



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A5017/2022

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES:
DATE
SIGNATURE

In the matter between:

SHILANE, NYEPANE PETRUS

and

TEN NAPEL, JAN LOURENS

DU RANDT, HUGO

EKURHULENI METROPOLITAN MUNICIPALITY

Appellant

First Respondent

Second Respondent

Third Respondent

In re the matter between

TEN NAPEL, JAN LOURENS

DU RANDT, HUGO

And

EKURHULENI METROPOLITAN MUNICIPALITY

SHILANE, NYEPANE PETRUS

First Applicant

Second Applicant

First Respondent

Second Respondent

JUDGMENT

MOORCROFT AJ [SENYATSI J ET VAN NIEUWENHUIZEN AJ CONCURRING]

Summary

The Court has a discretion at common law to order the demolition of structures illegally erected on land. The owners of neighbouring properties to the property on which the offending structure was erected, enjoy standing to approach the court for appropriate private law relief.

Introduction

[1] This is an appeal with the leave of the presiding Judge to the full court of the Gauteng Division, Johannesburg, by the second respondent in the court *a quo*. The first and second applicants *a quo* are the first and second respondents in the appeal, and are referred to as *'the respondents.'* The first respondent *a quo* did not participate in the appeal and is referred to as *'the Council.'*

Background

[2] The appellant is the owner of immovable property described as Portion 2 of Erf

57 Parkhill Gardens Township.¹ He erected a structure (a multi-storey block of eight apartments) on the property that was illegal for a number of reasons:

- 2.1 Firstly, no building plans were approved by the Council as required by section 4(1) of the National Building Regulations and Building Standards Act, 103 of 1977;²
- 2.2 Secondly, the structure encroached on building line restrictions imposed by the Ekurhuleni Town Planning Scheme of 2014;³
- 2.3 Thirdly, the structure did not comply with the Residential 1 zoning of the property;⁴
- 2.4 Fourthly, a restrictive condition in the title deed was contravened. The title deed permitted only one dwelling on the property and the appellant was erecting a second.

[3] On dates prior to 3 November 2020, the first as early as March 2020, the Council issued two contravention notices to the appellant. The appellant did not comply with the notices. On 25 November 2020 the appellant gave an undertaking to cease the works but instead the building process was accelerated.

[4] The appellant therefore persisted with his unlawful conduct even when he knew that the works were not compliant.

[5] The respondents approached the Court for relief in the form of an urgent interdict

¹ The respondent's late wife who died eight years ago was also cited in the application.

² Non-compliance is a criminal offence: S 4(4).

³ Non-compliance with the Scheme is a criminal offence.

⁴ Residential 1 zoning restricted occupation to one dwelling on the property, for one family unit.

application (Part A) and final interdictory relief (Part B) aimed at the eventual demolition of the structure. They derived their standing from the fact that they are the owners, respectively, of an adjoining residential property and one across the street.⁵

[6] On 22 December 2020 Keightley J granted an interim order that pending finalisation of Part B of the application, the appellant be interdicted and restrained from continuing with building activities on the property.

[7] Part B of the application came before Fisher J in August 2021. Shortly before the hearing in August 2021 the appellant brought an application for a stay of the application pending the finalisation of a rezoning application to the Council. After hearing argument the court *a quo* refused the application for a stay and granted the order now appealed against.

[8] In terms of the judgment, *inter alia*,

8.1 the application for a stay or postponement was refused;

8.2 the structure erected by the appellant on the property was declared to be unlawful for being constructed in contravention of the Council's Town Planning Scheme of 2014 and of restrictive condition no. 3 in Title Deed T26269/2001, and also without the prior approval of building plans by the Council as required in terms of sections 4 and 7 of the National Building Regulations and Building Standards Act, 103 of 1977 ("the Act"), and

8.3 the appellant was ordered to demolish the structure.

⁵ See *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) 401B,

The appeal process

[9] Fisher J granted leave to appeal on 10 November 2021. The appellant failed to prosecute the appeal timeously and brought an application for condonation and for reinstatement of the lapsed appeal.

Condonation application

[10] The appeal lapsed and the appellant brought an application seeking reinstatement and condonation for the late lodging of a security bond, the late finalisation of the record, the late application for a date for the hearing of the appeal, and the late prosecution of the appeal.

[11] It would appear that nothing was done to prosecute the appeal from 8 December 2021 when the appeal was noted until January 2022 when the appellant's attorneys requested a transcription of the record. As the matter was decided on application, it is not apparent why an expensive transcription was required, and the appellant baulked at paying this apparently unnecessary expense.

[12] The appellant failed to timeously deliver a power of attorney required in terms of Rule 7(2),⁶ failed to apply for a date as required by Rule 49(6)(a),⁷ failed to file and serve copies of the record as required by Rule 49(7)(a), and failed to timeously enter into the required security as required by Rule 49(13)(a).⁸

⁶ It was delivered on 23 March 2022.

⁷ See also *Aymac CC and Another v Widgerow* 2009 (6) SA 433 (W).

⁸ It was signed on 8 April 2022 and uploaded to Caselines on 14 April 2022.

[13] The appeal should have been prosecuted by 4 March 2022 but the application for condonation and reinstatement was only brought on 14 April 2022.

[14] In argument Mr Verster who appeared for the respondents indicated that the respondents would no longer oppose the application for condonation and reinstatement, but would seek an appropriate cost order.

[15] The application for condonation and reinstatement is granted in the interests of the proper ventilation of the issues.

The merits of the appeal

[16] In the notice of appeal the appellant prayed for an order setting aside the judgment and order, and substituting an order staying or postponing the application pending final resolution of the appellant's application for rezoning and the removal of restrictive conditions on the property.

[17] The appellant relied on the following grounds of appeal.

17.1 The Judge *a quo* erred in refusing the application for a stay of proceedings pending the outcome of the rezoning application and removal of restrictive conditions;

17.2 There was no compelling reason to order demolition of the building;

17.3 There were good prospects of success in the pending application for

rezoning and removal of restrictions;

17.4 There was no evidence that the amenity and value of surrounding properties would be affected by a temporary stay of the application;⁹

17.5 The presiding Judge failed to appreciate the evidence that the appellant would suffer irreversible damage in the event of the structure being demolished.

[18] As will be shown below, it is common cause that the Ekurhuleni Municipal Planning Tribunal approved the rezoning of the property from Residential 1 to Residential 3 with a density of 65 dwelling units, subject to a number of conditions not relevant for the purposes of this judgment. The rights will be incorporated into the City of Ekurhuleni Land Use Scheme of 2021.¹⁰ It is specifically noted in the resolution approving the rezoning that the Tribunal did not condone the '*partly constructed building that encroaches into the building lines of the*' property. A site development plan including a landscaping plan as well as building plans had to be submitted and the legislation must be complied with before the commencement of any further building work.

The application in terms of section 19(b)

[19] The parties jointly applied in terms of section 19(b) of the Superior Courts Act, 10 of 2013, for the leave of the court to receive the minutes of the Tribunal meeting

⁹ It must be noted that diminution in value is not a requirement for an order compelling compliance with a town planning scheme. See *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) 401B.

¹⁰ The 2021 Land Use Scheme superseded the Town Planning Scheme of 2014.

referred to above. Both parties relied on the minutes in argument.

[20] It is the case for the respondents that the resolution of the Tribunal renders the appeal moot. The application for a stay or postponement was sought on the basis of the outcome of the application for the rezoning and removal of restrictions. The Tribunal has now granted both parts of the relief sought and the illegal structure is still illegal. The stay sought would not have cured the illegality.

[21] The Tribunal resolution indeed renders the appeal moot insofar as the appellant seeks an order that the application be stayed. The resolution addresses the rezoning of the property and the removal of the restrictive condition, but does not dispose of the illegality. No building plans had been approved and the building encroached on the building lines prescribed in the Scheme.

[22] The appellant argues however that the notice of appeal must be interpreted in such way that a stay be granted also to permit the appellant to apply for the approval of building plans and relaxation of building lines. This in essence introduces a new ground of appeal raised on the day of the appeal, and is rejected.

The discretion to order demolition

[23] A town-planning scheme serves the interests of the community.¹¹ Members of the community who are affected by non-compliance therefore enjoy standing to approach the court for relief under the common law,¹² including a demolition order. The right to

¹¹ *The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) 70D

¹² *Escherich and Others v De Waal and Others* 2017 (6) SA 257 (WCC)

seek such an order most often arises when one landowner erects a structure that encroaches on¹³ or over¹⁴ the land of another but there is no difference in principle when the encroachment is not on a neighbour's land, but on his rights. In *De Villiers v Kalson*¹⁵ Graham JP said:

"... in the present case there has been no encroachment upon the ground of another, but an encroachment upon his rights as defined ... I am inclined to think that this difference makes little or no change in the plaintiff's rights for many of the same arguments used in favour of the view that the Court has no discretion but must grant an order for removal, apply equally well to encroachment on land and encroachment on rights, such as exist in this case."

[24] The fact that section 4 of the Act creates a criminal offence with a penal sanction militates against the exercise of a discretion not to order demolition.¹⁶

[25] In *Lester v Ndlambe Municipality and Another*¹⁷ the Supreme Court of Appeal was seized with a matter where a local authority had applied to court in terms of section 21 of the Act for an order that an illegal structure be demolished.¹⁸ The Court held that section 21 did not lend itself to the interpretation that the Court may grant relief other than a demolition order.

[26] The judgment must be distinguished from the present matter as the Supreme Court of Appeal was dealing with an application under section 21 of the Act. Section 21 of the Act (not relevant in this case) provides a public law remedy.¹⁹ Individuals do not

¹³ *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354.

¹⁴ *Pike v Hamilton, Ross & Co.* (1853-1856) 2 Searle 191.

¹⁵ *De Villiers v Kalson* 1928 EDL 217.

¹⁶ *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA) para 20.

¹⁷ *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA).

¹⁸ Majiedt JA rejected the conclusions reached by the court *a quo* that neighbour-law principles are applicable in this case and secondly that a court has a discretion in all demolitions sought under the Act.

¹⁹ Para 22. See also *Standard Bank of South Africa Ltd v Swartland Municipality and Others* 2011 (5) SA 257 (SCA).

have standing to pursue the remedies in section 21.²⁰

[27] In the present matter the respondents are seeking a private law remedy.²¹

[28] In *BSB*, the Supreme Court of Appeal confirmed a partial demolition order and held²² that the court had a broad general discretion to order demolition after considering all relevant circumstances. As in the present matter, the application was one brought by a neighbour seeking a private law remedy and the municipality did not participate in the proceedings.²³

[29] It is clear therefore that Fisher J had a discretion to order the demolition of the offending structure. She analysed the facts in the light of the legal principles and exercised her discretion properly and with great care. She was alive to the prejudice that demolition would have for the appellant²⁴ and weighed up²⁵ the competing interests in arriving at her order.

[30] The fact that the appellant persisted with the erection of the offending building even when he knew it was an illegal structure weighed heavily with the learned Judge.²⁶ The courts should not permit landowners to erect illegal structures on their land and then present the authorities with a *fait accompli* created by their illegal actions. The *dictum* by Harms J (as he then was) in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council*²⁷ is apposite:

²⁰ *BSB International Link CC v Readam South Africa (Pty) Ltd and Another* 2016 (4) SA 83 (SCA) para 23.

²¹ *Lester* is also perhaps not the last word on the subject of demolitions under section 21: In *BSB International Link CC v Readam South Africa (Pty) Ltd and Another* 2016 (4) SA 83 (SCA) paras 27 and 28 doubt was cast, albeit *obiter*, on the interpretation of section 21 in the *Lester* decision a year earlier.

²² Paras 25, 26 and 29.

²³ Para 2.

²⁴ See para 46 of the judgment.

²⁵ See para 21 of the judgment.

²⁶ See paras 39 and 46 of the judgment.

²⁷ *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) 348 I-J.

“...a lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with a hope that the use will be legalised in due course, and, pending finalisation, the illegal use would be protected.”

[31] The respondents on the other hand took steps to protect their rights immediately when it became apparent that the appellant was not constructing a garden cottage as he had previously represented to them, but rather an apartment block. They reported the illegal structure to the Council. The Council issued two stop building orders to the appellant which were both ignored and that led to an urgent application when the Council failed to act after their stop-building orders were ignored²⁸

[32] The approval of building plans is not a mere formality in town planning and compliance with building standards promote public safety. Local authorities are required to appoint building control officers²⁹ who have the duty, *inter alia*, to inspect buildings erected in compliance with approved building plans.³⁰ Buildings must comply with prescribed standards and building codes, and compliance is directly related to the approval of compliant building plans. No evidence was placed before the Court *a quo* regarding compliance by the appellant with building standards.

[33] It follows that the decision to order demolition can not be faulted.

The nature of the discretion exercised by the Judge a quo when dismissing the application for a stay

²⁸ See paras 28 and 47 of the judgment.

²⁹ S 5 of the Act.

³⁰ S 6(1)(c) of the Act.

[34] The decision to grant a stay involves the exercise of a true and unfettered discretion. A court of appeal will only interfere when it is of the view that the Court vested with the discretion did not exercise the discretion judicially³¹ or was influenced by wrong principles or a misdirection on the facts, or that the decision was not one that could be arrived at reasonably.³²

[35] The court of appeal will not substitute its own decision for that of the Judge *a quo* merely because it believes it would have arrived at a different conclusion.

[36] There is no indication that the learned Judge failed to exercise her discretion judicially, or that she misdirected herself on the facts or applied the wrong principles. Her judgment is well-reasoned.

ORDER

[37] The following order is made:

³¹ *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) para 25.

³² *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) para 14.

1. The appellant's application for condonation for the late prosecution of the appeal is granted;
2. The appeal is reinstated;
3. The appellant is ordered to pay the costs of the application for condonation;
4. The minutes of the meeting of the Ekurhuleni Municipal Planning Tribunal of 14 September 2022 is received in terms of section 19(b) of the Superior Courts Act, 10 of 2013;
5. The appeal is dismissed;
6. The appellant is ordered to pay the costs of the appeal.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

I agree and it is so ordered.

**M SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

I agree and it is so ordered.

**S VAN NIEUWENHUIZEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Judges whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **17 November 2022**

COUNSEL FOR THE APPELLANT

S MARITZ

INSTRUCTED BY:

MARK-ANTHONY BEYL ATTORNEYS

COUNSEL FOR FIRST AND
SECOND RESPONDENTS:

M VERSTER

INSTRUCTED BY:

BMV ATTORNEYS

DATE OF THE HEARING:

26 October 2022

DATE OF JUDGMENT:

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