IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. 92/2011

REPORTABLE

In the matter between:

NDLAMBE MUNICIPALITY **Applicant**

and

MATTHEW ROBERT MICHAEL LESTER **1st Respondent**

and

9 Others **2-10 Respondents**

JUDGMENT

ALKEMA J

[1] This is an application by the applicant, *Ndlambe* Municipality, for an order in terms of Section 21 of the National Building Regulations and Building Standards Act 103 of 1977 ("the Act") that the first respondent (*Lester*) be compelled to demolish his entire home situated on Erf 20, Kenton-on-Sea and also known as 6 Westbourne Road, Kenton-on-Sea ("the

property"). These proceedings involve issues of neighbour law, public law and administrative law.

[2] Except for the first (*Ndlambe)* and third (*High Dune House (Pty) Ltd.*) respondents, none of the other respondents have entered the fray, although they all have an interest in the outcome of these proceedings. The main role players are the applicant, the first respondent and the third respondent.

[3] The first respondent is a professor in tax law employed by Rhodes University in Grahamstown, and is the registered owner of the property on which he has constructed a residential dwelling at an estimated cost of R8 million ("the dwelling"). This is the dwelling which is the subject of the demolition order sought by the applicant. The first respondent has instituted a counter claim, opposed by the applicant and third respondents, for an order that the dwelling not be demolished, but altered in accordance with the plans submitted by him on 18 May 2010; alternatively, 13 September 2010, together with certain other ancillary relief, asking that certain building restrictions not apply in respect of the dwelling. In the course of all preceding applications and also in this application, the first respondent was referred to as *"Lester,"* and for the sake of continuity I shall continue to refer to him as *"Lester."*

[4] The third respondent is the owner of erf 18, Kenton-on-Sea, and the immediate neighbour of first respondent. It is the property whose view and privacy is affected the most by the dwelling. It is a duly registered private company whose sole directors and shareholders are Mr and Mrs *Haslam*. The driving force behind it, and deponent to all affidavits on its behalf, is Mr

Haslam, and I shall likewise continue to refer to the third respondent as *"Haslam."*

[5] The applicant is the local authority which has jurisdiction over the area of Kenton-on-Sea, having its principal place of business in Port Alfred. Part of its duties is to oversee and enforce compliance with the Act. It is responsible for the approval of all building plans relating to the property and dwelling. For the sake of clarity I shall hereinafter refer to it simply as *"Ndlambe."*

[6] *Haslam*, as a respondent in the main application, has applied for joinder as second applicant with *Ndlambe* in the main application. The application was unopposed and he was joined as such. The reason for the joinder was that the issues raised between *Ndlambe* and *Lester* in the main application are essentially matters of public and administrative law. The issues raised by the joinder, on the other hand, are essentially matters of neighbour law, which is a branch of the law of obligations, and which call into play certain legal principles which do not arise as between *Ndlambe* and *Lester*, but became relevant between *Haslam* and *Ndlambe*. The relevance of this distinction will become apparent later in this judgment.

[7] This application has a long, complicated and sad history. Preceding litigation involves numerous applications to the High Court which stretch over a period of nine years. In this judgment I will make reference to six (6) applications which preceded this application.

[8] Nevertheless, stripped of all emotive issues, the objective facts and chronology of events are largely undisputed. It may be summarised as follows.

[9] Kenton-on-Sea (*"Kenton"*) is a small, popular holiday resort and retirement village with a handful of business people in the Eastern Cape. It is flanked on the west by the Bushmen's River, on the east by the Kariega River, on the south by the Indian Ocean and on the north by the R72 from East London to Port Elizabeth. Grahamstown is situated approximately 40km inland to the north as the crow flies, or 60km by road. Its permanent population is largely pensioners and retired persons with a scattering of business and professional people. A large number of the homes, if not the majority, are used as holiday homes.

[10] *Lester*'s grandfather purchased the property during 1937 shortly after Kenton was first proclaimed. His mother and aunt inherited it from his grandfather, and during 1997 *Lester* acquired the property from his mother and aunt. At the time, the only improvement was a "small shack" at the foot of the property. The property fronted the Bushman's River on the south-west with clear unobstructed views to the south and south-east over the ocean. The property extends up a gentle sloping dune behind the shack to the north-east where it fronts a narrow pedestrian lane separating it from *Haslam*'s property. The latter's home is constructed on the flat top of the dune from where it enjoyed panoramic views over the Bushman's River and Indian ocean, from the west to the east. Peace, tranquility and a spirit of good neighbourliness reigned amongst the good citizens of *Kenton*. That is, until 2003.

[11] Shortly after he acquired the property, *Lester* added two small rooms as rudimentary holiday accommodation for him and his daughter. The next year, 1998, he joined Rhodes University in Grahamstown. During the latter half of 2001 he took up residence in Kenton and decided to make it his permanent home. To this end, he employed *Pollos Purden* as his architect with instructions to design a permanent separate residence further and higher up the slope of the dune. She designed a single storey pitch-roofed structure, and the plans were approved by *Ndlambe* on 3 May 2002. (Perhaps because it has different levels, it is sometimes referred to as a double-storeyed construction).

[12] It is important to observe that at this time, there were no height restrictions imposed by the Town Planning Zone; it only being imposed by October 2004. Although the height of the pitched roof interfered with *Haslam*'s view, it was not an undue interference or unreasonable, and remained perfectly legal. The foundations of *Lester*'s new dwelling were approved and signed off. He commenced building operations.

[13] The first time *Haslam* became aware of the new dwelling, was when the foundations were being cast. He obtained copies of the building plans from *Ndlambe* and made it clear to its officials that as an interested party he had to be given notice of building plans before approval. Nevertheless, and presumably on legal advice, he was unable to, and did not, object to the height, but instead objected to the construction of a second, separate dwelling up the slope of the dune on the basis, *inter alia*, that it offended the Title Deed Restriction which prohibited a *"a double residence"* on the same

property. The thinking of *Haslam* was (presumably) that the *"shack"* at the foot of the dune should be demolished and that the new dwelling be constructed in its place, which would not have affected his view at all. Notwithstanding the objection, *Lester* nevertheless continued with the building operations pending the outcome of the objection.

[14] These events triggered the first High Court application in Grahamstown. *Haslam* applied for an interdict against continued building operations pending the outcome of review proceedings. *Lester* opposed and averred in his answering affidavit that he realised full well that should the plans be declared not approved on review, he would be obliged to demolish what was being built. He was nevertheless prepared to take the chance. The interdict nevertheless succeeded and *Lester* was interdicted by *Pickering* J to continue with building operations pending approval of amended plans.

[15] *Lester* wasted no time and *Purden* prepared amended plans converting the "*shack"* to a boat-house and outbuildings. This removed the prohibition against the *"double residence"* restriction. The amended plans (presumably after notice to *Haswell*), were again approved on 8 November 2002. The significance of the events outlined thus far is two-fold: First, both *Lester* and *Ndlambe* by now knew that *Haslam* had a material interest in the development of the property and in any impact the construction of the dwelling may have on his views.

[16] Second, and because the approval of the amended plans on 8 November 2002 were not further challenged by *Haslam* or taken on review, such approval stands and is valid to this day. If *Lester* had caused the dwelling to

be constructed in accordance with these plans, the matter would have been put to rest at that early stage. But this is not what happened. The culmination of the events which then followed caused the atmosphere of good neighbourliness to evaporate, and seems to have involved the entire community. What followed was a lengthy and costly war of litigation over nine years.

[17] During January or February 2003, a few months after the amended *Purden* plans had been approved, *Lester* decided not to proceed with the construction under the *Purden* plans, but to construct a different building. He appointed a new architect, *Sam Pellisier*, to design a two storeyed dwelling (which was permissible under the applicable Zoning Scheme and building regulations), using the same foundations or, as he calls it, the same *"footprint"* under the *Purden* plans. The previously approved lateral building lines accordingly remained in place. (Again, and perhaps because it has different levels, it is sometimes referred to as a three storeyed dwelling).

[18] The reason for the new dwelling was this: *Lester*'s father suffered a stroke during February 2003, and died during April 2003. His aging mother would shortly be in need of frail care, and he decided to enlarge the dwelling further to accommodate her. He is at pains to explain that his instructions to *Pellisier* to enlarge the house were at all times to design a dwelling which complies with all applicable building regulations to accommodate his mother, and he was never motivated by malice or ill-feeling towards *Haslam* or any of his neighbours.

[19] *Pellisier* recommended a dome roof in the place of the pitch roof. Because the additional storey raised the apex of the pitch roof considerably, it was felt that for considerations of adequate shade, height and wind conditions, a dome-shaped roof would be more appropriate. Nevertheless, the new *Pellisier* plans introduced a radical change to the *Purden* plans of November 2002 in respect of height, overall size and square meters, roof and general architectural design. I will later in this judgment return in more detail to these changes.

[20] The next, and in my view the most profound, event which caused the war of litigation was the manner in which the *Pellisier* plans were approved. It came about in the following manner.

[21] By 17 July 2003 the *Pellisier* plans had been completed. *Lester* personally took them to Port Alfred and submitted them for approval. On his own version, he *"walked the officials of the various departments* (of Ndlambe) *through the plans."* The plans were approved the same day they were submitted, on 17 July 2003. Notwithstanding its undertaking to do so, *Ndlambe* did not give notice to *Haslam* of the amended *Pellisier* plans, and nor did *Lester*. On the latter's explanation, he was unaware of any obligation to do so.

[22] I find this explanation incomprehensible, if not untruthful. From previous correspondence and discussions with *Haslam*, Lester knew full well that he, *Haslam* was very concerned about the impact of the construction on his own views, and that he would object to any amendments which would further block his view. He had done so before and would do so

again. Yet, both he and *Ndlambe* went about the process of approval of the *Pellisier* plans without any notice to *Haslam.* The result was that *Haslam* was unaware of the *Pellisier* plans, and when construction commenced shortly after approval on 17 July 2003, *Haslam* continued to suffer under the impression that construction was proceeding under the *Purden* plans as approved on 8 November 2002. In the meantime, construction continued rapidly.

[23] By October 2003 *Haslam* realised from the enlarged multi-storeyed construction and altered roof design and general architectural appearance that the construction was not proceeding in terms of the November 2002 *Purden* plans. Not surprisingly, and having established the change of plans, he instituted the second application on 4 November 2003 for the review and setting aside of the *Pellisier* plans of July 2003.

[24] At the time of the institution of the second application, the construction of the new dwelling was almost complete. Only the finishings and paintwork remained outstanding (and presumably also the final plumbing and electrical works). In these circumstances, the balance of convenience had swung into the favour of *Lester*, and an interdict against building operations was no longer a viable legal option to *Haslam*.

[25] The review of the *Pellisier* plans was based on a number of grounds; *inter alia* on the absence of a report from the Building Control Officer (which was never appointed by *Ndlambe*). On the day prior to the review hearing, *Ndlambe* conceded that no Building Control Officer had been appointed, and it consented to an order setting aside the approval on 17 July

2003, and to refer the plans back to *Ndlambe* for fresh consideration after the appointment of a Building Control Officer (and notice to *Haslam*). *Lester* was forced to follow suit and he, too, consented to such an order.

[26] This resulted in the order of *Jennet* J on 25 June 2004 setting aside the approval of the *Pellisier* plans and referring the matter back to *Ndlambe* for fresh consideration.

[27] During November 2004 *Ndlambe* (again) approved the *Pellisier* plans *"conditionally,"* (subject to, *inter alia*, the change of conditions of title).

[28] On 24 February 2005 *Haslam* launched the third application for the review of the conditional approval of the plans in November 2004 on the grounds that:

1. *Ndlambe* had no power to approve plans *"conditionally"*; it either complied or did not comply with all statutory and building requirements, and the conditional approval was *ultra vires* section 7 of the Act;
2. The *"double residence"* issue still pertained;
3. The plans, and the dwelling *"as built,"* caused almost the entire view from *Haslam*'s property to be obscured, and notwithstanding the absence of height restrictions on 17 July 2003 (when the plans were first submitted and approved), *Ndlambe* had failed to properly consider the derogation of *Haslam*'s and other neighbouring properties' value in accordance with section 7 (1) (b) (ii) (ccc) of the Act; and
4. *Ndlambe* had failed to furnish reasons for the approval, resulting in the presumption under section 5 (3) of PAJA that the approval was without good reason.

[29] I think it is appropriate at this stage to revert, briefly, to the differences between (1) the (approved) *Purden* plans of November 2002; (2) the (also approved) *Pelliser* plans of July 2003; and (3) the dwelling *"as built"* by 2004. It may be summarised as follows:

1. The diagrammatic sketch (by architect *Milliken*) of the views from the balcony of *Haslam*'s house in a south-westerly direction over the Bushmans River lagoon, show that on the *Purden* plans the view over slightly more that the first half of the lagoon is obscured leaving a clear view over only the second (longitudinal) half of the lagoon and the opposite bank. On the *Pellisier* plans, however, the views over the entire lagoon including the opposite bank are totally obscured by the dwelling, leaving the skyline as the only line of sight.
2. From the evidence of the architect *Pringle*, it appears that the roof height of the *Purden* plans of November 2002 is 29.6 meters. The *Pellisier* plans of July 2003 show a roof height of 32 meters.
3. The dwelling, as built by 2004, has a roof height of 34.17 meters, which is 2.17 meters higher as shown on the (then approved) *Pellisier* plans, and approximately 5 meters higher than the approved *Purden* plans.
4. The photographs show that the dwelling block almost the entire view from *Haslam*'s property over the Bushman's River lagoon and ocean from the west to the south-east over a range of approximately 135^{0} .
5. Notwithstanding the protestations from *Lester* to the contrary, the *Pellisier* plans of July 2003 differ drastically from the *Purden* plans of November 2002 in roof, height, size and square meters, roof design and general architectural appearance and design.

6. Although there were no height restrictions in place during July 2003, the *Pellisier* plans exceed the height restriction introduced during October 2004 by 7.5 meters. The relevance of this observation will appear later in the judgment. For the sake of completion I should mention that *Haslam* subsequently ascertained that the foundations encroach over the building lines by 2cm. By reason of the insignificance of the alleged encroachment I ignore it for purposes of this judgment.

[30] By early 2004 the war of litigation had intensified between the parties to the extent that almost the entire Kenton community in general, and the Kenton Rate-payers Association in particular, had taken sides in the feud and expressed their feelings publicly. The on-going litigation, public expression of views and threats of demolition of his home convinced *Lester* to postpone all intentions to accommodate his aged and sickly mother in his new dwelling. Some members of the community had taken to throwing stones on his roof at night, and there can be little doubt that he and his (then) life-partner *Michelle Felder*, were harassed and their personal lives and circumstances were made extremely difficult. This resulted in *Felder* advising *Lester* during November 2005 that due to the continued unhappiness and stress caused by the on-going litigation and the campaign against them, she could no longer continue living with him in Kenton and had decided to leave him and Kenton-on Sea. For the same reasons his sister and her family decided to no longer holiday in Kenton which they had visited over many years. The relevance of these observations will appear later, but to continue with the chronology of events.

[31] On 22 September 2005 the third application (for the review of the *"conditional"* approval of the July 2003 *Pellisier* plans by *Ndlambe* on 30 November 2004) came before *Goliath* AJ. By agreement between the parties, the *Pellisier* plans were again set aside and referred back to *Ndlambe* to reconsider approval afresh.

[32] Submissions by all interested parties having been made and after a full hearing on November 25, *Ndlambe* for the third time approved the July 2003 *Pellisier* plans on 14 February 2006. Needless to say, *Haslam* instituted the fourth application on 7 November 2006 for the review of the February 2006 approval. The grounds of review remained essentially similar to those advanced in respect of the third application. The matter came before Jones J who, again, made an order by consent between the parties on 29 June 2007, setting aside the approval of 14 February 2006. (The reasons for the consent order are for present purposes irrelevant) However, instead of simply referring the matter back to *Ndlambe* to again consider the approval afresh, the learned Judge made a declarator by ordering that "*the* (July 2003 *Pellisier* plans) *be not approved."* *Lester*'s counter application was dismissed.

[33] The *Jones* J declarator is significant. It effectively precluded *Ndlambe* from again approving the *Pellisier* plans of July 2003 in their then existing form. New or amended plans were required for consideration. This was recognised by *Ndlambe* who passed the following resolution on 31 March 2008: (I quote *verbatim*)

> *"That it be noted that the building on Erf 20 exists without plans, no plans have, subsequent to Jones' Judgment, being submitted by the*

owner of Erf 20 for approval. It is further recommended that Prof. Lester's attention be drawn to the provisions of Section 4 of the National Building Regulations and Building Standards Act 103 of 1977 read with its Regulations and the Land Use Planning Ordinance 15 of 1985 as read with the Town Plan Scheme and that he be instructed:

1. *To submit and obtain approval for plans and specifications relevant to the Building already constructed on Erf 20 (if indeed it is possible so to do);*

2. *To rectify the contraventions referred to in para 10(a)-(f) of the attached annexure 'C' or, where applicable, obtain the relevant departure; or*

3. *To apply for a determination of a contravention levy.*

That all or any of the above instructions must be complied with within 6 months of receipt of the relevant notice."

[34] *Haslam*, however, was not satisfied with the above resolution. On his perception of events the position was stale-mate. *Lester* was in occupation of a dwelling without approved plans which rendered the construction unlawful. It continued, in the perspective of *Haslam* and some members of the community, to be an architectural eyesore which blocked his view and interfered with the enjoyment of his own property. *Lester* continued with his applications for the removal of his Title Deed restrictions and refused to

revert to the previous approved *Purden* plans of November 2002. He relentlessly pursued his attempts to legalise what *Haslam* considered to be unlawful plans. And *Ndlambe* seemed to continue approving unlawful plans which required continuous, costly and never-ending litigation to review and set aside.

[35] In order to bring finality to the process, *Haslam* instituted the sixth application to review and set aside the above resolution of 31 March 2008, to be replaced with a resolution directing *Lester* to, within one month, submit plans for his dwelling that comply with all relevant statutory and zoning provisions; failing which, *Ndlambe* may apply in terms of section 21 of the Act for an demolition order of such dwelling.

[36] On 22 April 2010 *Plasket* J made an order by agreement between *Haslam* and *Lester* reviewing and setting aside the resolution of 31 March 2008, and substituting it with the following:

> *"1. That MATTHEW ROBERT MICHAEL LESTER be directed to submit plans for the alteration of his dwelling on erf 20 Kenton-on Sea that comply with all the relevant statutory and zoning provisions;*
>
> 2. *That such alteration plans be submitted within 1 month of this order;*
>
> 3. *That MATTHEW ROBERT MICHAEL LESTER be informed that should such plans not be filed timeously, or should such plans not be approved by the Municipality, the Municipality may, subject to consideration of any submissions that might be received from MATTHEW ROBERT MICHAEL LESTER, apply*

forthwith to the appropriate Court in terms of Section 21 of the National Building Regulations Act for an order compelling MATTHEW ROBERT LESTER to demolish the offending structure.

4. *THAT Second Respondent (Lester) pay the costs of the application, including the costs of two counsel."*

[37] In the meantime, the community campaign against the construction of the dwelling also intensified. Residents were campaigning for signatures to a petition objecting to the removal of the Title Deed restrictions in a local shopping centre. *Lester* and his family were subjected to continuous criticism and harassment. *Lester* had in the meantime formed another relationship with a lady friend, *Caroline Brown*. She, too, was subjected to an unfriendly and hostile Kenton environment. Not surprisingly, these influences resulted in the onset of emotional stress and the decline of the general health of *Lester*, including the onset of diabetes. His work at Rhodes University was being adversely affected. His daughter, who had matriculated in 2009, no longer wanted to attend Rhodes University and decided to enroll instead at the Cape Peninsula University during 2010. On medical advice *Lester* decided to remove himself temporarily from the Kenton community. He was granted sabbatical leave from July 2010 to June 2011 by Rhodes University. In a joint venture with Ms *Brown*, they purchased a property in Tokai near Cape Town during August 2010, where they resided during his sabbatical.

[38] *Lester* remains a permanent (not visiting) Professor at Rhodes University where he teaches tax law in the Business School. He does

consultancy work in Johannesburg and Cape Town, but continues to regard Kenton as his permanent home where he stays when teaching at Rhodes in Grahamstown. I have no reason to doubt that, notwithstanding his share in the Tokai property, *Lester* regards Kenton as his *domicilium* and the dwelling as his primary residence.

[39] *Haslam*, on the other hand, and to use his own words *"… have to live with this massive edifice bearing down on us …"* and blocking their view. He states that whenever *Lester* is in residence, he and his family have to keep their bedroom curtains closed to protect their privacy. The photographs support this complaint.

[40] In response to the order of *Plasket* J on 22 April 2010 referred to above, Lester made various attempts to comply with its terms. He submitted a number of revised and altered plans to comply with the zoning and building requirements, the first of which was during May 2010. Although there does not appear to be any final resolution taken by the council of *Ndlambe* in this regard, the building Control Officer advised *Lester* in respect of each amended plan submitted, including that of May 2010, that such plan did not comply with the requirements and could not be approved. I do not consider it necessary to detail these plans and the basis on which they are said not to comply.

[41] It suffices to say that on 15 September 2010 *Lester* submitted his final amended plans. The proposed alterations in an attempt to comply with the zoning and building requirements include the top (third) floor to be

removed, the bowed roof to be replaced with a flat roof, all resulting in a significant reduction of overall height and size.

[42] On 5 October 2010 the Building Plan Committee of *Ndlambe* considered the amended plans of 15 September 2010 together with the submissions made by *Lester* in support thereof. It resolved that *"… the revised plan does not comply with the Court order 2649/2008 dated April 2010* (the *Plasket* J order) …*"*

[43] The Committee prepared a report giving their reasons for such conclusion, and submitted the report and its resolution to the Council of *Ndlambe.* On 5 December 2010 the full Council of *Ndlambe* unanimously accepted and approved the Committee's resolution of 5 October 2010.

[44] As said earlier, by now the height restrictions were in place, it having been promulgated on 4 October 2004. It is unnecessary to deal in any detail with the above report, save to say that one of the main reasons, if not the most important, for not approving the amended plans of 15 September 2010, is that such amended plans continue to exceed the maximum admissible building height by no less than 7.5 meters, measured from the mean undisturbed ground level of the plot to the top of the parapet.

[45] Notice of disapproval of the plans was given to *Lester* on 13 January 2011. This application, for the demolition of the dwelling, followed on 21 January 2011.

[46] I now turn to the contentions of the parties and the law on the subject.

[47] The statutory regime relevant to the facts of this matter is the following:

Section 4 (1) of the Act provides:

> *"No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act."*

Section 7 provides in connection with the approval of plans:

> *"If a local authority, having considered a recommendation referred to in section 6 (1) (a)-*
>
> *(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;*
>
> *(b) (i) is not so satisfied; or*
>
> *(ii) is satisfied that the building to which the application in question relates-*
>
> *....*
>
> *Such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal ...."*

Section 9 provides:

> *"Any person who-*
>
> (a) *feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;*

(b) *feels aggrieved by any notice of prohibition referred to in section 10; or*

(c) *disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law, may within the period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board."*

Section 21 provides:

Notwithstanding anything to the contrary contained in any law relating to magistrates' courts, a magistrate shall have jurisdiction, on the application of any local authority or the Minister, to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorizing such local authority to demolish such building if such magistrate is satisfied that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorization granted thereunder."

[48] It is common cause that the dwelling erected on the property require plans and specifications to be drawn and submitted in terms of section 4 (1). It is common cause that the *Purden* plans were duly approved on 8 November 2002 in terms of s 7(a), and continue to remain approved. It is common cause that the *Pellisier* plans which were first approved on 17 July 2003 but thereafter set aside on review, resulted in the consent order of *Jones* J on 29 June 2007 to the effect that the July 2003 *Pellisier* plans "…

be not approved." It is common cause that the *Plasket* J order (by agreement) of 22 April 2010 constituted a resolution of *Ndlambe* dated 31 March 2008 calling upon *Lester* to submit plans *"… that comply with all relevant statutory and zoning provisions …;"* failing which, *Ndlambe* may apply in terms of s 21 for a demolition order in respect of the dwelling. Finally, it is common cause that *Lester*, acting in terms of the *Plasket* J order and the resolution of 31 March 2008, submitted his final plans on 15 September 2010 which resulted in the resolution of *Ndlambe* on 5 December 2010 (in terms of s 7 (b) (i)) that the amended plans of 15 September 2010 be *"… not approved."*

[49] It is not contended by *Lester* or any of the respondents that *Ndlambe* acted *ultra vires* in its powers under any provision in arriving at any of the decisions referred to above. It is accepted by all parties that all these decisions constitute administrative actions within the meaning of both the Act and PAJA. It is also common cause that *Lester* has not pursued any internal appeals against any of the decisions under s 9 of the Act, and nor has he challenged the correctness of any decision of *Ndlambe* on review under PAJA. And neither has any of the orders by *Pickering* J, *Jones* J *or Plasket* J been taken on appeal or review.

[50] By virtue of the operation of the presumption of regularity, all administrative decisions remain valid and legal until it is set aside on review or appeal. In *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) it was authoritatively held that until an administrative illegality is set aside by a Court, it exists in fact and in law and has legally valid consequences. There is no suggestion in this case that any of the aforesaid

decisions are illegal or even wrong. And by virtue of the operation of the *stare decisis* rule, I am bound by the orders of particularly *Jones* J and *Plasket* J. These orders were taken by consent with *Lester* and there is not even a faint suggestion that any of these orders were incorrectly or wrongly issued.

[51] The consequence of the aforesaid is that the dwelling, both judicially and administratively, is an unlawful structure in terms of the Act, and in terms of s 21 thereof *Ndlambe* is entitled to an order authorising it to demolish such building. And this brings me to the nub of the argument before this court. Does this court, on the facts of this case, have a discretion to issue a demolition order, or is it obliged to order demolition *"… if (it) is satisfied … that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorization granted thereunder"* (s 21 of the Act). (For the sake of completion I should add that I am so satisfied – indeed, this is common cause).

[52] Needless to say, Messrs *Lowe* SC for *Ndlambe* and *Ford* SC and *Paterson* SC for *Haslam* argued strenuously that I have, on the facts of this case, no such discretion. On the other hand, Mr *Buchanan* SC on behalf of *Lester* argued equally convincingly that I do have such discretion, which, for the reasons I will later recite, should be exercised in favour of *Lester*.

[53] The argument advanced by Messrs *Lowe* SC, *Ford* SC and *Paterson* SC on behalf of *Ndlambe* and *Haslam* can be summarised as follows. The High Court orders and administrative decisions resulting in the dwelling to be unlawful remain legally valid and enforceable until set aside on review or

appeal. It is common cause that this application is not a review or appeal, and as a matter of law and common sense the orders and decisions cannot be set aside by a court comprising one Judge exercising a discretion. To do so would be to usurp the administrative functions of *Ndlambe* and to interfere with the constitutional principle of separation of powers, and to exercise a power I do not have.

[54] In support of these contentions I was referred to cases such as *Peri-Urban Areas Health Board v Sandhurst Gardens* (*Pty) Ltd* 1965 (1) SA 683 (T) and followed by the Full Court (per *Harms* J as he then was) in *United Technical Equipment Co. v Johannesburg City Council* 1987 (4) SA 343 (T) at 347 F-I and 348 I-J; *Louvis v Municipality of Roodeport – Maraisburg* 1916 AD 268 at 276 and *Ostrowiak v Pinetown Board* 1948 (3) SA 584 (D) followed and approved in *Transvaalse Raad vir die Onwikkeling van Buitestedelike Gebiede v Venter* 1985 (3) 979 (TPD) at 987 D-J; *Cape Town Municipality and another v Bethnal Investments (Pty) Ltd and another* 1972 (4) SA 153 (CPD); and more recently in *Nelson Mandela Metropolitan Municipality v Greyvenour* CC 2004 (2) SA 81 (SECLD) at 110F (para 94)-111D (para 95); and *Standard Bank of SA v Swartland Municipality* 2010 (5) SA 479 (WCC) where *Moosa* J said at 484F:

> *"The unauthorized and illegal conduct of the third respondent is* ***contra boni mores*** *and contrary to public policy, and cannot be condoned. It militates against the doctrine of legality, which forms an important part of our legal system, and more especially since the Constitution became the supreme law of the country*

[55] The *Standard Bank* judgment (*supra*) was dealt with on appeal in *Standard Bank v Swartland Municipality* 2011 (5) SA 257 (SCA) and reversed on the issue of joinder, but on the issue of demolition the Court stated, per *Lewis* JA at [15]:

> "*Even if it* (the bank) *had been joined as a respondent, as it should have been, it could not have defended the application since the Act (section 21) gives the municipality the right to demolish illegally erected structures.*"

[56] Mr *Buchanan* SC, on the other hand, argued convincingly that it is a long standing and well recognised principle of our law that where a party seeks a demolition order, a court always has a discretion where the demolition of his home will operate unduly harshly against its owner and produce an unjust result having regard to the prejudice which will be suffered by the neighbouring owners should the demolition not be ordered (also referred to as the "*disproportinality of prejudice test*"). In these circumstances the court has the power to order the payment of damages in lieu of ordering demolition, and pursuant to such discretion the Act also makes provision for the payment of a "*contravention levy*" to the local authority in the place of a demolition order. Therefore, so the argument concluded, *Lester* is entitled to the grant of the counter-claim which will result in a more just and equitable order.

[57] In support of these contentions, the starting point is the following extract from Joubert, "*The law of South Africa,*" Volume 27 1st re-issue (2002) para [317] and the authorities there cited:

"When a landowner erects a structure on his land he must take care that he does not encroach on his neighbour's land. This rule of neighbour law is not only applicable in cases where the building itself or its foundations encroach on neighbouring land but also where roofs, balconies or other projections encroach on the airspace above a neighbour's.

In the case of encroaching structures the owner of the land which is encroached upon can approach the court for an order compelling his neighbour to remove the encroachment …. Despite the above rule the court can, in its discretion, in order to reach an equitable and reasonable solution, order the payment of compensation rather than the removal of the structure. This discretion is usually exercised in cases where the costs of removal would be disproportionate to the benefit derived from the removal. If the court considers it equitable it can order that the encroaching owner take transfer of the portion of the land which has been encroached on. In such circumstances the aggrieved party is entitled to payment for that portion of land, costs in respect of the transfer of the land as well as a solatium on account of trespass and involuntary deprivation of portion of his land."

[58] See also *Johannesburg Consolidated Investment Co. Ltd and Another v Mitchmor Investments (Pty) Ltd and Another* 1971 (2) SA 397 (WLD) at 405 E-407 H following a number of earlier decisions including a Full Bench decision of this Court in *De Villiers v Kalson* 1928 EDL 217 at 231 (by which this Court is bound) and more recently again by *Froneman* J (as he then was) in *Van Rensburg and Another NNO v Nelson Mandela*

Metropolitan Municipality and Others 2008 (2) SA 8 (SE) at 11 (para 9) and also *Trustees Brian Lackey Trust v Annandale* 2004 (3) SA 281 (CPD) (per *Griesel* J) para 28-45. The remedy of demolition is also now constitutionally limited by s 26 of the Constitution which entrenches the right to adequate housing – but more about this later.

[59] At first blush, there appears to be a conflict between the above decisions holding that the court does have a discretion, and those decisions mentioned earlier and relied on by counsel for the applicant and *Haslam* to the effect that the court does not have a discretion. But, as I will endeavor to demonstrate, on a careful analysis of all the judgments this is not so.

[60] I posed the question to counsel in argument whether or not a legal principle can be discerned from all the judgments pointing to when the court does have a discretion; and under what circumstances it does not have the discretion to order demolition. In an interesting argument Mr *Ford* SC, and in reply Mr *Paterson* SC, argued that although there is no judgment in which such a principle was articulated, an analysis show that in cases of public law, ie where a local authority relying on an Act of Parliament or other secondary legislation seeks demolition of an unlawful structure erected in contravention of a statutory enactment, the court does not have a discretion and is obliged to order demolition. On the other hand, in matters of private law, ie matters of neighbour law where for instance a structure obscures a view or encroaches upon a view or encroaches upon a restrictive condition of title, the court does have a discretion and may order damages or the payment of a contravention levy in lieu of making a demolition order. This will be the case where the prejudice suffered by the owner of a property to

be demolished is disproportionate to the inconvenience or prejudice suffered by the neighbouring property owner, and will result in an unjust order.

[61] Interesting as this debate may be, time constraints, space and consideration of judicial expediency do not require a detailed and scholarly discussion on all the judgments mentioned above and the many others quoted in heads of argument and relied upon in argument. It suffices to make a few observations of general application to the facts of this case.

[62] The discretionary nature of many common law remedies is well known and deeply established in South African law. For instance, remedies of interdict (both temporary and permanent), mandamus, review, declaratory orders and specific performance are all of discretionary nature. There is, however, no uniform set of principles upon which such discretion is to be exercised – save that it must always be exercised judicially. However, the *"judicial"* exercise of the discretion will depend on the nature of the remedy; different approaches are adopted according to the remedy under consideration. For instance, the test in a temporary prohibiting interdict is very different to the test in granting a mandamus. And notwithstanding that the claim for the demolition of a building is a mandamus which, in turn, is in the nature of a permanent interdict, the decided cases show that the discretion to order demolition must be exercised in the same manner as the discretion in granting specific performance in contractual matters, ie in accordance with the proportionality of prejudice test.

[63] There is some debate whether the discretion in the grant of a demolition order is derived from the English Court of Equity or from Roman- Dutch

law. (See, for instance, the scholarly discussions on this subject in *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (OPD) at 125C-139I; *Malan and Another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 33D *et seq;* and *Trustees, Brian Lackey Trust* (*supra*) para 17-31.

[64] It is unnecessary to enter this debate. Whatever its origin, it is aimed – as is a claim for specific performance ─ to prevent an injustice; and the test of disproportinality of prejudice is the same. See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783 B-E, in which the Court of Appeal dealt with the exercise of discretion in granting demolition orders.

[65] In the above regard Hefer JA further added in *Benson* (*supra*) at 783 C-E:

> *"… It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant.* ***Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy."*** (my emphasis).

[66] It is of particular importance, in my view, that in the exercise of the discretion in matters of demolition orders, it is not only the usual considerations of equity, e.g. how a demolition order will impact on the private life of the home owner, which play a role, but as observed by the learned Judge of Appeal in the above extract, it is also how the grant or

refusal of a demolition order will accord with legal and public policy. And it is in the context of the latter regard that, on the facts of this case, the issues of wrongfulness, the principle of legality and the legal effects of the various court orders and administrative decisions must be viewed.

[67] The *Benson* (*supra*) judgment is important. The discretion in granting or refusing demolition is based on two legs. The first is the proportionality of prejudice test, and the second relates to the dictates of legal and public policy. The first leg involves the weighing up of issues relating to fairness and equity, and the second is that the end result must accord with legal and public policy, i.e. with the legal convictions of society. Normally, issues of fairness and equity by their very nature accord with the legal convictions of society. However, the distinction must nevertheless be made because very often legal and public policy require that issues of fairness and equity play a very small role, if any, in what is considered by legal policy to be wrongful or unlawful. I will shortly return to this issue in the context of the case under consideration, but first it is necessary to consider counsel's submissions on why this court has no discretion at all on the facts of this case.

[68] I have read and re-read the judgments referred to by counsel in support of the submission that in cases of public law, as opposed to cases of private or neighbour law, the court has no discretion in granting demolition orders and is obliged to do so in the face of an unlawful structure. In my respectful view, there is no judgment in support of the distinction between public and private law, and nor do the cases relied upon by counsel support such a distinction. Rather, on my reading of the judgments, the courts accepted that

they did have a discretion, and exercised such discretion either in favour of, or against, the grant of a demolition order, depending on the facts of the case.

[69] The first problem confronting the argument that a discernable principle can be extracted from the cases in support of the proposed distinction, is that not all cases relied on dealt with a demolition order. And, as I remarked earlier, the discretion is exercised in accordance with the type of relief claimed, and not in accordance with a uniform set of rules. For instance, in the *United Technical Equipment Co*. (*supra*) the court considered the suspension of the operation of an interdict (and found that it had no such discretion) and not the grant of a demolition order (where the court does have such a discretion).

[70] Secondly, there are numerous decisions where the courts, in cases of public law, exercised their discretion either in favour, or against, depending on the facts, a demolition order. See, for instance, *Johannesburg Consolidated Investment Co. Ltd* (*supra*) at 405 E-407 following a number of earlier decisions along the same line; *Van Rensburg and Another NNO* (*supra*) at 11 (para 9) following a Full Bench decision of this division; *Camps Bay Rate Payers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others* 2001 (4) SA 294 (C) at 328C; *Cape Town Municipality v Abdulla* 1976 (2) 370 (C) at 377 D-H; *Trustees, Brian Lackey Trust v Annandale* (*supra*) at 291 para 28-45.

[71] Thirdly, and importantly, there is no difference in context or content between the judicial element of unlawfulness arising from a breach of a statute on the one hand, and on the other hand unlawfulness arising from the common law.

[72] Very often a statutory breach gives rise to the same claim under either private law or public law. Why a discretion in these circumstances is afforded under private law, but not under public law, escapes me. When I put this problem to counsel, he suggested that where the applicant is a local authority the court has no discretion, but where the applicant is a neighbour, the court does have a discretion. Surely, the powers of judicial discretion cannot depend on the happenstance of the identity of the applicant. The legal right to a demolition order under statute law is no different to the same right under the common law. I also find support for this view in the judgment of *Harms* J in *United Technical Equipment Co.* (*supra*) where he remarked at 347 A-B (with reference to the judgment in *Peri-Urban Areas Health Board* (*supra*):

> *"The learned Judge did not thereby intend to lay down that a statutory right is stronger than a common law right. The breach of statute referred to is a breach which is visited by criminal sanctions."*

[73] I have been unable to find one reported judgment where it was held that in certain circumstances a court has no discretion in considering a demolition order, and nor was I referred to any such case. Indeed, in all judgments dealing with a demolition order, the courts accepted that they retained a discretionary power. See, for instance, *Camps Bay Rate Payers and Residents Association* (*supra*) at 328C; *Trustees, Brian Lac*key *Trust*

(*supra*) at 291 para 28-45. This is the case also where the right to a demolition order arose from a statutory breach; i.e in matters of public law.

[74] The requirement that the discretion must be exercised in accordance with legal and public policy, is in my respectful view no more than that effect must be given to the requirement of lawfulness under both public and private law. The construction of a building or use of a property may be unlawful either because it contravenes a statutory enactment under public law, or because it constitutes unlawful use of one's own property under private law. In the latter regard the requirement of the "*reasonable use*" of one's own property which does not interfere with the reasonable use of a neighbouring property, is contained in the definitional element of delictual unlawfulness which give rise to a delictual claim under neighbour law. And the test for delictual unlawfulness is found in the legal convictions of society, which is often expressed as being legal or public policy. For a full discussion on this subject, see the Full Bench judgment of this court in *Wingaardt and Others v Grobler and Another* 2010 (6) SA 148 (ECD).

[75] Of course, a claim for demolition can be founded on both a breach of a statutory duty and on common law. When dealing with a breach under a statutory enactment, it matters not whether the breach is of a minor or a major nature or extent. Any breach, however minor or insignificant, constitutes an unlawful act. And this is precisely the reason why the court is given a discretion in applications for a demolition order. To order the demolition of an economically viable and costly construction because, for instance, it encroaches 2 cm across a lateral building line with little or no prejudicial consequences will result in an unduly harsh and unjust order.

This is particularly so if the encroachment can be compensated for by damages or a penalty order. On the other hand, there is authority in this division that in cases of a flagrant and sustained disregard, not only for the legitimate interests of its neighbours, but also for local authority requirements over a long period of time, the court in the exercise of its discretion will order demolition. See *De Villiers v Kalson* (*supra*) and *Van Rensburg NO V Nelson Mandela Metropolitan Municipality* (*supra*) at 11 paras 9 and 10.

[76] In passing, I should perhaps mention that for purposes of the delictual element of unlawfulness under the common law in cases of neighbour law, the result is the same as a breach of a statutory enactment under public law. Using the same example as in the previous paragraph, the legal convictions of society will not consider an encroachment of 2 cm over a lateral building line to be unlawful under the common law if it has no, or very little, harmful effect. However, the encroachment or use will be regarded as unlawful in the face of a flagrant and sustained disregard for the legitimate interests of its neighbours over a long period of time, resulting in the loss of deprivation of the reasonable use by the neighbour of its own property. In this regard, it must be borne in mind that *Ndlambe* bases its case against *Lester* on s. 4 (1) read with s. 21 of the Act, whereas *Haslam* relies on both the common law principles of neighbour law and on the statutory breaches.

[77] I therefore come to the conclusion that in all cases where a demolition order is sought, the court retains a discretion. Such discretion is to be exercised judicially, that is to say in accordance with the disproportionality of prejudice test, having regard also to the dictates of legal and public policy

as required by *Benson* (*supra*). I intend to deal firstly with the disproportionality of prejudice test and thereafter with the requirement of lawfulness.

[78] In regard to the disproportionality of prejudice test, Mr *Buchanan* SC urged me to have regard to *inter alia,* the following considerations:

> 1. All construction works undertaken on behalf of *Lester* were in accordance with approved plans. After the approval of the *Pellisier* plans had been set aside on review, the construction was complete and no further construction took place. Accordingly, there was never, at any stage, any disregard by *Lester* of the legislative or regulatory provisions applicable to the construction, and he never acted in breach of any court order or administrative decision. In short, he never acted in an unlawful manner. The present matter is therefore distinguishable from the contemptuous disregard to the building regulations of the property owner in *Van Rensberg NO* (*supra*).
>
> 2. The claim for demolition arises from the wrongful conduct of *Ndlambe* in approving plans which it should not have approved. *Lester* therefore finds himself as the victim of a sorry tale of gross incompetence on the part of the applicant who seeks the demolition. In these circumstances the payment of a levy contravention in terms of the Act is more appropriate.
>
> 3. At the time when the amended *Purden* plans were approved in November 2002 (which approval remains valid and legally binding), there were no height restrictions in place. In this sense *Lester* is also

the victim of the *"vengeance"*of *Haslam* who is now offended by the obstruction of his *"borrowed"* view which the *Haslam* family had previously enjoyed, and to which he (*Haslam*) was not legally entitled. Therefore, the payment of damages rather than total demolition would be more appropriate.

4. Following from the above, an order in terms of the counter application to effectively declare the amended plans of either May 2010 or September 2010 *"approved"*, will have the practical and more just result that for all practical purposes *Haslam* is placed back in the same position he would have been in had the dwelling been constructed in accordance with the (legally) approved plans of November 2002. This result is more proportional to the prejudice which *Haslam* will suffer compared to what *Lester* will suffer if he is ordered to demolish the entire structure. This course, even coupled with the payment of damages, is also more in accordance with the general principle that a court will be slow to order demolition if the justice of the case would be met with an award of damages. In this respect there is a natural aversion on the part of the courts to order the destruction of economically valuable building works if an alternative, more equitable, remedy is available.

5. A demolition order will be financially calamitous for *Lester.* The present value of the construction is approximately R8.1 million. The demolition costs will be R1 million. (It is not disclosed what the construction costs would be of a dwelling which would comply with

the approved Purden plans of November 2002, but logic dictates that it will be significant.)

6. The demolition of the existing structure may adversely affect the stability of the dune and therefore may adversely also affect the neighbouring residences built on the adjoining properties.

7. Finally, the dwelling is the prime residential residence of *Lester.* It is his *domicillium.* His main vocation is being employed as a Professor in tax law at Rhodes University in Grahamstown, and he resides in the dwelling whenever his duties dictate his presence at Rhodes University. He has no other home in the area. In terms of s 26 (3) of the Constitution, *Lester* has the right not to *"… be evicted from (his) home, or have (his) home demolished, without an order of court made after considering all the relevant circumstances."*

[79] I accept the factual correctness of the above submissions. But these are not the only relevant facts, and they must be weighed together with all other facts and circumstances, and in the context of the historical background of this case.

[80] I am not persuaded by the argument that *Lester* is the innocent victim of the incompetence of *Ndlambe* who approved plans it should not have approved, or in approving the foundations which exceeded the building line. Or by the assertion that construction took place after approval, but before the setting aside thereof on review.

[81] The reaction of *Haslam* and the other neighbours to the new dwelling after the initial approval of the *Purden* plans in May 2002, clearly alerted *Lester* to the interest they had in the development. The battle lines were drawn by the first application instituted by *Haslam* which resulted in the *Pickering* J order. The subsequent approval of the *Purden* plans (not proceeded with by *Lester*) ostensibly placated *Haslam* and the other neighbours, and as far as they were concerned the matter was laid to rest.

[82] *Haslam* made it clear to *Ndlambe* that he should be advised of any further amendments to the *Purden* plans. The improper haste in which the *Purden* plans were abandoned and substituted by the *Pellisier* plans, and the manner of approval of the *Pellisier plans* – obtaining approval the same day of submission by *"walking the plans"* through with the officials of the various departments without any notice to *Haslam* or any other neighbour, and in circumstances where the *Pellisier* plans in comparison with the *Purden* plans had a substantial impact on *Haslam* both visually and in obstructing his views; all of this contributed to the war of litigation which followed and to the position in which *Lester* now finds himself.

[83] Why he (or Ndlambe) did not give notice to *Haslam* is left unexplained. I reject *Lester*'s excuse that he did not know that *Haslam* should be notified. Further, as is quite evident from his answering affidavit in the *Pickering* J application, he realised full well that continuing with building operations pending the outcome of review proceedings to set aside the approval, contained a real risk of being ordered to demolish the new structure in the event of the review being successful. He nevertheless continued with building operations under the approved *Pellisier* plans knowing full well that

Haslam would object and challenge the lawfulness of the approval. (He subsequently consented to an order setting aside the Pellisier plans).

[84] By virtue of the issues raised in the first interdict application before *Pickering* J, *Lester* (who is obviously a learned and very intelligent man) must have been made aware of the general rule in law that Courts will be slow to order demolition of valuable buildings if alternative remedies such as payment of damages or contravention levy are available.

[85] *Lester* energetically commenced construction of the new dwelling after he obtained approval from Ndlambe (without Notice to *Haslam*) on 17 July 2003. On 4 November 2003, less than four months later, when *Haslam* instituted the second application for the setting aside of the July 2003 Pellisier plans, the construction of the new dwelling was for all intents and purposes complete. Although this was not an issue raised or argued before me, it was in anyone's language a rather swift and rapid construction of a large building. And not only was the roof height of 34.17 meters 5 meter higher than the *Purden* plans approved in November 2002, but also 2.17 meters higher than the approved *Pellisier plans* of 17 July 2003 (which were set aside by consent on 25 June 2004 per the *Jennet* J order). The new dwelling was also considerably larger than shown on the *Purden* plans.

[86] Again, this issue was neither raised nor argued before me, but I find it difficult to believe that *Lester* was not aware that the roof of his newly constructed building was not only higher than shown on the previously approved plans, but also considerable higher than shown on his (then approved) July *Pellisier* plans. As a matter of overwhelming probability, he

must have known that *Haslam*'s previous views were almost entirely obstructed, or will be obstructed after completion. Yet, he continued with building operations (at speed) until the November 2003 proceedings were instituted. By now, the balance of convenience had swung in his favour and *Haslam* could not obtain – and did not even bother to apply for – an interdict against building operations pending review. And now *Lester* had a further string to his bow – the inherent reluctance of Courts to order demolition of valuable and fully constructed buildings if other remedies are available.

[87] I have a sense, nothing more, that *Lester* may have orchestrated the situation in which he now finds himself. There is insufficient evidence before me to make such a finding, but on the available evidence I am certainly unable to find that *Lester* is the *"innocent victim"* of circumstances beyond his control. His entire argument, advanced so eloquently on his behalf by Mr *Buchanan* SC, is that a demolition order will operate extremely harshly against him and will result in an injustice. This may be so, but I respectfully disagree with Mr *Buchanan* SC that *Lester* is *"an innocent victim of his circumstances."* (Or of *Ndlambe*'s incompetence or of the *"vengeance"* of *Haslam*, or that he innocently constructed the dwelling in accordance with (then) approved plans)

[88] *Lester*'s reliance on the absence of any height restrictions at the time of the approval of the *Pellisier* plans (later set aside), is also of no particular moment. It loses sight of the fact that the absence of height restrictions in a Planning Scheme does not negate the common law. It is trite that under the common law a property owner may not exercise his right of ownership to that property in such a manner that it unduly interferes with the reasonable

use and enjoyment of a neighbouring property by the owner of such neighbouring property. And the common law recognises that such undue interference can be constituted, *inter alia,* by an undue and unreasonable interference with the view from the neighbouring property. There are many judgments on this subject, but since this is not an issue before this court I say nothing further, save to recognise the existence of these rights and obligations under the common law.

[89] The absence of height restrictions, therefore, does not confer an unfettered right on *Lester* to construct a dwelling at any height and size of his choice without any regard to the reasonable use and enjoyment of neighbouring properties by their owners.

[90] Whereas *Lester*'s initial plans of 3 May 2002 (the *Purden* plans) would have reduced *Haslam*'s views, it would not have been overbearingly intrusive and were approved; whilst the *Pellisier* plans and construction of the new dwelling are much more intrusive and were not approved (on grounds other than height).

[91] With respect, I also do not find support for *Lester*'s contentions concerning *Haslam's "borrowed view"* in *Camps Bay Ratepayer and Residents Association and Another v Harrison and Another* 2011 2 BCLR 121 (CC).

[92] The *Camps Bay* judgment (*supra*) dealt with the meaning of *"value"* within the meaning of s 7(1)(b)(ii) of the Act. This section obliges the local authority to take into account any *"derogation of value"* of neighbouring

properties in considering the approval of plans. The learned (then) Acting Judge of the Constitutional Court (Brand AJ) made his remarks regarding *"a borrowed view"* in the context of the meaning of *"value"* in s (7) (1) (b) (ii) of the Act. This has nothing to do with whether or not a property owner exercises his right to ownership of his property in a reasonable or lawful (or wrongful) manner. Depending on the facts, the obstruction of the view from a neighbouring property may not derogate from its value, but the extent of the obstruction of the views of a neighbouring property may very well constitute unlawful use of his own property.

[93] The argument that demolition may affect the stability of the dune and pose a risk to neibouring properties, must be evaluated in the light of the relevant evidence. There is no concrete evidence to support a contention that there is a reasonable likelihood that this may occur, or that it constitutes a real risk. The evidence shows conclusively, in my view, that although there is always such a possibility, it is not a reasonable possibility which is likely to eventuate. The evidence shows that if reasonable precautions are taken and the demolition is carried out with reasonable professional care and skill, the integrity of the dune and possible damage to other properties will not be compromised. Although it is a factor to be taken into account, in my view it does not carry sufficient weight not to order demolition.

[94] The contention that a demolition order will be financially calamitous for *Lester* has merit. It is said that the construction costs of the dwelling sought to be demolished exceeds R8 million. The costs of demolition, undertaken by professionally skilled engineers and builders exercising due care and caution, may very well exceed R1 million. The construction costs of yet a

further new dwelling on the same foundations, either in accordance with the approved *Purden* plans of November 2002 or other lawfully approved plans, may be millions of rands and no longer economically viable to *Lester*.

[95] However, *Lester* does not say he cannot afford it. He does not say that this course will leave him and his family destitute. He does not say, for whatever reason, that he is unable to either construct a new dwelling on the same foundations in accordance with new plans and in compliance with all statutory enactments and building regulations and conditions of title, or, at minimal costs, to re-use the existing structure at the foot of the dune (the original holiday home). Although a demolition order will cause financial prejudice and hardship and inconvenience, I do not get the impression that it will ruin him financially. Sadly, the effect of many court orders arising from commercial transactions (as *Lester* as a tax expert will know) cause financial hardship from which litigants may never recover. This, however, is not a bar to allowing the law to take its course. It is a sad consequence of commercial litigation.

[96] The argument that the dwelling is his prime residence and he has a constitutional right under s 26 to housing, is a relevant consideration but without any constitutional foundation.

[97] The protection against arbitrary demolition of a home under s 26 (3) of the Constitution must be read together with and in the context of s 26 (1) which entrenches the right to access to *"… adequate housing."* See *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) at para 28.

[98] The constitutional protection against arbitrary demolition of a home, therefore, flows from the right to access to *"adequate"* housing. *Mokgoro* J pointed out in *Jaftha* (paras 25-26) (*supra*) that the meaning of *"adequate"* housing must be interpreted against the historical background of forced removals of (mostly indigent) people and racists evictions during the apartheid era, resulting in homeless and destitute people. In *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) (per *Cameron* and *Nugent* JA) the Supreme Court of Appeal distinguished at 274 C- 274 H between the above situation and a luxury or holiday home. To similar effect is the judgment of Rogers AJ in *Standard Bank v Hunkydory Investments 188 (Pty) Ltd. and Others* 2010 (4) BCLR 374 (WCC).

[99] The situation of *Lester*, should a demolition order be granted, is a far cry from the mischief which s26 seeks to prevent and from the factual situation in *Jaftha* (*supra*). There is no suggestion whatever that he will be left homeless or destitute, or without *"adequate"* housing, or that he has no other alternative accommodation. On his own evidence, he is very often engaged in Cape Town and Johannesburg on consultancy work. He is the joint owner of a home in Tokai near Cape Town where he stays when in Cape Town, and when in Johannesburg he has an arrangement with his sister where he stays. He has, for the reasons mentioned, been absent for a considerable period of time from his home in Kenton. He had not suggested, not even faintly, that when his presence is required in Grahamstown at Rhodes University, he has nowhere to stay, or is unable to afford or find accommodation in Grahamstown or in Kenton. Moreover, the dwelling in Kenton may rightly be described as a luxurious holiday home which he uses as his prime residence. I am therefore unable to find on the evidence in this

case that *Lester*'s constitutional right to *"adequate"* housing has been adversely affected.

[100] I am not insensitive or unsympathetic to the hardships which *Lester* will suffer should a demolition order be granted. It is undoubtedly an important factor in the consideration of the just and equitable effects of a demolition order. However, I am not persuaded that s 26 can save him from these results. Moreover, I believe I have considered all the relevant circumstances as required by s 26 (3) and a demolition order will be in compliance with all constitutional and common law requirements.

[101] Finally, I am left equally unpersuaded by the argument that the effect of a demolition order will render the slope of the dune useless to *Lester* and deprive him of his ownership thereof. The fallacy of the argument is that the demolition order sought is not directed against the use by *Lester* of his land, but against the unlawful use thereof. *Lester* remains perfectly entitled to use the remaining slope of the dune, or even the present foundations which accords with the approved *Purden* plans of November 2002, as long as the dwelling is constructed in terms of lawfully approved building plans under s 4 read with ss 7 and 9 of the Act.

[102] I am therefore driven to the conclusion that if a demolition order is granted, the obvious hardship and prejudice which *Lester* will suffer is not disproportionate to the prejudice which his neighbours, particularly *Haslam*, will suffer if a demolition order is not made. Coupled to this consideration, is also the requirement of public and legal policy. And this brings me to the second requirement in the exercise of my discretion to grant a demolition

order ─ the end result must be lawful (or, as put in *Benson* (*supra*) it must accord with public and legal policy).

[103] The decided cases in this division show clearly that if the facts show a *"flagrant and sustained disregard, not only for the legitimate interests of its neighbours, but also for local authority requirements, over a very long period of time …"* then the requirement of lawfulness may override the hardship and prejudice which a property owner may suffer if a demolition order is granted against it. (*De Villiers v Kalson* (*supra*) and *Van Rensburg NO v Nelson Mandela Metropolitan Municipality* (*supra*). To similar effect is also other cases in the country.

[104] In a long line of cases concerning building regulations, our courts have shown little sympathy to acts of unlawfulness. In *Ostrowiak* (*supra*) *Broome* J said at 590-591:

> *"An attempt has been made in this case to invoke the Court's indulgence on the ground of apparent hardship, notwithstanding the very clear terms of the legislation. The sympathy of the Court and its view of the general public interest can have no bearing upon a matter of this sort. But, even if such matters were relevant, I am bound to say that no ground whatever has been shown for any indulgence. Both the rondavels in question were erected not only in defiance of by-laws but also in defiance of a precise intimation from the Board that work upon them must stop. The applicant, as I have said, was prosecuted in regard to both buildings and was convicted. That his attitude of defiance has not changed appears from the terms of his letter … The public interest requires that the control and regulation*

of buildings in local authority areas should be placed in the hands of the local authority itself. This may, in individual cases, cause some hardships, but if private persons are permitted to erect buildings in the teeth of the law, then there is an end to any sound local government."

[105] In *Peri-Urban Areas Health Board* (*supra*) *Clayden* J said at 685A: *"… where the breach of law interdicted is a breach of a statute a stricter approach is adopted…"*

[106] And at 685E:

"… I can see no reason, as it were, to give approval to illegal action by the respondent by allowing it to continue the illegal use of lot 47. "

[107] To the same effect is the judgment of Smit AJ in the *Transvaalse Raad vir die Ontwikkeling* (*supra*) at 987 H-I.

[108] In the Full Bench judgment per *Harms* J in *United Technical Equipment Co,(supra)* the learned Judge said at 347 G:

"I am not aware of any authority which would entitle the Court to suspend the operation of an interdict where the wrong complained of amounts to a crime. The Court would thereby be abrogating its duty as an enforcer of the law. No good reason has been given why we should not follow the approach adopted in the ***Peri-Urban Areas Health Board*** *(supra)"*

[109] I do not suggest that the evidence in this case show that *Lester* acted unlawfully. The fact, however, is that his dwelling is an unlawful structure, and has judicially and administratively been declared so. The question is: how do I exercise my discretion in the face of these judgments and administrative decisions?

[110] In all the cases referred to above, including the two cases in this division (*De Villiers and Van Rensburg NO* (*supra*)), the court exercised its discretion in favour of a demolition order in circumstances where the owner of the offending building or property either personally acted in defiance of administrative orders, or showed a flagrant disregard to orders, enactments or by-laws. The argument put forward by Mr *Buchanan* SC is that *Lester* never personally showed a disregard to any order or decision, and he at all times acted in accordance with the rulings of *Ndlambe.* He argued that, in this regard, these cases are distinguishable from the case under consideration. I have already said that I accept that *Lester* never personally acted in an unlawful manner.

[111] I nevertheless do not believe the cases mentioned above are distinguishable. The fact that the owners of the offending structures were shown to have personally acted in an unlawful manner, is to my mind fortuitous and of no defining moment. The principle, in my respectful view, is not so much their personal involvement in unlawful activities, but that they as registered owners actively associated themselves with the unlawful use of their properties in flagrant disregard of municipal requirements and of the legitimate interests of their neighbours. The facts of this case show that the encroachments complained of are not of minor or insignificant nature. I

have already referred to the fact that the *"as built"* roof height of the property as at today's date is 34.17 metres, which exceed the present height restrictions by slightly more than 9.5 metres. This exceeds the roof height of the (not approved) *Pellisier* plans by 5 metres, which in any event today in turn exceeds the permissible roof height by 7.5 metres. The result is that approximately 75% of the views from *Haslam*'s property are totally obscured.

[112] *Lester* managed to complete construction of the property in circumstances where *Haslam* labored under the erroneous impression that it was being built in accordance with the approved *Purden* plans, and in any event in circumstances where the *Pellisier* plans were approved surreptitiously and in suspect circumstances. For the reasons mentioned, *Lester* was not an innocent victim of the vengeance of *Haslam* or the incompetence of *Ndlambe*. He continued to complete the unlawful structure after *Haslam* instituted the second application in 2003 for the setting aside of the *Pellisier* plans, and took occupation of the property. He continued in occupation even after the *Pellisier* plans were declared to be unlawful by this court (per *Jones* J) on 29 June 2007. He did so, and continues to do so, in flagrant disregard to the rights of *Haslam* , the building regulations, the Act, and the Town Planning Scheme.

[113] It bears repeating that I am not sitting as a court of review or a court of appeal. I am bound by the orders of *Jones* J and *Plasket* J. The administrative decisions not to approve the *Pellisier* plans or the subsequent amendments thereof continue to have legal effect and force, and by which this court is bound. I am not asked, and nor it is my function or indeed

within my powers, to set aside any of those orders or decisions and to replace them with my own orders or decisions. I am required to exercise a judicial discretion in the consideration of the grant of the remedy of demolition. Can I in the exercise of this discretion simply upset previous court orders and/or administrative decisions otherwise properly and legally arrived at? I believe the answer must be: No.

[114] A High Court constituted by a single Judge has no power to substitute another court order or legally binding administrative decision with its own order or decision in the exercise of its discretion. The principle of legality and the binding force of the *stare decisis* rule was recently constitutionally entrenched by the Constitutional Court. See *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* (*supra*) at para. 28). And to grant the relief claimed by *Lester* in the counter application and to dismiss the main prayer will have precisely this effect – setting aside decisions not to approve plans, granting approval of plans found not approved, and ignoring the order of *Jones* J and *Plasket* J by granting approval of plans not in compliance with statutory enactments, and found to be unlawful.

[115] To allow a Judge to alter previous orders and decisions simply in the exercise of his or her discretion will make a mockery of the legal system and allow the law to take its course according to the peculiar whims of a single judge. This is the short route to anarchy and chaos. And this principle is well recognised in our law and not the product of original thought. See, for instance, the rather bemused reference by *Griesel* J in *Trustees, Brian*

Lackey Trust (*supra*) at 292 A-B to the following remark of *Van den Heever JA* in *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 500G:

> *"… dat 'n Regter wat volgens sy gesonde verstand, na goeddunke en sonder regsreels kan oordeel, meer te vrese is as honde en slange."*

[116] In my view, legal and public policy, as expressed by the legal convictions of the community or society, dictate that on the facts of this case, this court is obliged to enforce the principle of legality and to uphold the rule of law. To hold otherwise would be to perpetuate and to sanction what was already held to be unlawful. See also *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O'Hagans* [2001] 4 All SA 415 (C) at 422 para 27.

[117] I do not minimise the financial hardship, discomfort and inconvenience which *Lester* will suffer should a demolition order be granted. I accept that he will not easily, if at all, recover from the financial losses it will bring about. On the other hand, if a demolition order is not ordered, I will condone the continued use of a dwelling found to be unlawfully erected. The unlawfulness will continue to be perpetuated. *Haslam* will permanently be deprived of reasonable views from, and lawful use of, his own property. I am unpersuaded that any circumstances have been shown to justify an order not to order a demolition order in these circumstances. Public and legal policy, in my respectful view, demand that effect should be given, in the circumstances of this case, to a demolition order. It will not, given the peculiar facts and circumstances of this case, result in an injustice.

[118] For the above reasons I am not persuaded that a demolition order does not accord with public and legal policy. On the contrary, I believe that on the facts of this case the evidence show that a demolition order does accord with public and legal policy. It follows that both *Ndlambe* and *Haslam* must succeed in the main application (albeit on different grounds), and the counter application must be dismissed.

[119] The order which *Ndlambe* seeks is the total demolition of the new dwelling at *Lester*'s costs *"… within 90 days of this order …"* I do not believe, given the delicacy and care and skill with which the demolition operation is to be undertaken to preserve the integrity of the dune and safety of neighbouring properties, that it can be achieved in three months. I intend to afford *Lester*, in the exercise of my discretion, 180 days (approximately 6 months) to make the necessary arrangements, move house, make alternative accommodation arrangements, engage the services of a contractor, demolish the offending structure and store or sell any building materials and fixtures and fittings which may be saved. I also intend to grant *Lester* leave to apply for extension of the time period of 180 days should it prove to insufficient time.

[120] At the close of argument I invited Mr *Lowe* SC for *Ndlambe* to consider amending the Notice of Motion to ask, in the alternative, for an order that in the event of *Lester* not complying with the demolition order, either timeously or at all, *Ndlambe* is authorised to demolish the structure and to recover the costs of demolition from *Lester.* *Ndlambe* has now applied for such an alternative order, but this is opposed by Mr *Buchanan* SC on behalf of *Lester*.

[121] In view of the fact that the amended order raises issues which were neither canvassed on the papers nor dealt with in argument, and that unforeseen circumstances may develop which may delay the demolition process through no fault of *Lester*, I do not propose to grant such alternative order at this stage. Should this become necessary in the future, *Ndlambe* (or *Haslam* as the second applicant) retains the right to approach the court at the relevant time on the facts and circumstances then existing.

[122] I make the following order:

1. The First and Second Applicants succeed in this application and in terms of section 21 of the National Building Regulations Act (and such other legislation as may be relevant including the common law), the First Respondent be and is hereby ordered to demolish the offending building structure highlighted on Annexure RD 27 of the Applicant's Founding Affidavit, at his costs and expense, within 180 days of this order.
2. The First Respondent, on good cause shown, is granted leave to apply to this court to extend the period of 180 days in para.1 of this order.
3. The counter application is dismissed.
4. The First Respondent is ordered to pay all the costs of this application, and of the counter application, such costs to include the employment of senior counsel employed by 2nd Applicant.
5. The First and Second Applicants are granted leave to apply, on the same papers under this case no., for appropriate relief should first respondent fail to comply, either timeously or at all, with para 1 above.

ALKEMA J

Heard on	:	21 November 2011
Delivered on	:	3 May 2012
Counsel for Applicant	:	Mr Lowe SC
Instructed by	:	Wheeldon Rushmere & Cole
Counsel for 1st Respondent	:	Mr Buchanan SC
Instructed by	:	Netteltons
Counsel for 3rd Respondent	:	Mr Ford SC assisted by Mr Paterson SC
Instructed by	:	Borman and Botha Attorneys

No appearance for other Respondents