

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 33571/2022

DOH: 9 MARCH 2023

REPORTABLE: **NO**/YES  
OF INTEREST TO OTHER JUDGES: **NO**/YES  
REVISED.

.....**12 APRIL 2023**  
**SIGNATURE****DATE**

In the interlocutory application between:

**THE WILDS HOMEOWNERS' ASSOCIATION NPC**  
**(Registration number: 2003/008761/08)**

**APPLICANT**

and

**GOPAUL MAYANDRAN PILLAY**

**FIRST RESPONDENT**

**ISHARA PILLAY**

**SECOND RESPONDENT**

**CITY OF TSHWANE METROPOLITAN MUNICIPALITY**

**THIRD RESPONDENT**

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## JUDGEMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 12 APRIL 2023**

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### **Bam J**

#### **A. Introduction**

1. This case concerns an application for an order to demolish a part of the pergola constructed by the first and second respondents in their property. The applicant says in constructing the pergola, which encroaches upon the 5 m street boundary line, the first and second respondents deviated from the approved building plans. Such deviation contravened the applicant's architectural guidelines and makes the pergola an unlawful structure in terms of the Building Standards Act<sup>1</sup> (the SBA). The applicant also seeks an order directing the third respondent, the City of Tshwane Metropolitan Municipality (CoT), to take law enforcement steps against the first and second respondents and, where required, to procure a demolition order on its own and to give effect to the demolition order sought by the applicant.

2. The respondents are opposing the application. In the main, the respondents say there is no unlawfulness as the pergola was constructed in accordance with the plans approved by the applicant and the third respondent. The respondents further say the application ought to be dismissed, based on the material changes introduced in the applicant's replying affidavit. They add that given the fundamental change in the original case set out in the founding affidavit, the demolition order will not bring clarity and finality. As against the order sought against the CoT, the respondents submit that the order is not

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<sup>1</sup> Act 103 of 1977, as amended.

competent and the applicant lacks legal standing to seek the relief. They also assert that the issues involved in this dispute have been previously determined by an expert. As such, the matter has become *res judicata*. Lastly, the respondents raise the defence of waiver. They submit that by approving the building plans, with the plan depicting the encroachment on the 5 m street boundary line, the applicant waived its rights to rely on any alleged violation of its architectural guidelines.

## **B. The Parties**

3. The applicant is The Wilds Homeowners' Association NPC, a non-profit company duly registered in terms of South African law. Its registered address is described as Estate Manager's Office, Trumpeter's Loop, The Wilds, Pretoria, Gauteng. The applicant was established to manage the affairs of The Wilds Estate, a residential security estate consisting of six residential developments within the estate and comprising hundreds of full title stands and town house complexes. The first respondent, Mr Mayandran<sup>2</sup> Gopaul Pillay, is an adult male technologist. The second respondent is Mrs Ishara Pillay. The first and second respondents are married and are registered owners of the property described in the papers as 140 Witrenoster Street, The Wilds Estate, Pretoria, hereafter referred to as the property. The third respondent took no part in the proceedings. Accordingly, I refer to the first and second respondents as the respondents. Where necessary, I specify the respondent.

## **C. Background**

4. The respondents became registered owners of the property in February 2010. Prior to building their home, they submitted building plans to the applicant for approval and paid a fee of R 2 500. The plans were approved in June 2013 by the applicant and thereafter by CoT. Construction was completed in 2015. During the course of building, according

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<sup>2</sup> The first respondent states that his first name is Mayandran and Gopaul is his middle name. Caselines 09-1.

to the respondents, the construction team comprising engineers and builders realised that some that minor structural changes and a change to the atrium were required, which formed part of the building works but were not on the original plan. Similarly, a screen wall was constructed on the side of the dwelling for energy efficiency. As a result of the changes, the respondents submitted revised plans for approval. The applicant refused to approve the plans. To date, the revised plans remain unapproved. I record that the parties refer to the approved and revised plans in different ways. The applicant refers to FA4 and FA5, respectively, when referring to the approved and revised plans while the respondents refer to Plan A and Plan B, respectively.

#### **D. Merits**

##### *Applicant's case*

5. In terms of its Memorandum of Incorporation (MOI), Rules, Regulations and Architectural Guidelines, the applicant says its members are required to submit building plans for consideration and approval prior to building in the Wilds. The applicant adds that any member of the public wanting to erect a structure is obliged to obtain written approval in terms of the BSA. Thus, the respondents' plans set out in Plan FA4 (Plan A), were approved on 28 June 2013. The same plans were approved by the third respondent, the CoT. According to the applicant, in the course of building, the respondents deviated from the approved plans. In this regard, the respondents erected a screen wall<sup>3</sup> and an enclosed pergola which encroached upon the 5 m street building line.

6. Building on its case of the respondents' contravention of its architectural guidelines and the law, the applicant highlighted, *inter alia*, the following:

- (i) The pergola encroaches upon the 5 m street boundary line.

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<sup>3</sup> The present application is not concerned with the screen wall.

- (ii) In terms of section 4 (1) of the BSA, the respondents required the third respondent's prior approval before deviating from the from the approved building plans. They did not do so. Accordingly, the deviation constitutes an offence in terms of the BSA.
- (iii) In the result, the pergola accordingly constitutes an unlawful structure and the applicant is entitled to a demolition order, to the extent that the pergola encroaches the 5 m street boundary line.
- (iv) The demolition order sought is limited to the extent of the encroachment on the 5 m street boundary line.
- (v) The third respondent failed to fulfil its statutory and constitutional obligations in that it had neither caused a contravention notice to be served on the respondents nor did it prosecute them.

7. After canvassing the requirements of a mandamus, the applicant concluded that it had met the requirements. The applicant submits that it has demonstrated a clear right. It also says it has demonstrated the irreparable harm that its members stand to suffer in the event the demolition order is not granted. Finally, the applicant says that, in line with its MOI, the dispute was referred to an expert who made a final and binding decision. However, the respondents failed to take steps to remedy the contravention of the applicant's architectural guidelines. The applicant concludes that it is left with no alternative remedy but to approach the court for relief sought against all three respondents.

*The respondent's case*

8. The respondents say that the pergola was built in accordance with building plans. They placed before the court an opinion provided by an expert, an architect, who said that in his opinion, the footprint of the pergola in the approved and revised plans is exactly the same. However, Plan B contains minor changes unrelated to the pergola. The minor changes comprise changes to the internal structure, changes to the shape of the supporting columns and to the atrium roof structure. To promote energy efficiency, the changes also include the screen walls. The first respondent adds that he personally visited the CoT to submit the revised plans. He was advised that the only outstanding requirement was the applicant's approval. Underscoring the prejudice they have had to endure as a result of the applicant's refusal to approve the revised plans, the respondents state that the CoT charges rates as though the property is a vacant stand. Such rates are much higher than the rates charged on a built stand. As I pointed out earlier, the respondents raise the defences of waiver and *res judicata*, and they ask that the applicant's case be dismissed owing to the applicant's changing its case in its replying affidavit.

#### **E. Issues**

9. The issues identified by the applicant for determination are:

(vi) whether the expert decision, read with clause 31<sup>4</sup> of the applicant's Memorandum of Incorporation (MOI) is final and binding; alternatively, whether the construction of the pergola encroaching upon the 5 m boundary line amounts to a deviation from the approved building plans;

(vii) whether the deviation contravened the applicant's architectural guidelines and or the SBA and consequently renders the pergola an unlawful structure;

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<sup>4</sup> The exact clause is 31.9 on page 06-90 and it reads: The expert's decision shall be final and binding on all the parties to the dispute and shall be carried into effect and may be made an order of any competent court at the instance of any of the parties at his cost.

- (viii) whether the applicant has made a proper case in terms of a clear right to ask for the demolition order; and
- (ix) whether the applicant is entitled to the relief sought, including punitive costs.

10. The respondents identify the issues to be determined as:

- (x) whether the case made out by the applicant in the founding affidavit changed when considering the case made in the replying affidavit; allied to this issue is whether it is permissible for the applicant to belatedly make a case in its replying affidavit;
- (xi) whether the pergola was built in accordance with the approved plan, or whether it was unlawfully erected;
- (xii) if found to have been erected in accordance with the initially approved building plan, whether the applicant has waived its rights to claim the relief premised on an unlawfully erected structure;
- (xiii) whether the relief sought will provide clarity and finality;
- (xiv) whether the applicant's reliance on the final and binding nature of the expert's decision is being selective;
- (xv) whether the relief sought by the applicant in prayer 3 is competent.

11. It is plain that the fundamental question has to do with whether the pergola, as it stands, was erected unlawfully in deviation from the approved building plans. There is, however, a point *in limine* taken by the respondents on whether the applicant's case underwent some form of metamorphosis in its replying affidavit. In the event it is found the applicant's case changed in its replying affidavit then the question arises whether the applicant is permitted to do so. I start with the point *in limine*.

***(i) Whether the applicant has made a new case in its replying affidavit and whether it is permissible to do so.***

12. A cursory examination of the applicant's affidavit, including the issues it has identified for determination, demonstrates that the erection of the pergola which encroaches the 5 m street building line and the erection of the screen walls constitute the deviation from the approved plans. This application however, is concerned only with the encroachment of the pergola on the 5 m street building line and whether that encroachment constitutes a deviation from the approved building plans. In paragraph 3 of the founding affidavit the applicant avers:

'The purpose of the application is to obtain a demolition order against the respondents to demolish that portion of the pergola (*Porte Cochere*) that was unlawfully erected by the ..., in the absence of approved plans, to the extent that same encroaches upon the 5 m boundary building line.'

13. Upon being confronted with direct statements in the respondents' answering affidavit that the pergola was constructed in line with the approved Plan FA4, the applicant replied:

'3.13.1 It is blatantly obvious from the approved building plans FA4 that if the structure had been erected in accordance therewith, same would have encroached upon the building line restriction.

3.13.2 Such open plan pergola was allowed by the applicant and the municipality on the premise that such structure was an open structure and not closed by a solid roof slab.

3.13.3 ...The respondents misled the applicant and the municipality in submitting plans with an open pergola.'

14. I have already mentioned and the applicant has not disputed the respondents' version that according to the CoT, the only issue outstanding is the applicant's approval. The applicant's reference to the CoT having been misled by the respondents' conduct is unsustainable, especially given that the CoT had, as far back as 2016, issued a



temporary occupation certificate. Coming back to the issue at hand, when one breaks down the applicant's reply to its simple components, it is plain that:

(xvi) The applicant approved the building plans with the pergola clearly encroaching upon the 5 m building line.

(xvii) On the premise that the pergola was an open structure and not closed by a solid roof slab.

(xviii) The respondents misled the applicant and the CoT.

15. In response to the applicant's about turn, the respondents say that the following material facts cannot be found in the founding affidavit: (i) that the building plans approved by the applicant and the municipality allowed for encroachment on the 5 m building line; and (ii) that the real dispute centred on the question whether the pergola was open or closed. The respondents add that there is a significant difference between the case made in the founding affidavit and the new case that emerges from the applicant's replying affidavit. I agree. One may add that nowhere does the applicant make a case of misrepresentation in its founding affidavit.

16. It is trite that an applicant must make its case in the founding and not belatedly in its reply or heads of argument. This principle is elegantly articulated by the Constitutional Court in *South African Transport and Allied Workers Union and Another v Garvas and Others*, where the court said:

'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet. Moreover, past decisions of this Court have adopted this approach and in terms of the doctrine of judicial precedent we are bound to follow them unless we say they are clearly wrong. Judicial precedent serves the object of legal certainty. Following previous decisions constitutes not only compliance with the doctrine

of judicial precedent but also accords with the principles of judicial discipline and accountability.<sup>5</sup>

[See also *My Vote Counts NPC v Speaker of the National Assembly and Others*, [2015] ZACC 31, paragraph 177]

17. The case the respondents were invited to meet pertained to deviating from approved building plans by erecting a pergola that encroaches upon the 5 m street building line. That deviation, it was said, violated the applicant's architectural guidelines and the SBA. As a result the pergola was unlawfully erected. The case in the replying affidavit, however, says the applicant and the CoT had approved the plans, with the pergola clearly encroaching on the 5 m street boundary line. The approval, however, was granted on the premise that the pergola was an open structure and not one with a concrete slab. It is now common cause that the encroachment was based on the approved plans. I accordingly conclude that the respondents have successfully refuted the case they were called to answer. The corollary is that the applicant has failed to prove that the pergola was unlawfully erected because of its encroachment on the 5 m building line. The Constitutional Court in *South African Transport and Allied Workers Union*, states that an applicant may not make a new case in the replying affidavit<sup>6</sup>. On this basis alone, the applicant's case falls to be dismissed.

18. For the sake of completion, I now deal with the question whether the pergola is an open or closed structure, the respondents made submissions that the pergola is, in fact, an open structure. They provided an affidavit by an expert, Mr Machiel Adreas van der Merwe, an architect of 34 years' experience and member of the Committee of the Pretoria Institute of Architects (PIA). Apart from his several professional qualifications in

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<sup>5</sup> (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012), paragraph 114.

<sup>6</sup> *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* (171/06) [2007] ZASCA 153; [2007] SCA 153 (RSA); 2008 (2) SA 184 (SCA) (28 November 2007), paragraph 43.

architecture and law, van der Merwe's experience includes attending quarterly Task Team meetings between the PIA and members of the Building Office of the CoT to address problems regarding the approval of site development plans and building plans. He also inspects building sites, advises clients on building design and structure for new construction projects and alterations. In addition, he scrutinises building plans. Van der Merwe refers to FA4 in his affidavit and quotes the following<sup>7</sup>:

'Roof of porch described as 25 m screed to fall on concrete slab, acc to engineer waterproofing acc to specialist.'

19. Van der Merwe confirms that *'the pergola roof and position of columns as depicted on the revised Plan B contains no deviation from the pergola as depicted on the approved [plan]'*. He adds that the footprint and position of the pergola on both plans are identical and that the minor change is in the shape of the supporting columns. Finally, he opines that the pergola, based on its features, meets the definition of open porch. In response to van der Merwe's opinion, the applicant, whose deponent professes no expertise in architecture, engineering or in the building field, states: *'The respondents are attempting to convince the court that on the originally approved plan in 2013 a solid roof structure was depicted. This is demonstrably untrue and blatantly obvious if the court simply compares the roof of the pergola as depicted in FA4 to the roof in FA5.'*

20. This brings me an observation I have made in the course of working through the applicant's version. The plans provided by the applicant were simply placed before the court with the deponent making occasional references to FA4. At no stage did the applicant present expert evidence on the conclusions it seeks to draw based on the plan and the expert's observations. As is apparent from the statement in previous paragraph,

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<sup>7</sup> Caselines 09-47.

the court, according to the applicant, is expected trawl through the two plans and conduct a forensic investigation of the two documents in order to decide whether the pergola is or is not an enclosed structure. The court must launch itself into the position of an expert and navigate its way through technical concepts and drawings. Apart from the statement in paragraph 19, the applicant does not in any way attack the evidence provided by van der Merwe.

21. The applicant was aware from more than six months ago of the expert opinion secured by the respondents. Instead of providing evidence of an expert to the contrary, it chose to rely on the say so of its deponent whom, as I have already said, professes no expertise in engineering, architecture or building. It now resorts to inviting the court to provide form an opinion. Judicial time is public resource which is constantly under enormous strain. It is not the function of a court to trawl through technical drawings in annexures and form opinions. I accept Van der Merwe's opinion as logical and properly grounded on established facts. The applicant's unsupported assertion that the pergola is a closed structure is accordingly rejected.

22. A further point I had meant to record has to do with the gaps in the evidence provided by the applicant. Whether the applicant did this deliberately is not clear. Two examples will suffice. While the applicant contends the respondents failed to carry out remedial action, following the expert's decision, it left it to the court to determine what exactly the expert recommended that the respondents failed to do, preferring to attach the decision as an annexure. Similarly, in presenting its case for deviation from the approved plans, the applicant made reference to annexure FA4, being a copy of the approved plan with a hand written alteration in red ink. It took the respondents' evidence and the provision of the correct version of FA4, which depicted the full stretch of the

pergola and its encroachment on the 5 m building line. Only then did it become clear that the full stretch of the pergola was altered in the applicant's copy. After that revelation, the applicant explained its alteration of the plan and the reason it had cut the pergola. As a consequence of the applicant's conduct, it was accused of deception by the respondents. Nowhere is the alteration properly explained in the founding affidavit. On the whole, these shortcomings suggest that the effort put behind this application was insufficient and that perhaps, it was not properly conceived.

**(ii) Whether the relief sought against the third respondent is competent**

23. In paragraph 3.4 of the founding affidavit, the applicant, setting out the purpose of the application, states:

“Lastly, the application is aimed at directing the municipality to commence with law enforcement proceedings against the respondents in terms of the BSA and take the necessary action in terms of Section 21 of the BSA against the respondents in order to ultimately procure a demolition of the offending portion of the pergola unlawfully erected on the subject property.’

24. I have already found that the pergola was constructed on the basis of approved plans by both the applicant and the third respondent. There can thus be no basis for the order sought against the third respondent. There is, however, something I consider necessary to address, and that is the applicant's reliance on the cases of *Lester v Ndlambe Municipality and Another* (514/12) [2013] ZASCA 95; [2014] 1 All SA 402 (SCA); 2015 (6) SA 283 (SCA) (22 August 2013); and *BSB International Link CC v Readam South Africa (Pty) Ltd and Another* 2016 (4) SA 83 SCA. The applicant also relies on *Wierda Properties (Pty) Ltd v Sizwe Ntsaluba* 2018 (3) SA 95 SCA. However, it failed to state what aspect of *Wierda Properties* lends support to the relief it seeks before this court. I could not identify anything in *Wierda Properties* that may possibly lend support to the particular circumstances of its case.

25. *Lester* affirms that the remedy available in Section 21 is a public law remedy available to the Local Authority or the Minister. The question before the court in *Lester* was whether or not a court has a discretion to order a demolition order upon a finding of unlawfulness, which was not in dispute in *Lester*. This is what the court said:

'[20]...Both *Ndlambe* and *Haslam* (in particular) adopted the stance in the court below and again before us that a court has no discretion in the circumstances and must order demolition under s 21 once illegality is established. *Lester's* counsel valiantly sought to persuade us that such a discretion is to be found in the section itself and if not, that the neighbour law principles should be 'imported' into the section. [22] It is plain that *Ndlambe* approached the court below for a public law remedy, namely a s 21 demolition....[23] Section 21 authorises a magistrate, on the application of a local authority or the Minister, to order demolition of a building erected without any approval under the Act. This is undoubtedly a public law remedy....[26] ...The power to approach a court for a demolition order in s 21 is unquestionably a public power bestowed upon local authorities.'

In *BSB International Link CC v Readam South Africa (Pty) Ltd*, the court remarked:

'This reliance on *Lester* was misplaced. In *Lester*, the building in respect of which the high court had issued a demolition order had been constructed without any approved building plans. The demolition order was sought by the Municipality in terms of s 21 of the Building Standards Act, which empowers a magistrate, on application by a local authority or the Minister, to authorise such local authority or Minister to demolish a building, if the magistrate is satisfied that its construction does not comply with the provisions of that Act. In any event, *Lester* must now be read in the light of the subsequent judgment of this court in *BSB International (Pty) Ltd v Readam South Africa (Pty) Ltd*.<sup>8</sup>

26. It is plain from the dicta I have extracted in paragraph 25 that the applicant simply lost sight of the jurisdictional facts set out in *Lester* as affirmed in BSB. Firstly, there has to be a finding of unlawfulness which is demonstrably absent from the undisputed facts of the case. Until the 2013 approval by the CoT has been set aside by a competent

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8 (279/2015) [2016] ZASCA 58 (13 April 2016), paragraph 18.

court, it remains valid<sup>9</sup>. Secondly, the public power afforded in Section 21 can only be exercised by a local authority or the Minister. The applicant cannot circumvent those requirements by simply applying for an order based on alleged compliance with the requirements of a mandamus. I need not go any further; *Lester* is of no use to the applicant. *BSB* confirms the same conclusions. I add that even if there had been a finding of unlawfulness, according to *BSB*, the court retains a discretion in circumstances such as the present. The argument made by the applicant that the court has no discretion is incorrect.

***(iii) The order lacks clarity and finality***

27. The respondents submit that based on the later formulation of the case in the replying affidavit, it appears that the encroachment upon the 5 m building line is no longer the issue but the solid roof is. Putting aside for a moment my finding that the pergola is an open structure, the relief sought would in any event suffer from lack of clarity and finality and would not end the dispute between the parties. One need answer the following to appreciate the lack of clarity: (i) Is it only the solid roof part that extends beyond the 5 m building line that would be liable for removal or the entire pergola, as long as it has a solid roof? (ii) In the event that one concentrates on the part that encroaches the 5 m building line, may the columns and other the holding structures of the roof remain beyond the 5 m building line, as long as the solid roof is removed? In that case, how will the demolition of the pergola cure the alleged unlawfulness given that there will still be encroachment of the elements that were supporting the roof. The applicant does not say anywhere that it will approve the building plans immediately upon removal of the alleged offending parts of the pergola; besides, the screen walls which are also alleged to be the foundation of the unlawfulness will remain.

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<sup>9</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333.

28. The final issue to be considered in relation to the order sought by the applicant concerns the structural integrity of the remainder of the pergola. According to the respondents, as far back as 2016, the applicant was provided with a report from Square Root Consulting Engineers (Square Root). The content of the report is not in dispute. In the report, Square Root makes plain that the structural design of the pergola was based on the approved plans. More relevant to the issue at hand, Square Root confirmed that the trimming back of the slab would cause structural instability due to the fact that the slab is a one way spanning slab, and the majority of the weight is carried by the two side up-stand beams. Against this input from the engineers, the applicant says in its heads of argument:

'It is important to point out that the respondents concede that the pergola was only erected as a feature and [it serves] no structural purpose in respect of the respondents' dwelling.'

29. The applicant's submissions are startling given that, since 2016, the applicant did not trouble itself to find expert an expert opinion to contradict Square Root's assertions. The deponent on his own is not qualified to make the remarks set out in paragraph 28. Not only does the applicant fall short in disputing the expert input of Square Root, in pursuing its case for a partial demolition order, nowhere does it disclose to the court that it was informed as far back as 2016 that trimming back the pergola would bring about structural instability. It does not end there. Against the input that trimming back will cause structural instability, the applicant went further and stated that in the event, the whole structure would have to be demolished, a proposition that fails to take into account the constitutional proportionality of the remedy. In *Serengeti Rise Industries (Pty) Ltd & another v Aboobaker NO & others* (845/2015) [2017] ZASCA 79 (2 June 2017), the court refusing a demolition order after setting out various reasons said:



[13] Secondly, the order lacks certainty and clarity. On a plain reading of the order only the portion of the building that 'exceeds GR1 zoning' will have to be demolished. There is no description of that portion. This is not surprising, as no evidence, expert or otherwise, was led in the high court in this regard. There was also no evidence on whether the structural integrity of the building could survive the execution of the partial demolition order. In the end the demolition order lacked clarity and certainty. It would appear that the only way it could be executed would be the demolition of the entire building. And, the court below did not give any consideration to the constitutional proportionality of that remedy.'

30. The final point to make is that the principle of *stare decisis* or judicial precedent says that I am bound by the dicta set out in *Serengenti*. Thus, even where unlawfulness had been established, and assuming that the applicant had successfully reviewed the CoT's approval of the plan, I would still be compelled to consider the constitutional proportionality of the remedy sought by the applicant. I may add that the respondents responded to the applicant's statement and averred:

'The whole pergola will have to be demolished, which in turn will cause further structural damage to the main dwelling. The potential adverse financial implications for the respondents will be enormous.'

31. I find that the order sought by the applicant suffers from lack of clarity and finality. This is yet another basis for refusing the order.

#### **(iv) Waiver**

32. Now that the applicant has conceded that it had approved the building plans with the pergola encroaching the 5 m street building line as it is, the respondents state that the applicant had waived any right to rely on transgression of its architectural guidelines.

The requirements to establish waiver are set out in *Road Accident Fund v Mothupi*:

'The test to determine intention to waive has been said to be objective...That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations; secondly, that mental reservations, not communicated, are of no legal consequence... The

knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver...'<sup>10</sup>

33. Applying the principles to the present case: there is no dispute that the applicant approved the plans with the pergola encroaching the 5 m building lines. There can be no question whether the applicant knew of its rights then. Most importantly, the alleged premise on which the plans were approved, which amount to nothing more than mental reservations not communicated to the respondents, according to *Mothupi*, are of no legal consequence. I agree with the respondents that the applicant waived its rights. The applicant cannot be heard complaining of transgressions and alleged unlawfulness after approving the plans.

**(v) Res judicata**

34. Although the applicant raised as its first issue whether the finding made by the expert was final and binding, it immediately answered this question by confirming that the order is indeed final. It however, explained its pursuit of this case against the respondents by stating that the respondents failed to attend to remedial action<sup>11</sup>. What that remedial action is, is not explained anywhere in the applicant's affidavit. What is plain from the applicant's version is that the dispute has long been determined by an expert, which makes the matter *res judicata*. For all the reasons set out in this judgement, the applicant's motion falls to be dismissed.

**F. Order**

35. The application is dismissed with costs.

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<sup>10</sup> (518/98) [2000] ZASCA 27; 2000 (4) SA 38 (SCA); [2000] 3 All SA 181 (A) (29 May 2000), paragraph 16.

<sup>11</sup> Caselines para 000-6 paragraph 3.21.

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**NN BAM**

**JUDGE OF THE HIGH COURT,**

**PRETORIA**

**APPEARANCES:**

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