

SOUTH AFRICA / JUDGMENT

Ethekwini Municipality v Gopal (D1353/2022) [2023] ZAKZDHC 45 (21 July 2023)

[2023] ZAKZDHC 45

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D1353/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D1353/2022

In

the matter between:

ETHEKWINI
MUNICIPALITY
APPLICANT
and
BHAMNATHY
GOPAL
RESPONDENT

Coram:

Mossop J

Heard:

21 July 2023

Delivered: 21 July 2023
ORDER
The

following order is granted:

1.
The respondent is directed to do all things necessary to present an application to the applicant to secure its approval for the construction work performed at the immovable property with a street address of 1[...] C[...] Avenue, Block 1[...], Westcliff, Chatsworth.
2.
The applicant is directed to afford the respondent all such assistance as she may require to present the aforesaid application to it and is directed to consider it and determine her application.
3.
The respondent must present her application to the applicant within 6 months of the date of this order, failing which the applicant may reapply on the same papers, suitably supplemented, for further relief.
4.
There shall be no order as to costs.

JUDGMENT

Mossop J:

- [1] This is an ex tempore judgment.
- [2] The respondent leases certain immovable property situated at 1[...] C[...] Avenue, Block 1[...], Westcliff, Chatsworth (the property) within the boundaries of the eThekwin municipality. The entity from whom she leases the property is the applicant. The applicant claims that contrary to the terms of the lease that it concluded with the respondent, the respondent has made certain unlawful structural alterations to the property. The applicant wants her to demolish what she has constructed. The respondent, who acts in this matter in person, resists that relief.
- [3] The order sought by the applicant reads as follows:
- ‘2.[1] That it is hereby declared that the Respondent is in contravention of Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 as amended.

3. That it is declared that in terms of Regulation A25(7) and (10) of the National Building Regulations and Building Standards Act 103 of 1977, the Respondent is ordered forthwith to demolish and remove the illegal building operations that have been conducted on the property described as portion 2[...] of ERF 1[...] of Chatsworth with the address 1[...] C[...] Avenue, block 1[...], Westcliff, Chatsworth.
4. Should the Respondent fail to demolish and remove illegal operations within 30 days upon granting this order, the Applicant is hereby authorised to demolish and remove the illegal structure. The costs of such demolition to be borne by the Respondent.
5. The Respondent is directed to pay the costs of the application.'
- [4] This morning, the applicant was represented by Ms Mbonane. The respondent appeared in person. Ms Mbonane is thanked for the assistance that she provided to the court.
- [5] The written lease agreement (the lease agreement) between the parties was concluded on 6 March 2009. It records that it relates to premises situated at '1[...] Road 3[...], Block 1[...], Westcliff.' It does not mention the name of the road, unlike the notice of motion, but it appears to be common cause based upon the admissions contained in the answering affidavit that Road 3[...] is, in fact, C[...] Avenue where the property is situated.
- [6] Clause 5 of the lease agreement deals with alterations, repairs and renovations. The respondent, in agreeing to the lease, agreed to keep the property in good order and agreed to the provisions of sub-clause 5.3, which reads as follows:

'The LESSEE shall not make any structural alterations, additions, repairs or renovations to the premises without the prior written consent of the COUNCIL thereto.'

- [7] The applicant contends that the respondent has breached this undertaking. Regrettably, the applicant does not state in its founding affidavit in what way the respondent has offended this clause. What building work has allegedly been done by the respondent is not mentioned or described. There are, however, three photostatted photographs in black and white attached to the founding affidavit. Photograph B1 appears to show a wall. Given the lack of clarity of the photostat, I cannot determine whether it is a precast concrete wall, or a wall constructed from bricks. Photograph B2 shows what appears to be a precast concrete wall. Whether it is the same wall depicted in photograph B1 is not clear. Photograph B3 is virtually entirely black and devoid of detail but appears to show

a portion of a window in its top right corner. How the three photographs are related to each other is also unclear.

- [8] The applicant relies on one of its functionary's investigative reports to establish the respondent's unlawful conduct. The functionary is referred to in the founding affidavit as a 'Ms Pumla' but is, in fact, a Ms Pumla Madikana (Ms Madikana). Ms Madikana's investigative report reads as follows:

'I went to see the tenant and ask her to demolish the structure and she said there are many illegal structures why she had to demolish her one.

I ask her to come to the office with the rent bill to see my manager as he had no permission to do the structure.

She said she will come on Friday 01-02-2019.'

[9] The investigative report accordingly sheds no light at all on the nature of the illegal structure. There are other letters and notices attached to the founding affidavit that refer, inter alia, to 'the illegal structure', and 'building operations', but nothing that is attached describes what the nature of the structure is.

[10] Section 4 of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) states as follows:

'Approval by local authorities of applications in respect of erection of buildings

- (1) 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.
- (2) Any application for approval referred to in subsection (1) shall be in writing on a form made available for that purpose by the local authority in question.
- (3) Any application referred to in subsection (2) shall—
 - (a) contain the name and address of the applicant and, if the applicant is not the owner of the land on which the building in question is to be erected, of the owner of such land;
 - (b) be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act.
- (4) Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building.'

[11] Given the fact that I am uninformed on the nature of the structure, I cannot on the applicant's papers find that it is a structure in respect of which plans and specifications are to be drawn and submitted in terms of the Act.

[12] The respondent has delivered an answering affidavit. It appears that she has drafted the affidavit herself after failing to secure legal representation as she is apparently currently unemployed. She has done a fine job. But in advancing her version she has clarified the parts of the applicant's case that were not clearly established in the founding affidavit. She describes the building that she rented from the applicant as comprising of a bedroom and a kitchen. Within that dwelling, she, her partner and her six daughters resided. She states that

after living in those conditions for ten years she added a second room. She claims that other people living in the immediate vicinity of her home had also erected additional structures on their property. She attaches nine pages of photographs that depict, so she says, other dwellings in the vicinity of her home where unauthorised structures have been

constructed by their occupants. Unlike the applicant's photographs, her photographs are in colour. But she ultimately concedes that what she has done has been done without the necessary approval being sought from the applicant. She claims to be aware of the protection offered her by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). This, however, is not a matter that concerns the PIE Act.

[13] Besides her honest acknowledgment that she has not obtained the imprimatur of the applicant to construct the alteration to the property that she occupies, the next most significant part of her answering affidavit is her statement that she is willing to make application to the applicant for the necessary permission.

[14] While there may undoubtedly be merit in the allegation by the applicant that the respondent has not complied with the law, there can also be no doubt that the respondent and her family lived in intolerable conditions before performing the alterations. It cannot be easy living in a single room with 6 children. The respondent has done something about that and has tried, at her own expense, to improve her living conditions. For that she deserves some praise even though she has gone about it in the incorrect fashion. For it cannot be denied that building standards must be maintained so that buildings and alterations thereto do not ultimately pose a threat to their occupants or the general public.

[15] In its replying affidavit, the applicant insists that its prior written consent was necessary before the respondent commenced with her alteration. Significantly, it concedes that:

'Had the Respondent approached the Applicant regarding her intention of renovating the property, the Applicant would most certainly have assisted the Respondent.'

That is most heartening to read. I intend ordering that the applicant assist her now and trust that the applicant will find within itself the necessary ubuntu to help a needy but well-meaning member of society.

[16] I think that in the circumstances, it would be just to order that each party pay their own costs.

[17] I accordingly grant the following order:

MOSSOP J

APPEARANCES

Counsel for the applicants: Ms M A Mbonane Instructed by: Luthuli Sithole Attorneys 56 Henwood Road Morningside Durban
Counsel for the respondent: In person Instructed by: In person
Date of argument: 21 July 2023 Date of Judgment: 21 July 2023

- [1] The relief claimed in the notice of motion commences at paragraph 2. It appears that there may previously have been a paragraph 1, but that relief is apparently no longer claimed, and it appears that paragraph 1 has been removed from the notice of motion by placing a piece of blank white paper over it.
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Prepared on 12 October 2026 · Esheria