals.
- [44] A further and significant complaint relates to traffic. The chaotic state of Montreal Drive is such that the applicants' clients and visitors are reluctant to drive to the applicants' premises. In addition, Intercap faces a particular difficulty. Intercap has been operating from its premises in the Montreal enclave since 1979. It has a fleet of 80 luxury buses, 40 bus trailers and about 25 other company vehicles, most of them operating out

of the Montreal enclave. Passengers are collected and dropped off elsewhere, but after each journey a bus will drive to the Montreal workshop and maintenance centre. After being checked it will take a test drive. Mr Ferreira estimates that vehicles associated with the businesses of the first to fourth applicants (which are related) move to and from these applicants' premises between 150 to 200 times per day. Mr Ferreira says that there was a free flow of traffic up to January 2008, but since February 2008 the ability of Intercap's vehicles, particularly its buses, to come and go has been severely disrupted. It is often a slow and dangerous struggle for a bus to edge its way past the refugee office and into Morris Close.

[45] A further area of concern is safety and security. The applicants' employees no longer feel safe travelling to and from work or moving around the area on foot. Mr Ferreira says that there have been repeated incidents of physical violence, robbery, muggings and intimidation. Some employees have already resigned. The conditions discourage clients from attending at the applicants' premises.

[46] In further support of the latter complaint, the applicants have filed affidavits from certain employees. Ms Moller, the head of Intercap's call centre, confirms Mr Ferreira's general description of the situation. She says that for her personally the situation has become unbearable and that she and a number of her staff members have been the victims of assaults and muggings by criminal elements in and among the crowds of refugees. She says that in driving to and from work she is frequently subjected to insults, intimidation and filthy remarks. She and her staff can no longer walk freely between the various Intercap premises. She recounts a specific incident (on 11 September 2008) when she and a colleague had to attend a meeting across the road at the head office. On the way they were

attacked. Her colleague was thrown to the ground and robbed, while she was overpowered and held down by an attacker. Mr Ferreira witnessed the incident but the attackers fled before he could intervene. She also says that some months earlier, and following a number of robberies and muggings, her staff staged what she calls a “*small rebellion*” (this was on 9 June 2008) during which they handed her a petition objecting to their working conditions. She confirms that a number of call centre employees have already resigned because of the situation and she fears further resignations.

[47] Another call centre employee, Ms Hess, confirms Mr Ferreira’s affidavit and describes an incident in March 2008 when a colleague asked a taxi driver to move his vehicle from the front of the call centre premises so that she could pass through. The driver attempted to attack her while her head was turned and only the warning shouts of her colleagues saved her. On another occasion (in June 2008) she observed a fellow employee at the entrance being menaced by people from the crowd. The employee in question had to throw her handbag over the fence to prevent it from being grabbed.

[48] Six other current employees made affidavits confirming the general description contained in Mr Ferreira’s affidavit but without adding specific detail. Five of these are Interscape employees and one an employee of the fifth applicant. A female ex-employee also made an affidavit stating that she had resigned because the position had become unbearable. In his affidavit Mr Ferreira says that the affidavits of the various employees reflect the stress and danger under which they work on a daily basis. He says the deponents were “*randomly selected from present employees and is by no means intended to be exhaustive*”.

- [49] Representatives of each of the other applicants made affidavits confirming in general terms the allegations made by Mr Ferreira insofar as they relate to such applicant's business and the said applicant's exposure to the operation of the refugee office. Their confirmatory affidavits do not contain further details of particular problems experienced by the applicants in question.
- [50] Mr Ferreira annexes to his founding affidavit 34 photographs to illustrate the applicants' complaints. There is also a photograph from the *Cape Times* of 30 September 2008 capturing an incident the previous day – a policeman is seen firing rubber bullets as the crowd rushes down Morris Close towards Intercape's premises.
- [51] As noted, the application was launched on 18 December 2008. By then the problems of which the applicants complain had been in existence for about ten months. Mr Ferreira describes various extra-curial attempts by the applicants (and by him in particular) to get the authorities to address the issues. Initially he left messages at the refugee office, but to no avail. He telephoned the traffic department and the metropole on numerous occasions but says they were "*not really interested*". Although law enforcement officials did visit the site from time to time no action seemed to be taken. Out of frustration in March 2008 he organised a campaign of persistent telephonic complaints to the traffic department followed up by confirmatory emails (often with attached photographs recording the traffic offences). He also requested the assistance of Ms Rhonda Lewis of the City Improvement District Organisation. On 24 April 2008 he wrote to the Director-General of the DoHA setting out the applicants' grievances and attaching photographs. There was no reply. Ms Lewis established that according to an official at the City (Mr Ernie Batt) the Department's

use of erf 115973 did not violate the zoning scheme. The City's health department apparently indicated to Ms Lewis that they would investigate the state of affairs, though according to Mr Ferreira nothing came of this. On 18 July 2008 Ms Lewis wrote to the City's relevant sub-council manager requesting a meeting to be attended by all relevant role players. Nothing came of this request. At about the same time Ms Lewis also made enquiries with the Department about the lack of response to Mr Ferreira's letter of 24 April 2008 and was given the name of an official with whom to liaise. Mr Ferreira thereupon forwarded his letter of 24 April 2008 to this official, who replied that the matter would receive urgent attention (but nothing then happened). In August 2008 and out of desperation Mr Ferreira sent emails and photographs to various news media and also to the mayor (Ms Helen Zille). The mayor's office acknowledged receipt and said that further communication would follow (it did not).

[52] By early September 2008 the residents had come to the view that court action seemed to be the only way forward. On 10 September 2008 Mr Ferreira emailed the mayor's office asking for a 30 minute meeting. On 19 September 2008 her office replied to state that Ms Zille could not accommodate such a meeting in her busy schedule but that two other officials would be in contact. He was asked to complete an appointment request form (which he did), but he then heard nothing further from the City.

[53] On 2 October 2008 Mr Ferreira decided to take the law into his own hands and to cordon off Morris Close with barbed wire and an access boom. He notified the City of his actions and of his reasons. Shortly thereafter a City official called at his office to demand the removal of the barrier. Mr

Ferreira explained his reasons and the barrier has apparently remained in place. (Whether this is with the City's approval or due to the City's inertia is unclear.) Mr Ferreira acknowledges in his founding affidavit that the unilateral closure of Morris Close is not acceptable or advisable though it has apparently had some beneficial effect.

[54] At the same time as cordoning off Morris Close Mr Ferreira asked for a meeting with Mr Sikakane. (This followed shortly after the shooting incident on 29 September 2008.) The meeting took place. Mr Ferreira explained his frustration at the lack of response from the Department. According to Mr Ferreira, Mr Sikakane said that in his view the layout and situation of the building made it unsuitable for use as a refugee office. Mr Sikikane had been told by the Department that Civic Services would be vacating the premises but this move had been delayed on several occasions. Mr Sikakane also stated that his own officials were subjected to the same muggings and assaults as those of which Mr Ferreira complained. He had contacted law enforcement agencies on numerous occasions and also the City's Disaster Management Services, but nobody wanted to accept responsibility for the area. Mr Sikakane added that the mingling of South African citizens and foreign asylum seekers was a problem as it tended to ignite violence.

[55] In his answer to this part of Mr Ferreira's affidavit Mr Sikakane denies that he suggested by word or conduct that he was extremely unhappy with the situation or that he regarded the site as unsuitable. Save for so stating, Mr Sikikane "*notes*" what Mr Ferreira says. Mr Sikakane does not deny Mr Ferreira's account of what Mr Sikakane said concerning the threats faced by the refugee office's staff or Mr Sikakane's unsuccessful attempts

to get assistance from law enforcement agencies or concerning the Department's intention to relocate Civic Services.

[56] On 28 October 2008 the applicants' attorneys addressed formal letters of demand to the Minister of Home Affairs, Cila and the City cataloguing at some length the applicants' complaints (including alleged zoning violations) and demanding that the activities of the refugee office at the Montreal premises cease by 14 November 2008. On 8 December 2008 a reply from the Department informed the applicants' attorneys that the Department was not prepared to accede to the demand and that litigation would be opposed.

[57] Mr Ferreira says that the ordinary, efficient conduct of business by the applicants is no longer possible and that the applicants' profitability is being directly and prejudicially affected by the operation of the refugee office, even though proof of specific financial loss is difficult.

Answering papers

[58] The Department's principal deponent is Mr Sikakane. The deponents for the other respondents associate themselves in general terms with what Mr Sikakane says concerning conditions at the refugee office but without adding further detail. Mr Sikakane made his affidavit on 25 February 2009.

[59] He says that the Montreal premises have been used by the DoHA and the erstwhile Department of Manpower (for processing workmen compensation claims) since 1991 and that for many years the site has been attracting a large number of people. He admits that since February 2008

the numbers have increased and that on any one day there could be 400 to 500 people present. He also accepts that there is occasional “*unruliness*” and that the police are sometimes summoned. He says that the sporadic outbreaks of violence have been limited to the asylum seekers themselves and that he has no record of violence spilling over to other members of the public. He admits that the immediate vicinity of the refugee office has been plagued by littering, lack of ablution facilities, illegal trading and illegal parking, and that the illegal parking has from time to time caused vehicular obstructions.

[60] He alleges, though, that it is an “*exaggeration*” to say that the activities in and around the refugee office constitute a nuisance: “*At the most, the said activities constitute an inconvenience and then again, only to those businesses in the immediate vicinity to the Centre*”. He admits that there is from time to time “*much din and clamour*” in the vicinity of the refugee office but states that it is an exaggeration to claim that the noise levels are such that businesses in the enclave cannot operate. He points out that the Montreal enclave is an industrial area, not a leafy suburb.

[61] In answer to the allegation of crime, he says that he is not in a position to admit or deny what the various deponents say. He complains, though, that the affidavits are repetitious and lacking in detail. He disputes the impression the applicants create of a “*den of criminal activity*”.

[62] Regarding the allegations of makeshift offices on the street, he says it is incorrect to say that the refugee office “*has now extended its offices onto the street*”, and he points to the fact that more space has become available since Civic Services vacated the premises. (It is unclear whether he is denying that the Department’s officials were *ever* assisting clients on the

street or merely saying that with additional space having become available such outdoor activities will no longer occur. It should be remembered that the Civic Services unit was still in occupation when the application was launched in December 2008.)

[63] Although Mr Sikakane denies that the state of affairs at the time the application was launched constituted an unlawful nuisance, he sets out various steps which have or will allegedly ameliorate the situation.

[64] As regards littering, he says that this is being attended to in a more intensive way than in the past. A contract has recently been concluded with a cleaning services company (this was earlier in February 2009). The Department also employs two persons to clean the immediate environs.

[65] As regards the lack of ablution facilities, the Department has recently installed six mobile toilets in front of the building (this was again earlier in February 2009).

[66] Concerning the traffic situation, he says that he has on a number of occasions tried to engage the traffic department to stem the problem. A meeting with the City took place on 9 January 2009. The City's officials acknowledged responsibility for dealing with illegal parking in Montreal Drive. The City also promised to address the problems of illegal trading and of persons sleeping on the pavement outside the refugee office. Mr Sikakane adds, though, that to date (ie between 9 January 2009 and 25 February 2009) nothing has been done despite his calls to the City Manager's office.

- [67] As regards the problems created by large crowds, he says a new access system has been devised. At the beginning of each day the office will decide how many people can be served on that day. Those to be served will be issued with access cards. This will enable law enforcement agencies to clear the pavement and street of all non-cardholders.
- [68] He says that the Department is in the process of finalising a special dispensation for Zimbabwean nationals which will mean that 95% of current Zimbabwean asylum seekers will no longer need to apply for refugee status. Zimbabweans make up 60% of all asylum seekers. The Department is securing ten sites to process applications for this special dispensation. It will become operational once at least five sites have been secured. Mr Sikakane expects that this dispensation will dramatically reduce the numbers of those congregating outside the Montreal office. (This was the same claim made by Mr De Wet in his report in the *Kiliko* matter dated 6 March 2009.)

Replying papers

- [69] Mr Ferreira's first replying affidavit is dated 7 March 2009 (about two weeks after Mr Sikakane's answering affidavit). He states that he has personally monitored the situation since the application was launched and that nothing has materially improved since then. The number of asylum seekers has not declined. The new cleansing contract (of which he has no personal knowledge) has, he says, made no difference. There are still regular confrontations. He confirms the presence of the six mobile toilets but says that because they stand on a public pavement they exacerbate the nuisance, and that people from the crowd continue to urinate against

vehicles and walls in Montreal Drive. He states that officials are still setting up desks in the street.

[70] He annexes a number of further photographs in an endeavour to corroborate the absence of improvement. These photographs were taken on 8, 12 and 15 January 2009 and on 5 March 2009. On 12 January 2009 the police were summoned and shots were fired. The police vehicles and officers can be seen in the photographs for that day. A further protest occurred on 15 January 2009 with the police again in attendance. Three police vehicles can be seen in one of the photographs for that day. Litter and illegal parking can be seen in some of the photographs, and the crowd numbers appear to be similar to those seen in the photographs attached to the founding papers.

[71] On 11 May 2009 the applicants filed further replying papers, this time in reply to the answering affidavit filed on behalf of the Minister of Public Works. The latter Minister had filed his answering papers on 24 April 2009 pursuant to his joinder. His papers did not address the factual state of affairs complained of by the applicants. However, the applicants took the opportunity in reply to provide an “*update*” of the situation. Mr Ferreira says in his further affidavit that the State’s resistance to the application has left the applicants with “*dismay and concern*” and they feel they have to do everything in their power to prevent the court from making a decision on a misinformed basis. This they have sought to do primarily by introducing further photographs and video material to show what the two Ministers were wanting the court to allow to continue.

[72] Mr Ferreira states in the affidavit of 11 May 2009 that the situation has actually deteriorated. He attaches a large number of photographs

capturing images from the following dates: 11, 12, 13, 16, 17, 19, 23, 24, 26, 27 and 30 March 2009; 1, 6, 8, 15, 16, 20, 28, 29 and 30 April 2009; and 4 and 6 May 2009. On 17 March 2009 there was fighting and stone throwing. Some members of the crowd fled into the Intercape premises. On 24 March 2009 the crowd was particularly chaotic and police were already in attendance when Mr Ferreira arrived for work. A police officer advised him to turn around for his own safety but he persuaded the officer to allow him to struggle through to Intercape's premises. On 27 March 2009 the police were again summoned to deal with fighting. On 30 March 2009 the Department's officials cordoned off the pavement so that the only place where the crowds could stand was in the street. There are corroborating photographs for much of what Mr Ferreira says.

[73] The photographs reflect that with the passing of time the bars making up the palisade fence along the refugee office's street-front were being removed until some segments of the palisade were completely bare.

[74] In general, the photographs show large numbers of asylum seekers congregating in the streets, informal traders and traffic chaos. Some of the photographs illustrate the difficulties encountered by the Intercape buses. A person can be seen holding up a sign reading "*Expired Permits*". Mr Ferreira says that this sign is held up every day and a large number of persons congregate around it. On 4 March 2009 the "*street office*" (as Mr Ferreira styles it) had moved towards the Morris Close intersection, accompanied by placards reading "*Expired Permits*" and "*New Comers*".

Further answering papers

- [75] On 28 May 2009 Mr Sikakane made a further affidavit in which he foreshadowed an application to strike out the photographic material attached to Mr Ferreira's affidavit of 11 May 2009 and the portion of the affidavit providing commentary on the photographs, on the basis that such material constituted new matter. He nevertheless responded to the further allegations in case the court should not strike out such material. At the commencement of the hearing I was informed that the Ministers were not persisting in the striking out, subject to Mr Sikakane's further affidavit being received (to which there was understandably no objection).
- [76] Mr Sikakane says that between 500 and 600 asylum seekers are admitted into the office each day for purposes of processing s22 permits and extensions and in some cases for purposes of status adjudication. The last people are admitted between 11h00 and 11h30. The rest tend to disperse so that there are fewer people in the environs as the day wears on. He acknowledges that illegal taxi operators arrive in the afternoon "*to forage for passengers*" and that some congestion and noise then occur but this usually ends by about 17h00.
- [77] He points to the failure of the City to address illegal parking, illegal trading and so forth, saying that Department cannot be held responsible. As regards people sleeping on the street, he says that from his own personal experience there are often no more than ten such persons.
- [78] He states that asylum seekers from specific countries are processed on different days. Zimbabwean nationals are dealt with on Thursdays and

Fridays and these are the busiest days. He emphasises this aspect in commenting on photographs taken on those two days.

[79] He makes various observations on the photographs. He criticises Mr Ferreira in general for exaggeration. He points out that in some of the photographs the asylum seekers are to be seen standing in a very peaceful manner. He says that although vehicles may have to exercise care in winding their way through the crowds, he is not aware of any accident involving serious injury to persons or damage to vehicles.

[80] He denies that the Department conducts office activities on the street on a daily basis. (It is not clear whether he denies that such activities are *ever* conducted outside.) He says that there are no facilities to issue permits in the street, which is a computerised process. (Again, what is not said is whether any *other* activities take place outside.) Concerning the photographs depicting signboards being held aloft, he says that the persons in question might be members of the crowd or that one cannot see what is inscribed on the signboards. He states that there is normally a sign outside the refugee office with the words “*Expired Permits*” to assist in the regulation of queues.

Further replying papers

[81] Mr Ferreira’s further replying affidavit is dated 5 June 2009. He alleges that it is untrue to suggest that crowd numbers dwindle by 16h00 and says that the photographs show that the crowds keep gathering until shortly before the end of business hours. He also says that there is no discernible difference between crowd numbers on the different days of the week.

Regarding official activities on the street, he states that the video material will confirm his version.

Other affidavits

[82] On the second day of the hearing (9 June 2009) Mr Katz (the *amicus*) handed up an affidavit of the same date by a Ms Lisa Draga, a candidate attorney in the employ of the Cape Town office of the Legal Resources Centre (“the LRC”). She expressed a negative view concerning conditions at the Montreal premises and considered that they had deteriorated over the last three to four months. I permitted the Department to file a further affidavit in reply to Ms Draga and also dealing with one or two other aspects which arose in the course of argument. This further affidavit was made by Mr Sikakane and was dated 17 June 2009. Because Ms Draga considered that Mr Sikakane’s affidavit contained allegations against her of a professional nature she made a responding affidavit dated 18 June 2009 which was delivered to me by the LRC. The applicants, through Mr Ferreira, had the last word in an affidavit of 18 June 2009 in which he replied to Mr Sikakane’s most recent affidavit.

[83] From a procedural perspective it is undesirable that there should be additional exchanges of affidavits in this way, but the case is an unusual one, both because of the nature of the relief claimed and the presence of an *amicus* who wished to place certain information before the court. I have read the further affidavits. There are matters between Ms Draga and Mr Sikakane that it is neither necessary nor possible for me to resolve. I accept for purposes of this application what Mr Sikakane says concerning the number of asylum seekers to which the refugee office attends each day (about 600) and that there has been no deterioration in the number of

people serviced. I am mainly concerned with conditions outside the office, which is, I think, what Ms Draga was talking about. Regarding muggings and assaults (to which Ms Draga referred), Mr Sikakane did not dispute that these occurred but said that such instances more often than not took place towards the N2 highway about 500 metres away and are unrelated to the activities of the refugee office and would thus not be reported to him by the security guards. (He does not volunteer information as to how many incidents in the immediate environs of the refugee office have been reported to him.)

- [84] In a case where an interdict is sought to prevent an alleged nuisance, it is desirable that the information before the court should, within the bounds of fairness, be as up to date as possible. The last flurry of affidavits does at least indicate that the applicants' perception of matters has not changed. In his affidavit of 18 June 2009 Mr Ferreira says that crowds have not abated and that on Friday 12 June 2009 the situation was so bad that he could not enter Morris Close when he arrived at work. He also said that the mobile toilets on the verge outside the refugee office have been removed, leaving people without facilities. Mr Ferreira referred to the widely publicised comments of the new Minister of Home Affairs on the occasion of her visit to the refugee office on Wednesday 10 June 2009 (the day after argument in this matter concluded). He annexes a transcript of her briefing to the press, where she is reported to have said that there were hundreds of people who probably had to stand in queues for the whole day, that the infrastructure at the refugee office was inadequate for the volumes of asylum seekers, that she had been told that Wednesday was a quiet day and that she could not imagine what Fridays must be like. She also said that the Department needed to "*decentralise*" and find additional offices.

Video material

- [85] At the commencement of argument the applicants asked me to view the video material referred to in Mr Ferreira's affidavit of 11 May 2009. A large television screen had been set up in court for that purpose. The attitude of the Ministers' counsel both then and subsequently was that the video footage was admissible only insofar as the scenes depicted therein had been described in Mr Ferreira's affidavit. I expressed a provisional view that the video footage should be treated as any other annexure which I could study in my own time, and that the parties could in the course of their main arguments make submissions on admissibility and weight. Argument proceeded on this basis, and the video was not viewed in court.
- [86] In my view the video material (contained on a DVD disc) is admissible. The video material does not in principle stand on a different footing from photographs or other documentary evidence. In a matter of this kind it enables the litigant to place before the court documentary material which conveys more vividly than a photograph the conditions of which the litigant complains.
- [87] The affidavit in which Mr Ferreira introduced the video material (dated 11 May 2009) only expressly identified one of the three occasions filmed in the footage, namely a short clip taken on 17 March 2009 showing a violent outbreak. The disc handed to me was marked as containing footage from three dates, Tuesday 17 March 2009, Thursday 2 April 2009 and Tuesday 5 May 2009. The first two clips are relatively short (a couple of minutes) and have no sound track; the third one runs for about 20 minutes and has an audio track of crowd noise, hooting etc (not commentary from the deponent). This last clip is clearly the one taken by

Mr Ferreira on the advice of the applicants' legal team pursuant to their inspection of 4 May 2009. In his final replying affidavit of 18 June 2009 Mr Ferreira specifically affirmed that he took the videos on these three dates. The formal confirmation of this fact can cause no prejudice. In any event, the precise date is not important. I may add, though, that what is clear from Mr Ferreira's affidavit of 11 May 2009 is that the last and longest of the three pieces of footage was taken between 4 and 11 May 2009.

- [88] I do not agree with the submission by the Ministers' counsel that it was necessary for Mr Ferreira to provide a sworn narrative commentary of the video material. Mr Ferreira adduced the video footage as being generally illustrative of the applicants' complaints. After completion of argument I viewed the DVD and it does indeed portray conditions of the kind described in narrative by Mr Ferreira. I shall return to this later.

The zoning issue

- [89] The applicants advance two discrete causes of action, namely an alleged zoning violation and common law nuisance. The appropriate relief flowing from these causes of action may differ, and it is thus necessary to address both.
- [90] The Montreal enclave is subject to the zoning scheme of the former Divisional Council of the Cape ("the scheme") promulgated pursuant to the Townships Ordinance 33 of 1934. The latter ordinance was repealed by the Land Use Planning Ordinance 15 of 1985 ("the LUPO"), s7 whereof deems the scheme to be a zoning scheme in force in terms of

LUPO. The Montreal erven are zoned “*Industrial General*”. The scheme lists the “*predominant uses*” and “*conditional uses*” of such a zoning.

[91] It is common cause that the activities of the refugee office do not fall within the “*predominant uses*” for the site. One of the “*conditional uses*” is “*Place of Assembly*”, defined in the scheme as meaning “*a building or portion of a building designed for use as a public hall, social hall, theatre, cinema, music hall, concert hall, dance hall, exhibition hall, billiard saloon, indoor sports, games or amusement, but does not include special places of assembly, a place of Worship, Place of Instruction, Institution or Drive-In Cinema.*” From documents annexed to the founding affidavit it appears that in December 1990 the Western Cape Regional Services Council (the successor to the Divisional Council) granted a conditional use for the site to enable it to be used by the Department for administrative offices (400 m²) and a waiting hall (350 m²), apparently in the belief that this fell within the definition of “*Place of Assembly*”.

[92] In August 1999, and pursuant to its acquisition of erf 115973, Cila applied for the “*transfer of a conditional use right for a ‘Place of Assembly’ to permit the continued utilisation of the premises for the Department of Home Affairs Offices for the disbursement of unemployment funds*”. On 24 May 2000 the City’s Director: Planning and Economic Development (“the Director”) produced a report recommending that the application be granted subject to conditions. The report is headed “*Application for Transfer of a Conditional Use Right for a Place of Assembly: Erf 115973...*”. On 23 June 2000 the City’s Urban Planning Committee (“the UPC”) considered the report and resolved as follows (I quote only the relevant part of the decision):

“1. *That the application for the transfer of the conditional use right to permit the place of assembly use right on erf 115973, Montreal Drive, Borchards Quarry Industria Area (Boquinar) as offices for the Department of Home Affairs, be approved in terms of the Land Use Planning Ordinance 15 of 1985, subject to the following conditions:*

(a) that the approval be applicable to Cila Executive Apartments I CC and not be transferable, whether it be to the successor-in-title or any other person without Council’s permission and lapses when no longer in use;

(b) that the proposed 45 on-site parking bays be provided, as per plan 3 attached to the report, to the satisfaction of the Area Civil Engineer, Central and that no parking of client’s vehicles occur inside the Montreal Drive road reserve;

(c) that a waiting room for at least 60 people be provided and ablution facilities be provided for clients in accordance with plan 3 attached to the report;

(d) that a revised building plan in accordance with the Development Plan (Plan 3) attached to the report, be submitted to the Central Service Area for approval to ensure compliance with the National Building Regulations;

...”

[93] The applicants allege that the Department’s use of the property as a refugee office is not covered by the Place of Assembly consent use and that in any event there has not been compliance with conditions (b), (c) and (d).

Is the State bound?

[94] I asked counsel to address me on a threshold question, namely whether the State (here represented by the two Ministers) is bound by LUPO and the zoning scheme. Although the point had not been raised on the papers, I

was concerned that – being a legal question – it might bedevil the matter if it went on appeal. Predictably, the applicants’ counsel argued that the State was bound while the Ministers’ counsel argued that the State was not bound. The question arises in this way. Section 39(2)(a) of LUPO provides that no person shall contravene or fail to comply with the provisions incorporated in a zoning scheme or conditions imposed in terms of LUPO or the repealed Townships Ordinance (except in circumstances not here relevant). Section 3 of Part 1 of the scheme stipulates that no person shall depart from the provisions of the scheme or use or permit the use of land contrary thereto. It is thus s39(2)(a) of LUPO read with Section 3 of Part 1 of the scheme that creates the unlawfulness of which the applicants complain. However, and assuming everything else in the applicants’ favour, the Department’s conduct would be unlawful only if the State is bound by s39(2)(a) of LUPO.

[95] The question is not answered by pointing to the fact that erf 115973 is owned by Cila, a private entity. Cila would undoubtedly be bound by the scheme in its use of the premises. But Cila has leased the premises to the Department for use as offices. The Department’s use of the premises can only be an unlawful violation of the scheme if the Department is bound by LUPO and thus by the scheme. In other words, although the zoning of the property is not affected by the fact that the Department is in occupation thereof, use of the property by the Department contrary to the zoning would be unlawful only if the Department were legislatively bound by the statutory scheme.

[96] Prior to the new constitutional era in South Africa our courts adopted the rule that the State is not bound by legislation unless the enactment so provides expressly or by necessary implication. As can be seen from two

of the early leading cases, *Union Government v Tonkin* 1918 AD 533 and *South African Railways and Harbours v Smith's Coasters (Prop) Ltd* 1931 AD 113, the presumption has ancient roots in English constitutional law, the position of the monarch and sovereign prerogative. At bottom, the rule appears to be based on the conception of an all-powerful sovereign who issues decrees binding on his subjects but who is not himself bound unless he so agrees. The immunity from legislation is one of the prerogative privileges which the Crown can surrender in the case of any given legislation. In *Tonkin* Innes CJ stated that “[t]he King’s prerogative, save where duly modified, is the same in every part of the Empire; and the position of the Crown under a statute to which the Crown was a party must be interpreted according to English principles of construction” (at 539-540). This was said at a time when laws in this country were assented to by the Governor-General or some other official as a representative of the Crown. The primacy of English law in determining the scope of prerogative powers and privileges was affirmed in *Sachs v Donges NO* 1950 (2) SA 265 (A) at 288.

- [97] The presumption that the State is not bound by legislation has subsequently been acted upon by the courts in this country, including by the Appellate Division in *Evans v Schoeman NO* 1949 (1) SA 571 (A) and *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A). The second of these cases was decided after South Africa had broken its constitutional ties with the Crown. Kriegler AJA said that no reason had been suggested to the court nor any authority cited to warrant “a departure from that which is known, tested and workable” (at 262E-F). It may be noted, though, that in the period between 1961 and 1994 the State President was vested with the prerogative powers and functions which previously vested in the Crown (see s7(4) of the Republic

of South Africa Constitution Act 32 of 1961 and s6(4) of the same-named Act 110 of 1983).

- [98] In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) Chaskalson P declined to entertain a belated contention that the Minister's conduct in that case violated Gauteng's town planning legislation. He said that the question whether the legislation was binding on the State was one of importance and raised not only factual issues but a constitutional issue concerning the applicability of the common law presumption that the State is not bound by its own enactments except by express words or by necessary implication (paras 85-88). As far as I am aware the issue has not been judicially addressed at any level, though the presumption has in some instances been applied without attention to the question whether it is still applicable (see, for example, *Minister of Water Affairs and Forestry and Others v Swissborough Diamond Mines (Pty) Ltd and Others* 1999 (2) SA 345 (T) at 351F-353G; see also *Somfongo and Another v Government of the Republic of South Africa and Others* 1995 (4) SA 738 (TkSC) at 742G-743C).

- [99] I venture to suggest that a reappraisal of the law on this topic is due. Prerogative powers and privileges have their historical foundations in the person of the monarch (for an informative discussion, see Baxter *Administrative Law* 1984 at 389-399). Where a prerogative exists, it is by virtue of common law – the hallmark of a prerogative is the absence of statutory authority (see *Sachs supra* at 306-307 per Schreiner JA). But under the Constitution the powers, functions and privileges of the State and the various spheres of government are sourced in the Constitution and in legislation consistent therewith. The President and his or her Ministers

have no powers or privileges beyond those for which provision is made in or under the Constitution. (Certain of the former common law prerogatives are now to be found – though not so styled – in s84(2) of the Constitution.)

[100] Under the Constitution a foundational value of our country is the supremacy of the Constitution and the rule of law (s1(c)). The notion of a State which is not in general bound by legislation strikes one as antithetical to the rule of law. Even more anomalous is the proposition that the State in this country should, in its various manifestations under the Constitution, be assumed not to be bound by legislation merely because this was the position of the Crown developed over hundreds of years by the common law of England. Furthermore, the presumption does not appear to sit comfortably with the constitutional regime for the legislative competencies of the various spheres of government. The legislative powers of the national, provincial and municipal legislatures are powers conferred on them directly by the Constitution; the provincial and local legislatures do not exercise powers notionally delegated to them by national government (cf *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) paras 53-60). Under common law, the proposition would have been that the Crown or State President in assenting to legislation was not thereby presumed to be agreeing that the State (whose head he or she was) should be bound. But where (for example) a provincial legislature under our Constitution enacts a law within its competence and such law is assented to by the provincial premier, why should it be assumed that the provincial legislature was not intending thereby to bind (for example) the national government or municipalities within its area? And if those other spheres of government are bound, why not the province itself?

- [101] It is to be emphasised that the common law presumption is not based on public policy considerations to the effect that the work of the State would be hampered if it were bound by legislation. The presumption has its source in regal power and privilege. That is not to say that public policy may not in appropriate circumstances justify an enactment by whose provisions the State (in one or more of its spheres) is not bound (whether in whole or in part). Such a result could be achieved by accepting that the State is bound by legislation unless the contrary appears expressly or by necessary implication. (There is academic support for such an approach: see *LAWSA* Volume 25(1) First Reissue para 327.)
- [102] However, as a judge of first instance I am hesitant to base my decision on a finding that the Constitution has altered the common law presumption, and I shall thus assume in the Ministers' favour that I must approach the question as laid down in the *Raats* case at 262A-F. Even on that basis I have come to the conclusion that the State is bound by LUPO.
- [103] When LUPO was passed in 1985 the legislative powers of provincial councils were located in s84 of the Provincial Government Act 32 of 1961 (formerly called the Republic of South Africa Constitution Act). There is nothing in that Act which prevented a provincial council from binding the State by ordinances within its legislative competence.
- [104] It is clear that LUPO is an ordinance passed in the public benefit. According to its preamble, the ordinance's purpose is to regulate land use planning. Chapter 1 deals with structure plans, which have as their purpose to lay down guidelines for the future spatial development of the area in such a way as will most effectively promote the order of the area and the general welfare of the community concerned (s5). Chapter 2 deals

with zoning schemes and provides that the general purpose of a zoning scheme is to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority (s11). This and other provisions in Chapter 2 disclose no intention to exempt any land from the control in question. Although s11 does not state why it should be desirable for there to be control over the utilisation of land, the object must be similar to the one previously stated expressly in s35 of the Townships Ordinance of 1934, namely the co-ordinated and harmonious development of the area. This view is fortified by s36, which sets out the guiding considerations for adjudicating applications under the ordinance (which would include applications for rezoning and departures). These considerations include lack of desirability of the proposed utilisation (including any relevant guidelines in a structure plan), the safety and welfare of the community concerned and the preservation of the natural and developed environment.

[105] In accordance with the common law approach, the fact that legislation is in the public benefit is relevant but not sufficient to establish that the State is bound. Nor is it enough to show that the State would not be prejudiced if it were bound (*Raats* at 263B); the court must be satisfied that the objects of the legislation would be frustrated if the State were not bound. Now the court can, I think, take judicial notice of the fact that the national and provincial governments are significant owners and users of land in the Western Cape (and indeed in the country as a whole). From a town planning perspective, the control over the utilisation of land customarily involves the allocation of the same use rights to all properties in a particular area so that one will have areas set aside for residential use, other areas for commercial use and yet others for industrial use, and so forth. The purpose of town planning would, in my view, be frustrated if

the State as a significant user of land were free to disregard zoning restrictions. Even if only a few pieces of land in a particular area were free to be used by the State contrary to the zoning for that area, the character of the area and the welfare of the members of the community in that area would be jeopardised and the planning objectives of the local authority (as approved by the province) frustrated.

[106] It is also not without significance that in this particular case neither the Minister of Home Affairs nor the Minister of Public Works (who one can assume to be familiar with the State's attitude to town planning issues) alleged in their answering papers that the State was not bound by the zoning scheme. The argument to that effect was only advanced by counsel, and then only in response to a request from the court. Moreover, the very fact that in 1990 and again in 1999 the owner of erf 115973 applied for a consent use approval so that the land could be utilised by the Department reflects that not only the City but the Department believed that it was necessary to conform to the zoning scheme. Although the Department was not formally the applicant for the consent use, it is impossible to suppose that the Department was not aware and did not approve the making of the consent use applications. I also pointed out earlier that the Department's abandonment of the Maitland school site as a possible location for the refugee office must have been based on an intimation from the City that it would not grant the requisite approval under the applicable zoning scheme. There is no evidence in this case that the State in this country generally sees itself as free to disregard zoning schemes and when I put that proposition to Mr Albertus SC he did not submit that this was the State's attitude.

[107] I believe I can also take judicial notice of the fact that zoning schemes typically include zones appropriate for State use of land. Indeed, the scheme in the present case has areas coloured “*Green Grey*” with the symbols “*State*”, “*L.A.P.*” and “*ED*”, reserved respectively for the following land uses: “*Government Purposes*”, “*Local Authority Purposes*” and “*Educational Purposes*”.

[108] I have already mentioned that the relevant statutory injunction in this case is s39(2)(a) of LUPO, which starts with the words: “*No person shall contravene or fail to comply...*”. Mr Albertus SC pointed to the fact that s2 of the Interpretation Act 32 of 1957 defines “*person*” as including various entities (among which are municipal councils and like authorities) without making any mention of the State. He also referred me to the *Swissborough* case *supra* where Joffe J said (353C) that the term “*person*” does not in its ordinary sense include the State, citing *Union Government v Rosenberg (Pty) Ltd* 1946 AD 120 as authority. In *Rosenberg* the court said that the word “*person*” did not, at least in its ordinary sense, include “*Government*” (at 127-128), and Davis AJA attached some significance to the fact that the Government was not mentioned in the definition of “*person*” in s3 of the Interpretation Act 5 of 1910 (which contained a definition similar to the one in the current Interpretation Act). Later in his judgment he equated the concept of the “*Government*” with the “*Crown*” (page 129). There were other considerations which the court took into account in concluding that the word “*person*” should be construed as not including the State.

[109] I do not read the *Rosenberg* judgment as laying down that the word “*person*” can never be construed as including the State. Moreover, and in view of the fact that the “*Government*” and the “*Crown*” were

interchangeable concepts in the prevailing constitutional regime, it is of some significance that in *Boarland (Inspector of Taxes) v Madras Electric Supply Corporation (In Liquidation)* [1953] 2 All ER 467 (Ch) Upjohn J held that the word “*person*” in its ordinary meaning was one of widest import and apt to include the Crown (at 472G-H). This decision was upheld by the Court of Appeal ([1954] 1 All ER 52 (CA)). As it was put in an earlier case cited by the Court of Appeal, the Crown refers to the Queen, and she is a person. It is unnecessary, I think, to enquire into the precise notion of the “*State*” under our Constitution. What is clear is that the business of the State is entrusted to people: executive authority vests in the President (s85(1)) and in the Ministers to whom he assigns executive functions (s91(2); cf *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) para 27). In a very real sense, the complaint here is that the Minister of Home Affairs is using (or permitting her Department to use) erf 115973 contrary to the zoning scheme. She is a person within the ordinary meaning of s39(2)(a). This may explain the absence of a specific reference to the State in the Interpretation Act: subject to whatever presumption may apply regarding the applicability of legislation to the State, conduct at the national level of government is typically performed by natural persons and the relevant legal proceedings are instituted against the relevant Minister, i.e. a person in the ordinary sense. The specific inclusions in the Interpretation Act, by contrast, cover juristic persons. I should add, though, that if the Interpretation Act were thought to stand in the way of my conclusion, I would find (as contemplated in the introductory part of s2 of the Interpretation Act) that the context of s39(2)(a) of LUPA points to a meaning different to the definition in the Interpretation Act. The reasons for this conclusion would

be the same as those which rebut the presumption that the State is not bound by LUPO.

[110] That the framers of LUPO understood that the word “*person*” could include the State appears from s23(1) of LUPO (a provision not mentioned in argument), which states that “*no person including the State*” shall subdivide land except in accordance with a duly approved application. It may be said that the absence of the words “*including the State*” in s39(2) indicate that the latter provision does *not* apply to the State. This would rest on the logic of the maxim *inclusio unius exclusio alterius*, which has never been regarded as a particularly powerful aid to construction. In *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) it was referred to somewhat dismissively as “*that last refuge*”, a maxim at all times to be applied “*with great caution*” (at 37G-H; see also *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 16E-17A). I do not regard the case for applying the maxim in the present matter to be strong.

[111] Finally on this aspect, I see that in *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC) Yacoob J writing for a unanimous court held that the word “*person*” in s167(6) of the Constitution includes the State and he seemed to regard the contrary contention as involving a “*narrow*” interpretation of the word (see paras 26-31). The attention of the court does not appear to have been drawn to the Interpretation Act or *Rosenberg*’s case but the conclusion is one which supports my own.

[112] I have not overlooked the fact that a contravention of s39(2) is, by s46(1)(a), made a criminal offence. That is a circumstance which has

sometimes been held to indicate that the State is not bound by the legislation (*Swissborough* at 353D). However, there is no conceptual difficulty in the proposition that some portions of an enactment bind the State but not others (*LAWSA op cit* para 327). Naturally the State cannot be subjected to criminal prosecution but I do not think that it necessarily follows that nothing else in the enactment binds the State.

[113] I thus conclude that the two Ministers and their Departments are bound by LUPO in their use of erf 115973.

Is Department's use in accordance with City's decision?

[114] The applicants allege that the Department's use of the premises is not in accordance with the consent use granted by the UPC on 23 June 2000. In particular, they allege that use of the premises as a refugee office or as any offices at all is not within the scheme's definition of "*Place of Assembly*".

[115] I agree that the refugee office cannot be accommodated under the definition of "*Place of Assembly*" and Mr Albertus for the Ministers did not contend to the contrary. Indeed, use as offices of any kind is not within the predominant or conditional use permitted by the scheme for properties zoned "*Industrial General*" (I leave aside offices which are incidental to permitted uses).

[116] Mr Albertus' main contention on this part of the case was that the UPC's decision of 23 June 2000 nevertheless stands until set aside and that in accordance with the principles laid down in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the decision cannot be collaterally challenged in these proceedings. Scope for this

argument arises from the fact that the City did not simply grant a “*Place of Assembly*” use right – if the City had done so, the applicants could, while accepting the validity of the decision, argue that the Department’s actual use of the property does not accord with the consent given. What the UPC in fact approved on 23 June 2000 was the transfer to Cila of “*the conditional use right to permit the place of assembly use right ... as offices for the Department of Home Affairs*” (my emphasis). The formulation of the decision is somewhat clumsy, but it is clear that what the City was asked to approve and what it did approve was the continued use of the premises *as offices* by the Department. That phrase is an essential and critical component of the decision, since it is clear that the City was not authorising *all* uses falling under “*Place of Assembly*” but only *as offices*.

[117] On the assumption that the activities of the refugee office are encompassed by the word “*offices*” in the UPC’s decision (a matter to which I return later), Cila and the Department are possessed of a decision from the City which expressly permits the Department to use the premises as offices. The fact that the UPC was under a misapprehension that office use was permitted by the “*Place of Assembly*” definition and that such use is not in truth permitted in an industrial general zoning may mean that the UPC’s decision was unlawful and substantively invalid but am I permitted so to find in these proceedings? I think not. *Oudekraal* discussed the relevant problem with reference to a somewhat different paradigm to the present case. In *Oudekraal* the court dealt with the issue on the assumption that the person raising the collateral challenge would be a person against whom relief was being claimed. In the present matter the respondents do not seek to challenge the decision. On the contrary, they say it permits them to use the property as offices. It is the applicants who, without actually instituting review proceedings or alleging the

unlawfulness of the decision, seek to deprive the decision of effect by arguing that office use is not a use that can lawfully be granted under the “*Place of Assembly*” definition. Despite the differing context, the principle which I extract from *Oudekraal* is that generally¹ and in the interests of certainty the mere factual existence of a decision is a sufficient precondition for valid consequences unless and until the decision is set aside, the exception being those cases where coercive State powers are used against an accused or respondent on the strength of such decision. In the latter instance, the substantive validity and not merely the factual existence of the decision is a prerequisite, and the accused or respondent can thus raise the unlawfulness of the decision collaterally as a defence.

[118] In the present case the question is whether the Department is using the premises contrary to the scheme. The scheme makes provision for conditional uses (i.e. uses conditional on obtaining the City’s consent). Section 4 of Part 1 provides for the making of applications for permits and approvals, as does Section 3(b) of Part II. Although the scheme itself does not make provision for departures (i.e. for permission to use premises in a way covered neither by the predominant or conditional uses for the zoning in question), s15 of LUPO does. One thus has the position where the City is vested with the power (whether as a consent use or by way of departure) to permit uses of land not covered by the predominant uses. The City in this case has expressly permitted the property to be used by the Department as offices. It seems to me that in response to a complaint that a respondent is using land contrary to the scheme, it is open to the respondent to rely on a decision of the City expressly permitting such use.

¹ I say “*generally*” because as I read *Oudekraal* the question is ultimately one of statutory construction – see para 32.

In other words, the mere fact of that decision renders the use lawful unless and until the decision is set aside.

[119] The next question is whether the Department's refugee office falls within the phrase "*as offices*" in the City's decision of 23 June 2000. I accept, taking the phrase "*as offices*" in abstract, that the use of premises for receiving applications from asylum seekers and issuing permits to them involves the use of the premises "*as offices*"². But I do not think the resolution should be interpreted divorced from its context nor should it be construed with the same strictness as legislation. Cila made an application to the City and what the City approved was that application. The appropriate test, I think, is to ask what a reasonable party in Cila's position would have understood the City's decision to mean.

[120] The application made by Cila in 1999 is not before the court, but in the absence of any refutation from Cila or the Department there is no reason to doubt that the Director's report of 24 May 2000 is a fair summary. The application was to permit the "*continued utilisation*" of the premises as offices "*for the disbursement of unemployment funds*". The application was advertised. Objections were received, and these were discussed in the Director's report. Various conditions were proposed.

[121] The Director's report may not be entirely accurate in describing the use of the premises as at May 2000. There is reference in Mr Sikakane's affidavit to the fact that the Department of Manpower at one stage occupied or shared the premises with the DOHA. Be that as it may, it is clear that as at May/June 2000 the premises were not being used as a

² *The New Oxford English Dictionary* defines "office" as "a room, set of rooms, or building used as a place of business for non-manual work".

refugee office and that use as a refugee office (which began only in February 2008) was of an altogether different character to the office use being exercised in May/June 2000 and for the continuation of which Cila sought permission. It would be quite wrong, in my view, to interpret the phrase “*as offices*” in disregard of what Cila was applying for, *viz* permission to continue an existing office use. Whatever such existing office use was, it was completely different to the activities of the refugee office. What was advertised for potential objection was the application to continue the existing use, and it is such use that the Director and the UPC would have assessed in deciding whether to grant the application and if so on what conditions.

- [122] Assuming for the moment that office use at all were permissible in respect of a property zoned “*Industrial General*”, it is perfectly clear that there is an enormous difference between an application to use premises for an existing office use which attracts only a modest number of citizens to the site (e.g. Civic Services or paying out unemployment benefits) and an application to operate a refugee office (with its potential to attract very large numbers of foreign asylum seekers). The reaction of the City and others to the Department’s attempts to relocate the refugee office at various alternative sites demonstrates this fact. Indeed, the deponent for the Minister of Public Works (a Mr Poto, Director: Property Management: Regional Office, Cape Town) makes the point himself. He says that “*given the peculiar facts and complexity surrounding the activities of the Centre*”, securing alternative premises would take at least a year. He anticipates that “*floods of objections*” will “*frighten off most landlords*” if the refugee office were to be located in a business, commercial or residential area. Volumes of pedestrian traffic are, in his experience, a critical feature for landlords when it comes to the letting of space to the

Government. He refers to the numbers frequenting the Cape Town refugee office and says that “*this factor alone will frighten off most potential landlords*”. He adds that it is a notorious fact that asylum seekers bring in their wake “*all kinds of non-refugee phenomena*”, such as informal hawkers, taxis and undesirable elements. This factor, too, would be a “*formidable problem*” to any potential landlord.

[123] In the circumstances, I am of the view that the phrase “*as offices*” in the UPC’s resolution of 27 June 2000 does not constitute an authorisation by the City for the Department to use the premises as a refugee office. In the light of the application made to the City, that could never have been intended by the City nor could Cila ever have understood the City’s permission to sanction such use.

Non-compliance with conditions?

[124] In the light of the conclusion just reached, it is not strictly necessary to consider whether, as the applicants allege, the conditions of the consent use have been satisfied. However, and in case my conclusion on the previous point should be incorrect, I shall deal with the conditions.

[125] There was some debate about the nature of the conditions. In my view, they are neither suspensive nor resolute in the contractual sense. Section 3 of Part II of the scheme states that a person’s entitlement to use property in accordance with the conditional use is subject in each case to the City’s consent “*and to such special conditions, restrictions or prohibitions... as the Council may think fit to impose*”. When a consent use is granted subject to conditions, those conditions circumscribe the extent of the permission. In order lawfully to use the property in accordance with the

consent, the conditions must be satisfied (cf *Transvaalse Raad vir die Ontwikkeling van Buitestedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 (3) SA 351 (T) at 358H-360E). If the conditions are not satisfied the use is unlawful. If the conditions are at first satisfied and later not, the use will at first be lawful and then become unlawful. I was referred to cases to the effect that township conditions have the force of law (see, e.g. *Thompson v Port Elizabeth City Council* 1989 (4) SA 731 (A) at 770C-E). Characterisation may be important where (as in *Thompson*) the condition imposes a positive obligation, enforcement of which is sought by the authorities. In the present case, we are simply dealing with a circumscribed consent. Cila was not necessarily obliged to do the things listed in the conditions but unless those conditions were satisfied the property could not lawfully be used by the Department as offices.

[126] As to condition (b), it is common cause that there are not 45 on-site parking bays, whether as depicted on plan 3 or otherwise. In the affidavit filed on behalf of Cila it is stated that there are only 30 bays. It is clear from what is said regarding the location of those 30 bays that most of the “missing” 15 bays are those which, according to plan 3, should have been located in the south-east part of the streetfront building, accessed by a driveway off Montreal Drive. The entrance to this enclosed parking area in the streetfront building has been permanently closed up with a wall (as can clearly be seen from the photographs) and there is no entrance off the street at the point indicated on plan 3.

[127] The Ministers say that some of the parking was lost when, at the request of the occupants of the immediately adjoining property (erf 160415), the boundary wall was moved slightly to the south-west (i.e. onto erf 115973).

The applicants who currently occupy erf 160415 (the 7th, 8th, 9th and 14th applicants) are said to have been “*complicit*” in the violation of the parking condition and that because the applicants make common cause with each other none of the applicants can rely on the violation. This contention is without merit. There is no evidence that the applicants who occupy erf 160415 were aware of the conditions imposed by the City or that the moving of the wall would have an effect on the lawful use of erf 115973. In any event, Cila’s deponent states that the request came not from the said applicants (as erroneously claimed by the Ministers) but from the developer of the erf. There is, furthermore, obviously no basis on which the right of the other applicants to complain of the non-compliance can be taken away by the allegedly “*complicit*” conduct of the four applicants who occupy erf 160415.

[128] In any event, the complaint at a factual level is simply untenable. As already noted, it is clear from the respondents’ papers that the bulk of the missing bays are those which should have been located under cover in the streetfront building. The disappearance of those bays has nothing whatsoever to do with the dividing wall on the other side of the building. The missing parking bays have disappeared because the entrance to that part of the building has been closed up and the space has been put to other use. Moreover, plan 3 already takes into account the moved wall (in other words, it depicts the dividing wall in its moved position). What seems to have happened, though, is that Cila extended the dividing wall shown on plan 3 so that it now runs along not only the streetfront building (as depicted on plan 3) but right to the back of the property. There is no evidence that the wall was extended in this way at the request of the developer or occupants of the adjoining property. The extension of the wall has made access to the five side parking bays on the north-east side

of the rear building difficult or perhaps impossible, but the 24 bays at the back of the property are accessible by a servitude right of way and a break in the dividing wall, and the open parking bays at the front of the property are not affected by the dividing wall. All of this is perfectly clear from plan 3 and from the aerial photographs of the site.

[129] I thus find that there is not only a current violation of the parking condition in regard to the number and location of on-site bays but that a relocation of the dividing wall back to its original position (as foreshadowed in Cila's answering affidavit) could not conceivably restore the number of parking bays to 45. In any event, the condition requires the 45 bays to be provided "*as per plan 3*". The only way this could be achieved is by demolishing a part of the front wall of the streetfront building and re-establishing the interior as a covered garage.

[130] A further component of the parking condition is that no parking of "*client's*" vehicles should occur inside the Montreal Drive road reserve. It seems to me that the "*clients*" contemplated by this condition must be the persons using the services of the refugee office, i.e. asylum seekers. It is common cause that illegal parking in front of the refugee office is a persistent occurrence. The Department has not denied the applicants' allegation that the entrance gate for vehicles (which would give access to the streetfront parking bays) is kept permanently closed and that no visitors are allowed to park on site. It is fanciful to suppose that the illegally parked vehicles (which, by the way, can be seen from a number of the photographs and from the aerial photographs) do not include vehicles bringing "*clients*" to the refugee office.

[131] Condition (c) requires a waiting room for at least 60 people and ablution facilities to be provided in accordance with plan 3. I cannot find on the evidence that this condition has been violated. Cila has annexed to its answering affidavit the approved building plans for the property. These plans do not show the additional ablution facilities required by plan 3 but Cila's deponent appears to acknowledge that what has been built may not accord exactly with the approved plans. It may well be the case that the additional ablution facilities have *not* been built. Cila's deponent says that Cila has not made any alterations or extensions to the outside of the building since it purchased the property in 1997, and it is apparent that the additional ablution facilities depicted on plan 3 still had to be built as at 2000. However, I cannot be entirely sure of this fact, and in the absence of an express allegation by the applicants (which they have not made) that the additional ablution facilities have not been installed, it would not be right to make a finding on this aspect.

[132] Condition (d) requires that a revised building plan in accordance with plan 3 be submitted to the City's Central Services Area for approval to ensure compliance with the National Building Regulations. There are no approved building plans in accordance with plan 3. This is apparent when one compares the approved plans annexed to Cila's answering papers (which Cila says are the only approved plans) and plan 3. There should be approved plans showing additional ablution facilities in the north-west corner of the streetfront building and showing indoor parking (with vehicular access) in the south-west quadrant of the streetfront building. It is common cause that no such plans have been approved (this is so even if the additional ablution facilities in fact exist). Moreover, the actual building departs materially from plan 3 in that there is no indoor parking and the vehicular access to that part of the building has been closed up.

[133] I thus find that there has been a violation of condition (d).

Locus standi?

[134] The Ministers have disputed the *locus standi* of the applicants to rely on the violation of the zoning scheme. Mr Albertus referred me to the decision in *Patz v Green & Co* 1907 TS 427 and submitted that this was a case where the applicants had to show actual harm in order to obtain an interdict.

[135] It has been the consistent view of our courts that town planning and zoning restrictions are enacted in the interests of a class of persons, namely the residents of the area, and that such residents thus have standing to interdict violations without proof of actual harm. For the decisions in this court which accord with this approach, see *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) at 400D-401H; *Esterhuyse v Van Jooste Family Trust and Another* 1998 (4) SA 241 (C) at 252C-254D; *Hayes and Another v Minister of Finance and Development Planning, Western Cape, and Others* 2003 (4) SA 598 (C) at 623D-E; *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others* [2009] ZAWCHC (23 January 2009) para 40.

[136] Mr Albertus argued that even if this was so in respect of the zoning scheme in general, one should distinguish between use contrary to the zoning and a violation of conditions imposed in respect of a consent use. He submitted that there was no evidence that the conditions imposed by the UPC on 23 June 2000 were imposed for the benefit of the neighbours. I regard the distinction as misconceived. The immediate neighbours have

a special interest, as an affected class, in upholding the zoning scheme. This means the zoning scheme in all its respects. There is no difference in principle between a case where a person uses property without obtaining a consent use at all and the case where a consent use subject to conditions has been obtained but the conditions are then disregarded; in both cases the use is unlawful and contrary to the scheme. The neighbours have the same interest in insisting on compliance regardless of the precise form of the non-compliance.

[137] In any event, I am satisfied that the conditions were imposed in the interests of neighbours in the Montreal enclave. The Director's report records that among the objections received in respect of the Department's use of the premises prior to 2000 were insufficient parking and congestion and the health risks attendant upon insufficient ablution facilities. Mr Ferreira affirms that his company (Intercape) was one of the objectors. The inference is inescapable that the UPC had the objecting neighbours in mind when these conditions were imposed. The fact that the conditions would also benefit visitors to the Department's office does not detract from the conclusion.

[138] In any event, the objection to *locus standi* has an air of unreality about it when one has regard to the raft of complaints made by the applicants concerning the conditions prevailing in the immediate environs of the refugee office. Although I will need to return to this when dealing with the cause of action based on nuisance, actual harm (even if not quantified financial loss) has been shown.

Waiver?

[139] The Minister of Public Works filed a second affidavit in which he contended that the City had waived compliance with the conditions imposed on 23 June 2000. This waiver was to be inferred, so it was alleged, by the fact that the City, despite the applicants' assertions of non-compliance with the conditions, had elected not to oppose the application.

[140] I would have thought that the only way conditions imposed as part of a consent use could be varied or excised is by a further valid decision of the City made upon due application to it by the owner of the property and after compliance with any applicable administrative procedures (which might, in a case such as the present, include advertising the application to amend the conditions). But it is unnecessary to go into this question, because the factual foundation for a waiver is entirely absent (and the onus to prove the facts in that regard rests squarely on the Minister of Public Works). The City's decision to abide the court's judgment cannot possibly show that the City has waived compliance with the conditions. On the contrary, if the City had waived compliance I would have expected the City either to oppose the application or at least to inform the court that the City did not require compliance with the conditions. The City's decision to abide means only that it is content to allow the court to investigate *inter alia* whether there has or has not been compliance with the conditions and to grant relief accordingly.

Nuisance

[141] Before considering the relief which should be granted pursuant to my finding on the zoning cause of action it is appropriate to address the additional cause of action based on nuisance.

[141] In the context of the present case, the term “*nuisance*” connotes a species of delict arising from a wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference. Wrongfulness is assessed, as in other areas of our delictual law, by the criterion of objective reasonableness, where considerations of public policy are to the fore (see, generally, *East London Western District Farmers’ Association and Others v Minister of Education and Development Aid and Others* 1989 (2) SA 63 (A) at 66G-68A; *Dorland and Another v Smith* 2002 (5) SA 374 (C) at 383B-C and 384A-C). For a recent statement by this court of the factors which typically fall to be assessed in determining reasonableness, see *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) paras 19-21; see also *LAWSA Vol 19* (2nd Ed) paras 173-185.

[143] Since the applicants in the present case do not claim damages but an interdict in respect of an allegedly ongoing nuisance, fault on the part of the Department and Cila is not an element of the cause of action (see *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106A and 120G).

[144] Although the affidavits in this case were in large part devoted to facts relating to the alleged nuisance, relatively little time was devoted in oral argument to this cause of action. This was, I suspect, for the reason that the relevant legal principles are uncontentious and that the conclusion on reasonableness is largely a matter of impression.

[145] It is as well to record that the Department did not raise statutory authority as a defence. In other words, the Department did not allege that the Refugees Act or any other legislation expressly or by necessary implication authorised the Department to use property in a manner which would (but for such authority) constitute an actionable nuisance. As stated in the majority judgment in the *East London* case *supra*, in the absence of statutory authority a public body has no greater power to create a nuisance than a private individual and that under the State Liability Act 20 of 1957 the State's liability is co-extensive with that of the individual (at 69G-J). Had the defence of statutory authority been raised, the Department would have had the *onus* of proving that in whatever way the power to establish refugee offices under s8(1) of the Refugees Act was exercised some interference of the kind complained of (ie an interference which would in the ordinary course be unlawful) would necessarily result. If this had been alleged and proved, the applicants might then have attempted to rebut the defence by alleging that by adopting reasonable precautions or other reasonably practicable methods the extent of the interference could have been lessened (*East London* at 70G-73C).

[146] Since the defence of statutory authority was not raised I do not need to go into the question. I merely observe that s8(1) of the Refugees Act does not localise the refugee offices that can be established nor limit their number. Presumably the reason the Department did not raise the defence

was that the circumstances of which the applicants complain could notionally be avoided by establishing a greater number of refugee offices and locating them in areas and on properties where persons waiting to be helped could be accommodated and where vehicles transporting asylum seekers to the site could park.

[147] I thus approach the question of nuisance in the ordinary way by asking myself whether the Department is using erf 115973 in a way which results in an unreasonable interference in the right of neighbouring owners and occupants to use their premises. I have come to the firm conclusion that the answer is in the affirmative.

[148] I have already set out at some length the factual contentions of the parties, and it is thus sufficient here to summarise my assessment. I have approached the facts in accordance with the well-known rule that where there is a genuine dispute of fact I must accept the respondents' version.

[149] I do not consider that there is any material dispute of fact regarding the applicants' description of the circumstances which have since about February 2008 prevailed at and outside the refugee office in Montreal Drive. The Department's answer to these allegations is, in the main, a criticism of exaggeration. Very little by way of factual material is advanced to show that the circumstances are materially different to what the applicants describe, and indeed a great deal is admitted (crowd numbers in the street, illegal parking, illegal trading, sporadic outbreaks of violence, the need to summons the police to quell disturbances, the presence of criminal elements).

[150] By my reckoning there are photographs depicting scenes outside the refugee office on more than 29 different dates over the period 29 September 2008 to 6 May 2009, and video material on two further dates. The photographic and video material covers all days of the week. These photographs substantially confirm the applicants' description of matters that can be visually assessed. As regards noise, the court must apply common sense. One knows as a matter of human experience that large crowds of people waiting or hoping to be helped, and no doubt often frustrated, will generate substantial noise. The way in which taxis constantly sound their hooters is well known to people living in Cape Town. It is also to be expected that commercial vehicles attempting to navigate their way safely through crowds will sound their hooters. Noise levels would inevitably increase when there are outbreaks of violence and when the police are summoned.

[151] While I would without difficulty come to a conclusion in favour of the applicants without having regard to the video material, such material does provide further compelling evidence in their favour. The video on 17 March 2009, apart from showing large crowds, captures a vicious fight. Most useful is the recording of 5 May 2009 (a Tuesday). It runs for about 20 minutes. It has a sound track capturing the noise of the crowd, the hooting of vehicles, the shouting of officials as they try (without conspicuous success) to organise surging crowds, the congested street and the difficulty encountered by vehicles in moving up and down the road, a taxi parking halfway across Morris Close, the appalling litter, the state of the mobile toilets on the pavement and so forth.

[152] It is significant that the respondents, while claiming exaggeration on the part of the applicants, have offered no photographic or video material of

their own to show that the conditions at the refugee office are materially better on some days or at different times during working hours. I am alive to the fact that photographs capture a moment in time and I am willing to assume in favour of the respondents that there may be occasions when things are not as bad as the applicants allege, but the applicants do not need to prove that circumstances are perpetually as they describe. Even if the circumstances they allege prevailed on only some days of the week and only for two or three hours on those days, it would be unreasonable to expect them to tolerate the interference. As it happens, I am satisfied on the evidence that the circumstances in question prevail on all or almost all working days and that although there may be some decrease in crowd numbers as the day wears on the circumstances are still unacceptable for most of the working day.

[153] In determining the application I have accepted the Department's version that no processing of applications is done in the street and that nothing in the nature of a street office is utilised. What does seem undoubtedly to be the case, though, is that security guards employed by the Department attempt to organise people in the street into groups and that part of this organisational effort involves grouping different categories of asylum seekers in different parts of the public areas outside the Department's premises. Indeed, it is difficult to imagine how the Department could, over the course of several hours in the morning, admit 500 to 600 people into the refugee office without some attempt to organise the mass of people outside. The placards reading "*New Comers*" and "*Expired Permits*" can be clearly seen in the video. It seems that each group's placard is held aloft by a member of the group rather than by an official of the Department. I think it probable that the Department supplies these placards, but the precise details in that regard are not material to the

outcome of the case. Indeed, the position would probably be even worse than it is now if the Department made no such attempt to organise the crowds in the road.

[154] Mr Albertus submitted that the Department cannot be held responsible for the fact that crowds gather in the road, and that it was for law enforcement agencies to deal with illegal activities in the street. I cannot accept that argument in the circumstances of the present case. It is not to be doubted that the cause of people gathering in the street is that the Department is conducting a refugee office on erf 115973. If law enforcement agencies were as a fact clearing the streets and clamping down on illegal activity, the conclusion might conceivably be that there is no nuisance. But it is common cause that the law enforcement agencies are *not* doing so, and this despite repeated requests not only from the applicants but also from the Department itself. I cannot say whether the law enforcement agencies are at fault – perhaps they are, but on the other hand they have pressing calls on their resources. They need to prioritise their activities, and conceivably they are simply unable to cope with the circumstances which have been created in Montreal Drive. The activities of the refugee office would seem to require the almost permanent presence of police and traffic officials in order to prevent illegal parking, illegal trading and crowd disturbances. That hardly seems a reasonable duty for a land user to impose on the law enforcement agencies. Moreover, while such agencies would be entitled to take action against illegal conduct it has not been explained to me on what legal basis they could arrest or chase away people calling at the refugee office for assistance. Accordingly, and even if the law enforcement agencies had endless resources to devote to the environs of the refugee office, their presence would by no means eliminate

the unsatisfactory conditions under which the applicants are currently operating.

[155] In the *East London* case the complaint of the applicant (an association of farmers) was that their farming activities were being seriously disrupted by the criminal activities of “settlers” resulting from the government’s action in settling about 8 000 displaced persons on nearby land. The criminal activities included theft of crops and fencing material, damage to farm buildings and equipment, threats to farm labourers and the like (see at 78E-79I). The majority held that this was an actionable nuisance on the part of the State. There was no suggestion by the court that the applicants had misconceived their remedy and should instead have taken action against the police for the latter’s failure to prevent the criminal activities emanating from the settlement. It was clearly regarded as sufficient that the government by its actions had created the problem. Hoexter JA said the following towards the end of his judgment (at 75H-J):

“One cannot but have sympathy with the 8 000 displaced persons in their unfortunate plight, and at the same time one has a keen appreciation of the quandary in which the respondents found themselves as a result of the precipitate and heedless action of the Ciskeian Government. It is clear that in deciding to settle the refugees on ‘Needs Camp’ the respondents were actuated by the best of motives. It must be accepted, furthermore, that the settlement of but a relatively small number of refugees (as opposed to 8 000 of them) on ‘Needs Camp’ would have done little to solve the total problem. In our system of law, however, the bureaucratic solution of problems, however intractable, must be achieved with due regard to the legitimate property rights of ordinary citizens.”

[156] Admittedly the *East London* case concerned disturbances which emanated from property belonging to the respondent and as a result of action taken by the respondent on such property. The cases do not directly address the situation where the respondent carries on an activity on his property which

attracts people to public areas immediately adjoining the property and where the crowds interfere with the use by neighbours of their properties. As a matter of principle I do not think the distinction matters. The delict (the wrongful conduct) lies in the use of one's property in a way which unreasonably interferes with the enjoyment of their properties by neighbours. If a person uses his property for a purpose which continually attracts crowds to the area who block up the streets and make a clamour and leave litter, there is no reason in principle why such use should not be regarded as unlawful. I have not been referred to any authority in this country dealing directly with this type of situation, though *SA Motor Racing Co Ltd and Others v Peri-Urban Areas Health Board and Another* 1955 (1) SA 334 (T) illustrates the principle. That was a case where the conduct of a drive-in cinema was alleged to cause congestion in the street leading to the cinema. Although the reported judgment does not contain a final finding on the merits of the case (there was a referral to oral evidence) it is clear that in principle the court considered that the respondent's conduct could constitute an actionable nuisance.

[157] There are several English cases which have dealt with activities causing people to congregate in public streets. Although in the *Regal* case it was emphasised that the South African law of nuisance is based on our own common law and not on English law, the central element in both systems is reasonableness. (See, for example, *Sedleigh-Denfield v O'Callaghan and Others* [1940] 3 All ER 349 (HL) at 364G, where Lord Wright said that a useful test for actionable nuisance was “*what is reasonable according to the ordinary usages of mankind living in society, or more correctly, in a particular society*”. See also *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53 (HL) at 70j-71e.)

[158] Among the English authorities which have dealt with the issue are two cases concerning crowds which gathered outside theatres (*Barber v Penley* [1893] 2Ch 447 and *Lyons, Sons & Co v Gulliver* [1914] 1 Ch 631 (CA)). In the first of these cases North J extensively reviewed earlier cases dealing with the use of property in a way which led to obstructions of adjoining roads. His judgment was approved by the Court of Appeal in the later case. See also *Vanderpant v Mayfair Hotel Company Ltd* [1930] 1 Ch 138 at 152-153 for a statement of the general principle.

[159] In the *Lyons* case the trial judge (Joyce J) said the following (at 635-6):

“Among the usual and recognized nuisances on a highway which you find enumerated in almost any text-book are these. It is a nuisance to organize or take part in a procession or meeting which naturally results in an obstruction and is an unreasonable user of the highway, to use premises situate near a highway for exhibitions, entertainments, or other purposes of such a character that crowds of persons naturally collect and obstruct the highway, not by the mere act of coming and going but by remaining on it awaiting admission or watching the spectacle or endeavouring to obtain information as to what is going on out of their sight.”

[160] On appeal the majority of the Court of Appeal upheld the trial judge. The defendant argued that it was not responsible for what went on in the street, that it was the duty of the police to keep the street clear, and that if the police failed to do so the plaintiff should complain to the police. Couzens-Hardy said that this was not the law (at 641-2):

“I have no intention of going through the ancient authorities which were so fully discussed by North J in the case of Barber v Penley. I am quite content not to do any more than take what Lord Cairns said in the case of Inchbald v Barrington LR 4 Ch 388, 390 that ‘There were authorities to show that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular

individual, that individual might be restrained from the commission of that act, – that is quite irrespective of noise, and quite irrespective of anything improperly done by the defendant in the sense of a matter which was indecent or anything of that kind, but it is a case where a man is carrying on his own lawful business, but doing it in such a way as he must know will, in all probability, in the natural course of events, lead to the obstruction of the street.”

And a little later (642):

“I think, therefore, we must start with this as a proposition of law, that a man is or may be liable to an indictment for attracting, even by something lawfully done on his own premises, a crowd in the street adjoining his premises.”

[161] Swinfen Eady LJ delivered a concurring judgment in which he said the following (at 646):

“Then it was urged that really all that the defendants were doing was doing something lawfully on their own premises. That begs the question. No one complains of the way in which the theatrical performances are conducted. The real point is whether the acts of the defendants do not occasion crowds to assemble so as to occasion a nuisance to the plaintiffs. It was said that the police should move them on. Why? The very purpose for which they stand there would be defeated if they were moved on. The police, I am satisfied from the evidence, do their best to minimize the obstruction. They marshal the people, and make them stand in order a certain number deep so as to minimize the obstruction as far as possible; but it is not for the police to make them go away, because the whole object of their being there is to preserve their places and to get into the theatre, and if there were to be a forcible attempt to move these persons away from the theatre and send them elsewhere, a considerable disturbance would probably be created.”

[161] The *Lyons* case was followed by the Supreme Court of Canada in *Strand Theatre Co v Cahill & Co* [1920] 61 SCC 100, where Brodeur J said the following at 104:

“It has been suggested that the control of crowds in a highway was a matter for police regulation and that the owner of a theatre was not responsible because persons collected before the hour at which they were invited, forming a queue on the sidewalk and causing an obstruction to access to the adjacent premises. But the Court of Appeal in England decided this question adversely to that suggestion and declared that if the natural and probable result of what a person is doing will be the collection of a crowd which will obstruct the highway, then the obstruction is an actionable nuisance and this person could be restrained. Lyons v Gulliver.”

(See also the judgments of Anglin J and Mignault J in the same case; and see, further, *Prince George Pulp & Paper Ltd v Newell* (1979) 13 BCLR 171 paras 13-15.)

[163] Although these cases were decided a good many years ago and in different countries, I think they propound a view which is consistent with our own law. Of course, what is reasonable may change over time and may differ as between societies. We are concerned here with South Africa in 2009. I cite these cases not on their particular facts and conclusions but as support for the proposition that in principle what a person does on his property may give rise to an actionable nuisance even though the nuisance is caused by persons who are attracted to the premises and congregate in the street and even though the police could be expected to maintain law and order in the street. Obviously there will be cases where the occasional obstructing of public areas will not be regarded as an unlawful nuisance to neighbours (for an English example, see *Dwyer v Mansfield* [1946] 2 All ER 247 (KB)).

[164] I was urged by Mr Albertus to take into account that the Montreal enclave is an industrial area and that the applicants could not expect the tranquillity of a leafy suburb. Naturally this is a relevant factor in assessing the reasonableness of the Department’s activities on erf 115973

(*LAWSA op cit* para 175). However, the conditions to which the Department's activities have given rise are by no means typical of industrial use. The Department's activities are not characterised by the orderly coming and going of commercial traffic or the steady sounds of machinery. One does not reasonably expect in an industrial area the congregating of crowds in the street and the illegal parking and constant presence of taxis. On the contrary, such phenomena are inimical to the conduct of business in an efficient way. Moreover, there is an enormous difference between the annoyance and distraction caused by crowd clamour, hooting, blaring radios and the shouting of officials on the one hand, and the ordinary sounds associated with industry on the other.

[165] It has been said that in assessing reasonableness a court should pay regard to the utility of the activity in question (*LAWSA op cit* par 182), and this too was a factor on which Mr Albertus relied. Activities which promote the general public welfare are said to have a high social utility. I have examined the authorities cited in the paragraphs from *LAWSA* and am doubtful whether they quite establish what the learned authors say. Indeed, the proposition appears to confuse the question of unreasonable user (which is the criterion for wrongfulness and where the onus rests on the complaining party) and the defence of statutory authority (where an otherwise unreasonable intrusion is rendered lawful by statute and where the onus, at least in certain respects, falls on the party accused of creating the nuisance). Some of the cases cited in paragraph 182 of *LAWSA* are cases of statutory authority while others go no further than illustrating trite propositions regarding the relevance of locality and so forth in assessing reasonableness. I do not regard it as sound law to allow in, through the back door as it were, a defence of statutory authority in the guise of social utility.

[166] The simple fact is that the Department has not alleged that the proper implementation of the Refugees Act inevitably involves the creation of a nuisance. The sacrificing of individual rights in the public interest should ordinarily be governed by statute, and in the absence of such legislation a court should not readily regard an interference with individual rights as justifiable by public welfare (cf *Herrington v Johannesburg Municipality* 1909 TH 179 at 190-194; *JL Armitage v Pietermaritzburg Corporation & GS Armitage* (1908) 29 NLR 91 at 104, being two of the cases cited in *LAWSA* para 182 – both cases of statutory authority). I regard this approach as all the more apposite since the advent of the Constitution. Where interference with private rights is contained in a law of general application its constitutionality can be tested and it is open to the State to attempt to justify any derogation from fundamental rights on the grounds set out in s36 of the Constitution. Evidence on that topic can be adduced and interested parties can intervene to have their say. In an individual case such as the present one which arises under common law, the court is not well-placed to explore all the issues relevant to the balancing of governmental objectives and individual rights, and indeed neither side advanced the sort of evidence which could be expected if the constitutional validity of legislation were in issue.

[167] However, and given the policy-based nature of the reasonableness criterion, I am willing to accept that the social utility of a respondent's conduct is one of the factors that can go into the scales, provided one guards against the temptation to use (or misuse) this factor so as to sanitise conduct which is otherwise clearly unreasonable and thereby effectively uphold a defence of statutory authority without properly examining the empowering legislation to ascertain whether the respondent has discharged the onus resting on it. Approaching the matter along these

lines, I accept that the activities of a refugee office have an important social utility, but in my view conditions at erf 115973 are so far in excess of what neighbours should have to bear that the social utility of the Department's conduct cannot neutralise the unreasonableness of its use of the premises. On the assumption that the Department's activities have a high social utility, the Government could be expected to apply the resources needed to conduct those activities in a way which does not materially disturb the lawful business activities of others. This might involve establishing a greater number of refugee offices, employing additional staff and locating the offices at more suitable sites.

[168] In conclusion, I am satisfied that the extent and duration of the ongoing inconvenience which the applicants have been and are being made to suffer as a result of the Department's activities on erf 115973 are objectively unreasonable. In reaching this conclusion it is not necessary for me to find that each and every applicant is affected to the same degree. Indeed, I am prepared to assume in favour of the respondents that the more distant applicants (those in Millpark Close) may not have proved a sufficient interference with their use of their properties to justify judicial intervention. I am quite satisfied, though, that the applicants who own or occupy erven 160415, 115975 and 113247 on Montreal Drive and those who own or occupy erven abutting Morris Close (including the Intercape premises) have proved that they are the victims of an unlawful nuisance.

Relief

[169] The relief which would typically flow from a finding that a person is using premises contrary to the zoning scheme is an order interdicting the unlawful use. The relief which would typically flow from a finding that a

person is causing an unlawful nuisance is an order for the abatement of the nuisance in the form of an appropriately worded interdict.

[170] As regards the zoning cause of action, there is no factual basis for me to conclude that the illegality could be remedied in the foreseeable future or at all. If I am right that the UPC's approval of 23 June 2000 does not extend to the activities of a refugee office, a new approval from the City would be required. Since there is no serious debate that office use is not one of the primary or consent uses of the general industrial zoning, such approval could not lawfully be given by the City as a consent use. This leaves a rezoning in terms of s16 of LUPO or a departure in terms of s15. It can safely be assumed that any application of that kind would be vigorously opposed by neighbours. In the light of the conditions which have prevailed outside the refugee office since February 2008 and Cila's failure to comply with the conditions imposed on the consent use of 23 June 2000, I cannot rationally proceed on the assumption that any such application would meet with the City's approval.

[171] As regards the nuisance of action, an order in the abstract for the abatement of a nuisance will rarely be appropriate. The respondent needs to know what it has to do in practical terms to bring the unlawfulness to an end. In the present case the applicants seek an order that the nuisance be abated by a closure of the refugee office at erf 115973. Is there anything short of this which can practically abate the nuisance? I do not think so. The Department does not say that it is able to prevent people from gathering in the road or to prevent all the undesirable consequences which this brings in its wake. There seems to be no prospect of refugee numbers materially decreasing in the foreseeable future. (I shall deal with the proposed Zimbabwean dispensation presently.) In his first answering

affidavit Mr Sikakane set out the steps which the Department was taking to ameliorate conditions, but these steps have made no material difference. It is simply not possible for the Department to accommodate on the site at erf 115973 all the people who are seeking assistance and all the vehicles calling at the refugee office, nor have I been told of any plans currently afoot to open additional refugee offices so as to divert some of the asylum seekers elsewhere.

[172] I am faced in this case with the difficulty that the Department is attempting, albeit in an unlawful way, to provide a service to asylum seekers in accordance with this country's international obligations and the Refugees Act. An interdict will or may have consequences for the Department's ability to perform this function in Cape Town. A court is naturally reluctant to grant an order which will have the effect that asylum seekers in Cape Town will or may, for an unknown period of time, have no refugee office at which they can make s21 applications.

[173] My task has been made no easier by the Department's stance in this application. The Department has steadfastly denied that it is in breach of the zoning scheme or causing an unlawful nuisance. The Ministers describe the process which will have to be gone through to procure other premises (if a suitable site or sites can be found). Mr Sikakane for the DoHA has said in his affidavit that the procurement process (i.e. compliance with supply chain management rules) would take at least six months and that this process would be in the hands of the DoPW. Mr Poto, the DoPW's deponent, says that the said process would take longer – even a year might not be sufficient. It is a process which applies both to purchasing and leasing. He adds that this process cannot even begin until

the DoPW receives a procurement instruction from the DoHA and that no such instruction has been received.

[174] I regard this attitude as unacceptable. The applicants have been complaining with justification about conditions at the refugee office since it opened in February 2008. The current application was launched in December 2008. It should have been obvious to the Department that circumstances at and outside the refugee office in Montreal Drive were totally unacceptable yet the Department seems to have adopted the attitude that it was under no duty to continue the search for more appropriate premises and effective solutions unless and until a court made an order against it. Premises which in February 2008 were intended as a temporary arrangement have been allowed to become permanent. The affidavits on behalf of the Ministers contain no information of endeavours by the State to identify other premises once the NIB house acquisition was put in apparently indefinite abeyance. In the light of the conditions which have prevailed outside the refugee office for more than 15 months, the DoHA should long since have fast-tracked the process of finding other premises and acceptable solutions.

[175] The fact that the Department is under a statutory obligation to receive applications for refugee status from asylum seekers cannot justify unlawful behaviour on the Department's part. I am not prepared to accept the proposition that if I were to issue an interdict I would effectively be ordering the Department to commit an illegality (namely, a violation of its duties under the Refugees Act). The Department cannot cure one illegality by another. If the unlawful activities at erf 115973 are interdicted and if the result is that the Department thereby falls into breach of its statutory duty to receive asylum applications, that will not be

because of the court's order but because the Department has failed over a substantial period of time to take the steps necessary to put itself in a position to provide a lawful service.

[176] The criticism of the Department implicit in my previous paragraph assumes that the Department has the resources and capacity to provide a service to asylum seekers in a way which does not infringe the rights of neighbours. The way this might conceivably be achieved is by having more refugee offices in the Cape Peninsula and/or locating the office (or offices) on larger sites where asylum seekers awaiting assistance can be accommodated on site and where taxis could enter and park. I accept that this might require additional financial and human resources. Conceivably the Department is doing the best it can within the resources allocated to it. I do not want to be unfair to officials who may be working hard under very trying conditions. However, it is simply impossible for this court to assess matters of that kind in the current proceedings, nor is it the judicial function to tell the Department how to do its work. If the government concludes that it is not possible to comply with the country's obligations under the Refugees Act without creating conditions of the kind which now prevail at erf 115973, the resultant choices have to be made by the legislature or the executive, not the court. Those choices have to do with the way in which the pool of public funds available for the attainment of various governmental objectives are allocated and with striking a balance between the rights of land users and the rights of asylum seekers. Legislation could notionally be passed which would curtail South Africa's obligations to asylum seekers or streamline and simplify the processes involved or which would sanction inroads on the rights of neighbouring land users. If such legislation were promulgated and challenged on

constitutional grounds, that would be the occasion for the court to determine the extent of the inroads and to assess the justifiability thereof.

[177] In short, at this stage the judicial function is constrained by the court's duty to apply the law. If my conclusions on the merits are right, it is not my place to say that the applicants must continue to suffer the unlawful violation of their rights.

[178] The *amicus*, Mr Katz, submitted that conditions at erf 115973 were, from the perspective of refugees, unacceptable. He based this submission on information furnished to him by Ms Draga of the LRC. Ms Draga assisted the LRC's Mr William Kerfoot in the *Kiliko* case and in other matters where the LRC has acted for asylum seekers. She said in her affidavit of 9 June 2009 that conditions at the Montreal premises had worsened over the past three to four months and that she had received reports of assaults, muggings, bribery and abuse, and that many asylum seekers could not enter the premises because of long queues. She also expressed the view that the Montreal premises were inaccessible to many. She set out the characteristics which (in her view) a suitable refugee office should possess. Mr Katz told me from the bar that these views were echoed by the UCT Legal Aid Clinic, with whom he had also spoken.

[179] The Department took issue with Ms Draga's views and, as noted earlier in this judgment, I allowed the Department to file a further affidavit. I wish to make it clear that I do not place any reliance on the views of Ms Draga and the submissions of Mr Katz in my adjudication of the merits of the case, nor am I able to determine disputes which may yet arise between the Department and refugees. In asking for Mr Katz's assistance as an *amicus* I had in mind that he might, in the light of his experience in this field and

in the light of any investigations he was able to conduct in the limited time available to him, submit that the Montreal premises were a significant improvement on the previous premises and that the Montreal premises were (or could, if given time) become satisfactory. Mr Katz did the best he could in a short space of time, and the upshot is that I have no plea from him to allow the Department to continue using the Montreal premises as a refugee office for an indefinite period of time. The order which I propose to make, and which I raised in the course of argument, was one which met with no resistance from him.

[180] I have already, in the course of summarising the affidavits, identified the Department's attempts at amelioration. It is clear that those steps (e.g. mobile toilets, additional cleaning services etc) have not brought about any material improvement and have no prospect of abating the nuisance to a degree which would eliminate the unlawfulness of the Department's conduct. There is one aspect which requires further mention, namely the proposed dispensation for Zimbabwean asylum seekers. According to Mr Sikakane's first answering affidavit in this matter, the said dispensation was in the process of being finalised and would see a very substantial reduction in the numbers of asylum seekers. It will be recalled that he made a similar statement in his *Kiliko* report of 12 December 2008 and it played a significant role in Van Reenen J's decision to discharge the structural interdict in that case.

[181] In her affidavit (handed to me by the *amicus* on 9 June 2009) Ms Draga stated that according to press reports published that same day (9 June) the Minister of Home Affairs was reviewing the proposed special dispensation for Zimbabwean asylum seekers. In the light of this information I asked Mr Albertus to take instructions on the position. I

was later informed from the bar that until about a week previously the Department had been hoping to go ahead with the new dispensation but that pursuant to the elections the proposal was under review and in indefinite abeyance. It thus appears that the expectation on the strength of which Van Reenen J discharged the *Kiliko* structural interdict has not come to pass. Be that as it may, it seems clear that in determining an appropriate course of action I can make no assumption that the numbers of asylum seekers will be significantly reduced in the near future.

[182] During the course of argument I asked Mr Albertus what the position was on the erf immediately to the south-west of the refugee office, namely erf 115972, and whether the said erf might conceivably be suitable as a holding area for persons awaiting assistance. It was clear that this had *not* ever been considered by the Department but the possibility was enthusiastically embraced as a lifeline which might avoid a more drastic remedy. In a supplementary affidavit dated 17 June 2009 Mr Sikakane said that Cila was the co-owner of erf 115972 and that the owners were willing and able to give vacant occupation immediately. (The video of 5 May 2009 shows a prominent “*To Let/For Sale*” signboard outside erf 115972. In the light of conditions prevailing at the refugee office, the fact that the adjoining property has not been let or sold is hardly surprising.)

[183] Although I myself raised the matter, I do not think I should allow the alleged availability of erf 115972 to influence my decision. I am sceptical of the Department’s grasping at my query. If the Department thought this was suitable, why was it never considered before? I have been told nothing about the state of the premises, their suitability and how long any necessary adjustments would take. It has also not been said how the cumbersome procurement process set out in the affidavits filed on behalf

of the Ministers (in an endeavour, evidently, to persuade me that I should effectively not come to the assistance of the applicants at all) can now miraculously be shortened. In any event, erf 115972 is zoned general industrial. I have already concluded that office use is not a permissible activity for a property so zoned (even as a consent use), and indeed this seems to be virtually common cause. There can be no doubt that any attempt at a rezoning or departure in respect of erf 115972 would meet with strenuous opposition.

[184] In the circumstances, I consider that the furthest I can go in ameliorating the disruption which an interdict will cause is to suspend its operation for a period of time. I cannot by my order render lawful that which is unlawful, but by affording a period of grace I can at least allow the Department an opportunity to consider its options without the risk of contempt proceedings. I am satisfied, in the light of the judgment in the *Laskey* case (where the authorities were reviewed), that a court can suspend the operation of an interdict. For the reasons set out in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) and *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) a court would ordinarily be reluctant to be seen to be condoning the perpetuation of unlawful behaviour, but in the very special circumstances of this case I consider that 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.

[185] For reasons stated earlier I am satisfied that I should not be swayed by the Ministers' assertion that the finding of alternative premises would take at least six months or even twelve months or more. If that is the usual period

of time for procurement, the State will in this instance have to act with considerably greater alacrity. Procurement instruments ordinarily permit public bodies to depart from usual procurement policies in the public interest or on grounds of practicality³.

[186] In the absence of any greater assistance from the respondents, the setting of the period of grace must inevitably be somewhat arbitrary. I propose to afford the Department until the end of September 2009 (a period of just over three months) to cease operating the refugee office at erf 115973. The applicants, who in their notice of motion proposed a termination date of about three weeks after the court's order, may well feel aggrieved and consider that the Department has been shown too much leniency. Hopefully the fact that the violation of the zoning scheme and the creation of the unlawful nuisance will be coming to an end on a fixed future date, albeit three months hence, will make the intervening period somewhat easier to bear.

Costs and order

[187] The applicants are obviously entitled to their costs, including those attendant on the employment of two counsel. Such costs should be borne by the three respondents who opposed, namely the two Ministers and Cila.

[188] There was an appearance before Goliath J on 10 March 2009 when the question of the joinder of the Minister of Public Works was debated. I was informed that by agreement the costs associated with this appearance are to be costs in the cause.

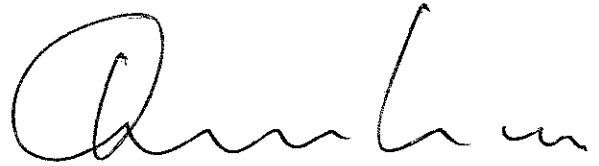
³ See, eg, regulation 16A.6.4 of the Treasury Regulations promulgated under the Public Finance Management Act 1 of 1999; s3(c) of the Preferential Procurement Policy Framework Act 5 of 2000.

[189] I propose to make alterations to the wording of the relief claimed in the notice of motion in order more accurately to reflect my findings.

[190] My order is as follows:

- (a) It is declared that the operation of the refugee reception centre by the first respondent and her Department at erf 115973 Montreal Drive, Airport Industria 3, Cape Town (“the property”), is unlawful:
 - (i) on the grounds that such use is not the subject of a consent use approved by the second respondent pursuant to the zoning scheme applicable to the property, and in particular is not covered by the consent use granted by the second respondent’s Urban Planning Committee on 23 June 2000;
 - (ii) on the grounds, in any event, that there has not been and is not currently compliance with conditions (b) and (d) of the said consent use granted on 23 June 2000;
 - (iii) on the grounds, further, that such use constitutes a common law nuisance.
- (b) The first respondent is ordered to cease conducting the activities of a refugee reception centre at the property by no later than 17h00 on Wednesday 30 September 2009.
- (c) The first, third and fourth respondents shall, jointly and severally be liable for the applicants’ costs of suit, including the costs associated

with the hearing on 10 March 2009, such costs to include those attendant on the employment of two counsel.

A handwritten signature in black ink, appearing to read 'Owen Rogers', written in a cursive style. The signature is positioned above a horizontal line.

OWEN ROGERS AJ

24 JUNE 2009