

SOUTH AFRICA / JUDGMENT

Dihlabeng Local Municipality v Khumalo and Another (2706/2024) [2024] ZAFSHC 398 (19 December 2024) [2024] ZAFSHC 398

COURT

Free State High Court, Bloemfontein

BEFORE

Hefer AJ

CASE / FILE NUMBER

2706/2024

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
FREE STATE DIVISION,
BLOEMFONTEIN
Reportable Yes/No
Case No: 2706/2024
In

the matter between:

DIHLABENG
LOCAL MUNICIPALITY
Applicant
And
ELIAS
KHUMALO
First
Respondent
ALL
UNLAWFUL OCCUPIERS OF AND/OR PERSONS
OCCUPYING
PORTION 0 OF ERF 383, BAKENPARK,
EXTENSION
3, BETHLEHEM, FREE STATE PROVINCE
Second
Respondent

CORAM:

Hefer AJ

Heard:

31 October 2024

Delivered:

19 December 2024

ORDER

1.

The respondents are declared to be in unlawful occupation of Portion 0 of Erf 383, Bakenpark, Extension 3, Bethlehem.

2.

The respondents are ordered to vacate Portion 0 of Erf 383, Bakenpark, Extension 3, Bethlehem.

3.

The order in terms of paragraph 2 above is suspended pending the approval of building plans by the applicant in respect of the brick structure on the property erected by first respondent, within 120 days

of this order failing which:

(i)

the respondents are to vacate the portion of Erf 383, Bakenpark, Extension 3, Bethlehem within 21 days after the expiry of the 120 day-period;

(ii)

first respondent is ordered to demolish and remove all structures improvements and/or infrastructure erected on Portion 0 of Erf 383, Bakenpark, Extension 3, Bethlehem within 60 days from date of the 120-day period;

(iii)

the respondents are interdicted from moving onto or from using or occupying in any manner Portion 0 of Erf 383, Bakenpark, Extension 3, Bethlehem;

(iv)

the Sheriff of Court, duly assisted by the South African Police Services and/or any contractor which the Sheriff may employ at any time is authorised and directed to remove the respondents from Portion 0 of Erf 383, Bakenpark, Extension 3, Bethlehem in the event of the respondents failing to vacate the property in terms of this order;

(v)

the applicant is authorised to demolish all structures and/or improvements and infrastructures erected by the respondents on Portion 0 of Erf 383, Bakenpark, Extension 3, Bethlehem in the event of the respondents failing to comply with this order.

4.

No order as to costs.

JUDGMENT

Hefer AJ

[1] In *PE Municipality v Peoples Dialogue on Land & Shelter*[1], Horn AJ said as follows:

‘One is dealing here with two diametrically opposed fundamental interests. On the one hand there is a traditional real right inherent in ownership reserving the exclusive use and protection of his property to the landowner. On the other hand there is a genuine despair of people in dire need of adequate accommodation. It is with regard to these two opposing interests that the Legislature had, by virtue of the provisions of the Act, set out implementing a procedure which envisages the orderly and controlled removal of informal settlements. It is the duty of the Court when applying the requirements of the Act to, with the wisdom of Solomon, balance these opposing interests and bring out a decision which is just and equitable.’[2]

[2] The eviction of unlawful occupiers of land has subsequently been the subject matter of many cases which now forms part of the jurisprudence. In many of them the relevant local authority had been the applicant for the eviction of such occupiers.

[3] It is common cause that the first respondent, Mr Khumalo, as well as a number of other people, are currently occupying the property situated at Erf 383, Bakenpark, Extension 3, Bethlehem, Free State Province (“the property”).

[4] The property is registered in the name of the applicant.

[5] It is common cause that:

- (i) the property had been fenced off (apparently by the first respondent); and
- (ii) there is currently one large corrugated iron shack, consisting of three rooms as well as a completed brick house on the property; and
- (iii) that such structures have been erected and built respectively by the persons currently occupying such property.

[6] The applicant, the local authority in whose area the property concerned is situated, seeks an order inter alia in terms whereof:

- (i) the respondent is to be declared in unlawful occupation of Erf 383, Bakenpark, Extension 3, Bethlehem (“the property”);
- (ii) the respondents be ordered to vacate the said property; and
- (iii) demolish and remove all structures, improvements and infrastructure erected on, brought onto or installed on the said property.

- [7] It is applicant's case that the respondents had been in occupation of the property since the beginning of 2023. It was during that period that the applicant has ascertained that a portion of the land on Extension 383, Bakenpark had been fenced off and that respondents had commenced with clearing of that portion.
- [8] It was subsequently established that the fencing off and clearing of the portion of land was the doing of the first respondent, Mr Khumalo.
- [9] On 6 September 2023, the applicant's housing manager, Mr Nhlapo hand delivered a letter, prepared by the attorney acting on instructions of the applicant, Mr Du Plooy. In this letter, first respondent was informed to vacate the property and remove all unlawful structures from the property on or before 14 September 2023.
- [10] Over the next eight weeks, municipal officials then attended to weekly inspections of the land and established that Mr Khumalo had indeed vacated the premises.
- [11] However, according to the applicant, much to its surprise, it was established on or about 23 December 2023 that first respondent had proceeded with '... unlawful construction and occupation of the said property'.
- [12] During a site visit to the property on 19 January 2024, it was established that Mr Khumalo had erected three informal structures on the property and was in the process of constructing one permanent brick structure.
- [13] During this visit, Mr Khumalo informed Mr Nhlapo and Mr Du Plooy that he is occupying the property together with his wife and three minor children and that they had been using the property for residential purposes since the beginning of December 2023.
- [14] Mr Khumalo was again informed that the occupation of the property is unlawful and that he does not have permission to use the property.
- [15] From photographs taken on 19 January 2024, appended to the founding affidavit before Court, it appears that at that stage there was a fully completed corrugated 'informal structure' as well as a brick structure which was in the initial phases of being constructed. These structures are fenced off by devils' fork fencing.
- [16] It is applicant's case that the respondents constructed and is still busy with completion of the permanent structure on the property without any authority and also without any approved building plans.
- [17] Photographs depicting the structures on the property allegedly taken during the time when the founding affidavit had been deposed to, being April 2024, show that the outer walls of the permanent brick structure had been completed.
- [18] It is further the applicant's contention that the buildings constructed on the property, more in particular the permanent brick structure, are unlawful and illegal whereas:

- (i) no approval had been granted by the applicant for such building activities;
- (ii) no occupation certificate had been requested or issued in accordance with the applicable legislation; and
- (iii) the council of the applicant has never resolved to allow the respondents to acquire any right of possession or use of the land.

- [19] The applicant further contends that the applicant is entitled to a demolition order in terms of s 21 of the National Building Regulations and Building Standards Act 103 of 1977 (“the Building Act”).
- [20] According to the respondents, in opposition to the application for eviction in terms of the PIE Act together with ancillary relief, it is being denied that they are in unlawful occupation of the property.
- [21] The only version of the respondents before Court is that of Mr Khumalo. According to his version he approached a councillor of the applicant, one Desmond Michaels, during 2017 regarding a plot of land where he could erect a house for him and his family.
- [22] Mr Michaels then indicated that the cost for such an erf / plot of land for occupation amounted to R15,000.00 which he then paid to the said Mr Michaels. As proof of this purported transaction, Mr Khumalo then placed a document before Court titled ‘Verification Report’. The contents of this document will be dealt with herein later.
- [23] Apparently, on the version of Mr Khumalo, he paid the amount before the particular site (the property) had been shown to him.
- [24] After the particular portion of land, which was allegedly marked with boundary pecks, had been shown to him by Mr Michaels, Mr Khumalo then took pieces of devils’ fork and drove same into the ground next to the marker pecks ‘... to completely define the property’.
- [25] According to Mr Khumalo, during 2020, he levelled and cleaned the property and erected the first corrugated iron shack on the property.
- [26] When it came to the knowledge of Mr Khumalo that Mr Michaels had passed away, on his version, he met up with Mr Tshepo Mahlakwane who was the legal manager of the applicant at the time during 2021.
- [27] After viewing the property himself, Mr Mahlakwane then allegedly, authorised Mr Khumalo to build a permanent building structure on the property.
- [28] Mr Khumalo then instructed a certain Mr Mlangeni to draft the relevant building plans. Such building plans were also placed before Court, the contents of which will be dealt with herein later as well.
- [29] Mr Khumalo then commenced building on the property during early 2020 and fenced off the property with the devils’ fork fencing.

- [30] According to Mr Khumalo he spent R400,000.00 on erecting the brick dwelling on the property. The value of the property is currently R450,000.00, according to a valuation by Aida Estate Agency, also placed before Court.
- [31] The first respondent further alleges that he attempted to have the building plans registered, but due to the failure of the officials of the respondent to inspect the site, this was not done.
- [32] It appears that Mr Mahlakwane was assassinated during June 2023.
- [33] According to Mr Khumalo, while he was erecting the roof onto the brick structure, he was approached by representatives of the applicant who confronted him regarding his authority to build on the property. He however completed building the house during December 2023, according to the first respondent.
- [34] Mr Khumalo further states that when the late Mr Michaels had shown him the property for the first time, Mr Khumalo was shown where a waterpipe runs which he could connect to supply water to the dwelling on the property, which he has done.
- [35] The property is occupied, according to the first respondent, by himself, his wife, his major daughter, his son, his wife and their two year old child.
- [36] According to the first respondent, his occupation and building on the property was approved by representatives of the applicant during all times and in all reasonable respects.
- [37] Mr Khumalo admits that Mr Nhlapo did hand him the letter written on behalf of the applicant by Mr Du Plooy during September 2023. However, according to Mr Khumalo, at that stage he had almost completed erecting the brick structure on the property.
- [38] In reply, the applicant contends that the version set forth by the first respondent is unlikely and untenable and is made purely with the purpose of creating a factual dispute of fact so that the Court would delay the finalisation of this matter or even refuse the application.
- [39] According to the first respondent, he is employed as a labourer and receives a salary of R8000.00 per month.
- [40] According to the applicant in reply, the applicant points out that one of the forms which is part of one of the documents relied upon by the first respondent, is termed 'Dihlabeng Local Municipality – Application for Household Indigent Support' which is used by the applicant to register a qualifying person as an indigent person to receive basic work and electricity supply free of charge.
- [41] According to the applicant, if it was the intention to register the first respondent as an indigent person, Mr Khumalo would not have qualified since he indicated in his opposing affidavit that he earns R8000.00 per month while an indigent person must earn less than R5000.00 per month.

[42] The applicant then further in reply states that as far as the purported building plans relied upon by the first respondent is concerned, it is evident that he had indicated the stand as being '83/2' but no such erf, according to the applicant exists in the deeds office or in the applicant's land use scheme.

[43] The applicant then further refers to the provisions of s 14(2) of the Local Government: Municipal Finance Management Act which section provides that the municipal council may sell municipal land at a price to be determined and approved by the municipal council as being market related or have some economic or community value. It is thus, according to the applicant, clear that on the first respondent's version, the late councillor Michaels nor the late Mr Mohlakwane were authorised nor mandated to delegate to sell property on behalf of the municipality, which is a function reserved for municipal council and in any event and which could not have been delegated.

Applicable PIE authorities:

[44] In *Port Elizabeth Municipality v Various Occupiers*[3] Sachs J stated as follows:

'Simply put, the ordinary prerequisites for the municipality to be in a position to apply for an eviction order at that the occupation is unlawful and the structures are either unauthorised, or unhealthy or unsafe. Contrary to the pre-constitutional position, however, the mere establishment of these facts does not require the court to make an eviction order. In terms of s 6, they merely trigger the court's discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In making its decision it must take into account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land.'

'Different considerations could arise depending on whether the land occupied is public or privately owned. In the case of public land, the State generally has further land to meet its obligations in terms of s 26 of the Constitution ...'

'The municipality launched motion proceedings to seek the eviction of the occupiers. Many of the facts it alleged in its founding affidavit were disputed by the occupiers in response. Accordingly, we must accept those facts asserted by the applicant that remain undenied by the respondent, together with the facts as alleged by the respondents.'

'Furthermore, persons occupying land with at least a plausible belief that they have permission to be there can be looked at with far greater sympathy than those who deliberately invade land with the view to disrupting the organised housing program and placing themselves at the front of the queue.'

'The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully appraised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights

under law land; the existence of unlawfulness is the foundation for the enquiry, not its subject matter. What the court is called upon to do is to decide whether,

bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their home.

The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.’[8]

‘It is clear from what has been said above that the occupiers moved into the land with what they considered to be the permission of the owner and that they have been there for a long period of time.’[9]

From the papers, it appears that the municipality in this matter took no action against occupiers for years and then acted precipitately to secure an eviction.’[10]

[45] In *Occupiers of Erven 87 & 88 Berea v Christian Frederick de Wet NO*[11] the Constitutional Court in a unanimous judgment held inter alia that:

‘It deserves to be emphasized that the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required

and expected to take an active role.’[12]

‘The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.’[13]

In *Port Elizabeth Municipality v Various Occupiers supra*, Sachs J stated:

‘The Court is not resolving a civil dispute as to who has rights under land law. The existence of unlawfulness is the foundation for the enquiry, not its subject matter.’[14]

Authorities relating to National Building Regulations and Building Standards Act 103 of 1977

[46] In *Lester v Ndlabe Municipality*[15] Majiedt JA (as he then was) with reference to s 21 read with s 4(1) and 4(4) of the Buildings Act, said as follows:

‘The conclusion that a statutory provision itself does not lend itself to such a discretion is unassailable. The language of the provision gives a magistrate no latitude not to order the demolition once the jurisdiction or fact, namely that the building was erected contrary to the act, is established. During argument Lester’s counsel contended that the provision must at minimum be read to give a residual discretion to the magistrate. But he was unable to advance authority for this proposition and it too is devoid of merit.’[16]

[47] In *Aboobaker NO v Serengeti Rise*[17] it was held that there is an obligation on a court to uphold the law; by the operation of the legality doctrine a court is dutybound to order that the part of the structure which was illegal be demolished.

Discussion:

[48] The required notice in terms of s 4(2) of the PIE Act was approved by Court and duly served on both respondents.

Unlawful occupation:

[49] The first question which needs to be considered is whether the respondents are unlawful occupiers as defined in the PIE Act.

[50] ‘Unlawful occupier’ is defined as a person who occupies land without the express or tacit consent of the owner or person in charge or without any right in law to occupy such land.

[51] ‘Owner’ in the PIE Act is defined as the registered owner of land including an organ of State.

[52] From a Windeed search document put before Court by the applicant, dated 19 February 2024, it is evident that Erf 2383, Bakenpark Extension 3, is indeed registered in the name of the Dihlabeng Local Municipality. Respondent admits that the property is currently registered in the name of the applicant but alleges that he is awaiting the applicant to attend to the necessary paperwork to have the erf registered in his name.

[53] The facts relied upon by the first respondent in support of his contention that the respondents are not in unlawful occupation of the property have already been dealt with above.

[54] Mr Janse van Rensburg, appearing on behalf of the respondents, correctly so, argued that the now trite Plascon-Evans principles[18] should be applied in consideration of the application before Court as a whole. This is in accordance with the remarks made by Sachs J in the matter of *Port Elizabeth Municipality v Various Occupiers* (supra).

[55] According to the first respondent, he together with the second respondent, came into occupation of the land through a councillor of the applicant.

[56] At this point it needs to be mentioned that most of the documentation relied upon by the respondents, do not support the version of the respondents in a satisfactory manner.

- [57] In the first instance, the applicant contests the authenticity of the 'Verification Report' and suggests that such document had been forged. I am not in a position to opine on the authenticity of such document. However plainly, considering the document on the face thereof, it does not contain the correct corresponding property description. Such documents cannot be accepted to show that the respondents have the right to occupy such property.
- [58] Furthermore, the building plans also relied upon by the respondents which were purportedly compiled for the first respondent in regards to the property concerned, contains a property description namely '83/2, Bakenpark'. According to the applicant, there is no subdivision 2 to Erf 383, Bakenpark.
- [59] Applying the Plascon-Evans principles, it however must be accepted that the respondents had obtained the de facto occupation of the property through the actions of the late councillor Michaels sometime during 2017.
- [60] However, as correctly pointed out by the applicant and also by Mr Rautenbach appearing on behalf of the applicant during argument, neither the late councillor Michaels nor the late Mr Mohlakoana were authorised nor mandated / delegated to sell property on behalf of the municipality which is a function reserved for municipal councils which can in any event not be delegated. In summary therefore, it cannot be held that the respondents are occupying the property with the express nor the tacit authority of the applicant. For that reason, the respondents are to be declared unlawful occupiers for purposes of the PIE Act.

Just and equitable:

- [61] That brings me to the second leg of the enquiry, namely whether, it be just and equitable to have the respondents evicted from the property.
- [62] As stated by Sachs J, the mere establishment of the facts showing occupation to be unlawful and the structures raised / built on the relevant portion of land are '... either unauthorised or unhealthy or unsafe', does not require the Court to make an eviction order. They 'merely trigger the Court's discretion'. 'If they are proved, the Court then may (not must) grant an eviction order if it is just and equitable to do so'. (emphasis added)
- [63] I have already indicated that the respondents' version of how they came into possession and occupation of the property must be accepted although it does not constitute any lawfulness to the occupation by the respondents.
- [64] The contentions by Mr Rautenbach, appearing on behalf of the applicant to the effect that the version as put up by the first respondent is so untenable that it stands to be rejected, is, unfortunately in today's reality of corruption of councillors and municipal officials, not so farfetched and untenable.

- [65] It do however need to be added, with emphasis, that it cannot be said or held that the relevant ward councillor or municipal official in this particular matter indeed acted in a corrupt or dishonest manner. I can go no further than to hold that the version put up by the applicant is not so untenable and false that it cannot be accepted as a whole.
- [66] As already indicated, the documents relied upon by the first respondent, do not support the version by the first respondent. That does not however result in the version of the applicant being rejected as a whole.
- [67] The latter regards are important and relevant in respect of the manner in which the respondents came into possession of the land, which is one of the factors that need to be determined in consideration of the question whether the eviction sought is just and equitable.
- [68] Of further importance is the period which the respondents have been occupying such property.
- [69] According to the applicant, the respondents had been in occupation of the land since about the beginning of September 2023. In support of this contention, the applicant alleges that during September 2023 it has been established that the portion of the land had been fenced off and cleared.
- [70] In answer to this, the respondents then responded as follows:
- ‘I have been in possession of the property since 2017 and erected my first corrugated iron shack on the property during 2020.’
- [71] Significantly so, the applicant in reply refrained from dealing with these allegations by the first respondent in totality. It must therefore be held that the first respondent had been in possession since 2017. Of further greater importance, is that the first respondent then alleges that he erected a corrugated iron structure on the property already during 2020. This means that it must have been visible to the applicant and all persons concerned that the respondents had been in occupation of the property since 2020.
- [72] According to the applicant, when the municipality’s housing manager, attended to the relevant site, he established that first respondent had fenced off a portion of the land and proceeded with clearing of the land. This was during September 2023.
- [73] The version by the respondents in this regard is however supported in a letter by the attorney acting on behalf of the applicant where the following is stated inter alia:
- ‘... hereby demand that you immediately vacate the property and remove all unlawful structures from the property ...’ (emphasis added)

- [74] If one considers the photographs put before Court, it appears that the corrugated structure on the property is of considerable size covering approximately one quarter of the property. This must have been visible to the applicant before September 2023 in all probabilities. In this regard, I do take into consideration that according to the first respondent, the first and not the entire corrugated iron structure had been erected during 2020.
- [75] According to the applicant, the first of two sets of photographs were taken by Mr Du Plooy of the applicant showing that during 2024 the corrugated iron structure had been completed entirely and that the brick structure was in the initial phases of the outer walls being built.
- [76] The respondents dispute the dates of the photographs being taken and alleges that during September 2023 the first respondent had already almost finished erecting the brick dwelling on the property.
- [77] Therefore, there exists a dispute of fact regarding the stage of completion at the time when the occupation, according to the applicant, came to the knowledge of the applicant during September 2023.
- [78] As stated, it must however be accepted that the respondents had been in possession and occupation of the property at least since 2020 when the first corrugated iron shack had been erected on the property, in other words approximately three years before the applicant approached Court for the eviction of the respondents from the property.
- [79] Another important factor which needs to be taken into consideration is the fact that on the version of the applicant, on the 19th of January 2024 it was already apparent (as since 23 December 2023) that the first respondent was in the process of constructing the permanent brick structure.
- [80] It is further common cause that the applicant only approached the Court for the first time at the end of May 2024 (therefore five months after it became clear on 23 December 2024 that the first respondent was proceeding erecting a brick structure on the property), initiating the eviction proceedings. It did not up until the hearing during May 2024, take any steps or even thereafter to prevent the first respondent from completing the brick structure by approaching Court on an urgent basis interdicting the respondents from continuing and completing the brick structure.
- [81] On the same footing, it appears from the facts relied upon by the applicant, that there is a satellite dish (which is also visible on the photographs) installed on the corrugated iron structure. The applicant then goes further and alleges ‘... the applicant is unaware of the source of electricity to the said erf and this might be from ... an illegal electrical connection which is not visible to the applicant’s electricity staff members’. This must have been known to the applicant since January 2024 or even earlier, but again the applicant has taken no steps to ascertain the true situation or prevent the respondents from using electricity illegally. The applicant waited till May 2024 for the eviction of the respondents.

- [82] The Court, as expressed by Sachs J, is called upon, bearing in mind the values of the Constitution to decide whether it is appropriate to issue an order which has the effect of depriving people of their home.
- [83] It speaks for itself that the Court has to have due regard not only to the interest of the respondents as occupiers of the property, but also the rights of the applicant as a landowner and a local government.
- [84] In this respect, I take cognisance of the fact that as argued by Mr Rautenbach, the conduct of the first respondent by taking the subject property and occupying it was prejudicial to the municipality's human settlement planning and might encourage other persons to similarly take the law into their own hands.
- [85] I have further taken into account that the area occupied by the respondents is on a public open space. I also take into account that the property is not provided with any municipal services or infrastructure. According to Mr Rautenbach however, if the property is not to be used as a public open space, it is to be allocated to persons on the municipality's housing allocation list.
- [86] It is not the applicant's case that it intends that portion of land is to be used for any other purpose, analogue to the *Port Elizabeth Municipality v Various Occupiers*-matter, where the owners of the landowners concerned, also did not assert that they intended using the land for other purposes.
- [87] Taking into account all the relevant factors and circumstances discussed under the above heading of "just and equitable" together with the fact that the first respondent has already spent R400,000.00 on the erection of the brick structure, in the exercise of my discretion, it cannot be held that it is just and equitable that the respondents be evicted from the property, subject to what is stated herein later.
- [88] It is to be accepted that the second respondent, being the present unlawful occupiers of the property and who it appears to be family members of the first respondent, have been occupying the property at all relevant times for the same reasons as well as for the same period as relied upon by the first respondent. For that reason, there is no basis to differentiate the two respondents from each other.

Demolition of the structures:

- [89] As far as the permanent brick structure is concerned, it appears that the applicant did not comply with the applicable legislative provisions.
- [90] According to the applicant, the subject property could only be improved by building works for which there exist approved building plans in accordance with the provisions of s 4 of the Building Act.

- [91] It is common cause, in the first instance that the property description on the plans which the first respondent relies upon, do not correspond with the property occupied by the respondents and upon which the first respondent erected the brick construction. In fact, according to the applicant, no such property is in existence.
- [92] It is further common cause that the building plans relied upon by the respondents has also not been approved by the applicant.
- [93] Section 4 of the Building Act provides that: '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'.
- [94] Presently, it is common cause that the first respondent's erection of the brick structure on the property, is indeed in contravention of the provisions of the Building Act.
- [95] In terms of s 21 of the Buildings Act, notwithstanding anything to the contrary, a Court may make an order prohibiting any person from commencing or proceeding with the erection of any building or authorising such local authority to demolish such building if the Court is satisfied that such erection is contrary to or does not comply with the provisions of the Act.
- [96] As already indicated, in *Lester v Ndlambe Municipality*, with reference to s 21 of the Buildings Act, according to the language of the provisions, a Court has no discretion not to order demolition once it has been established that a building was erected contrary to the Act. This is in accordance also with the operation of the legality doctrine relied upon in the *Aboobaker-matter*.
- [97] In view of the circumstances of this case, and in particular applicant's failure to timeously prevent first respondent from proceeding with the construction of the dwelling, first respondent should be granted a reasonable opportunity to try and resolve the issues pertaining to the non-compliance of the provisions of the Buildings Act. If he is not successful in such attempts, the brick structure dwelling is to be demolished.

Costs:

- [98] As far as costs are concerned, it cannot be held that the applicant had been substantially successful in its application before Court. On the other hand, the first respondent, through his actions is effectively responsible for the predicament which respondents find themselves in regarding to the erection of the brick dwelling without the necessary approved building plans. In view of these considerations an order to the effect that each party is to pay its own costs is appropriate.

Order

Therefore, I make the following order:

(ii) first respondent is ordered to demolish and remove all structure improvement and/or infrastructure erected on Portion 0 of Erf 383, Bakenpark, Extension 3, Bethlehem within 60 days from date of the 120-day period;

J J F HEFER, AJ

Appearances: On behalf of the applicant: Adv JS Rautenbach Instructed by:

Peyper Attorneys Bloemfontein On behalf of the first and second respondents: Adv S Janse van Rensburg Instructed by: Harringtons Incorporated c/o Blair Attorneys Bloemfontein

[1] 2000 (2) SA 1074 (SECLD)

[2]

p. 1081 D – F.

[3] 2005 (1) SA 217 (CC)

[4]

p. 232 B – D.

[5]

p. 232 F – G.

[6]

p. 242, par. [48]

[7]

p. 232, par. [26].

[8]

p. 237, par. [36]

[9]

p. 244, par. [53].

[10]

p. 245 E – G.

[11] 2017 (5) SA 346 (CC)

[12]

p. 361 D – E.

[13]

p. 361, par. [48].

[14] Par. [32].

[15] 2015 (6) SA 283 (SCA).

[16]

p. 295 C – D.

[17] 2015 (6) SA 200 (KZD)

[18] 1998 (3) SA 623 (AD)

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