

SOUTH AFRICA / JUDGMENT

IFJ Properties (Pty) Ltd v Brown and Others (70822/2012; 32592/2013) [2017] ZAGPPHC 654 (3 October 2017) [2017] ZAGPPHC 654

COURT
North Gauteng High Court, Pretoria

BEFORE
C.P. Rabie

CASE / FILE NUMBER
70822/2012; 32592/2013

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HIGH
COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: 70822/2012; 32592/2013
NOT
REPORTABLE
OF
INTEREST TO OTHER JUDGES:NO
REVISED
3/10/2017
In

both matters pertaining to
the same parties being:

IFJ
PROPERTIES (PTY)
Ltd Applicant
and
GEOFFREY
ALLEN BROWN
1st
Respondent
YVONNE
WILHELMINA BROWN
2ndRespondent
ANDRE
RADYN
3rdRespondent

MICHELLE
LEIGH
RADYN 4thRespondent
VYGEBOOM
COUNTY ESTATES
HOME 5thRespondent
OWNERS
ASSOCIATION
ALBERT
LUTHULI LOCAL
MUNICIPALITY 6thRespondent
THE
APPOINTED BUILDING CONTROL
OFFICER 7th
Respondent
OF
THE ALBERT LUTHULI LOCAL MUNICIPALITY
THE
REVIEW BOARD INSTITUTED IN TERMS OF
SECTION
9 OF THE NATIONAL BUILD
REGULATIONS
AND BUILDING
STANDARDS 8thRespondent
ACT,
103 OF 1977

JUDGMENT

Coram: RABIE J

1. Two applications have been set down before this court by agreement in order for them to be argued simultaneously and for this court to give judgement in both applications. The application under case number 70822/2012 pertains to an order against the 1st to 4th respondents to take all necessary steps to demolish the building situated on Erf 28 in the Vygeboom County Estates Township (also "the property") in so far as the building exceeds one storey. That would have the effect of only one storey remaining which presently consists of the garages and storage room. The applicant further claims that in the event that there is no compliance with the order within 60 days thereof, the Sheriff of Carolina be authorised to demolish that part of the building exceeding one storey at the cost of the 1st to 4th respondents and that the Sheriff shall be entitled to enlist the services of a suitable contractor for the demolition work. The applicant also seeks a cost order against the 1st to 4th respondents jointly and severally on the scale as between attorney and client.
2. The application under case number 32592/2013 is a review application to set aside the decision by the seventh respondent to recommend to the sixth respondent to approve any and all building plans in respect of the building already constructed by the 1st to 4th

respondents, as well as to set aside the approval by the 6th respondent on 25 February 2013 of all and any of the building plans submitted to it by the 1st to 4th respondents in respect of the building already constructed on the property. The applicant also seeks an order for costs against the 1st to 4th and the 6th respondents jointly and severally on the scale as between attorney and own client.

Background

3. It is necessary to give a brief background to the applications as presently before this court. The 1st to 4th respondents erected a three storey dwelling on the property in terms of building plans which were recommended and approved by the sixth respondent, the Municipality, to which I shall refer as the "2008 building plans".

4. The applicant, which owns the erf adjoining the property of the 1st to 4th respondents, took the approval on review and this court, myself presiding in that matter, gave judgement in favour of the applicant. That occurred on 17 February 2011. I should add that all the parties agreed that there is nothing standing in the way of me presiding in the present two applications. The parties in the first review application were the same except that the 8th respondent had not been a party to the original application. The judgement in the previous review application was based on, inter alia, the finding and conclusion that the building structure itself consisted of three storeys and that the 2008 building plans in terms whereof the building was constructed, provided for three storeys. Furthermore that this was in contravention of the applicable Conditions of Establishment ("COE") relating to the property which allowed for a one storey dwelling only. The full order of the court in the first review application reads as follows:

1. The decision by the seventh respondent to recommend to the sixth respondent to approve any and all building plans in respect of Erf 28, Vygeboom Dam County Estates Township is hereby set aside.

2. The approval by the sixth respondent of any and all building plans submitted to it by the first to fourth respondents in respect of Erf 28, Vygeboom Dam County Estates Township is hereby set aside.

3. The decision by the fifth respondent to approve any and all building plans submitted to it by the first to fourth respondents in respect of Erf 28, Vygeboom Dam County Estates Township is hereby set aside.

4. The matter is remitted to the fifth, sixth and seventh respondents to consider afresh the application to obtain approval in respect of the building plans in respect of Erf 28, Vygeboom Dam County Estates Township.

5. The first second, third and fourth respondents are ordered to pay the costs of the application jointly and severally, such costs to include the costs of senior counsel.

5. None of the respondents filed an application for leave to appeal the aforesaid judgement and order.

6. A little more needs to be said about the Vygeboom Country Estates Township development which, incidentally, was more fully set out in the previous judgement of this court. The development is approximately 50 hectares in extent and situated some 50 km away from the town of Carolina and comprises some 82 erven, most of which overlook the Vygeboom Dam and the natural vista. The development is situated on a hill which slopes down towards the Vygeboom dam to the east. Most of the dwellings were developed for holiday or weekend purposes and the minority of owners reside permanently on the development and most use it on a holiday or weekend basis only. The applicant is the owner of Erf 26 which adjoins erf 28, the property of the 1st to 4th respondents, directly to the west.

7. The development was approved subject to the COE which, inter alia, specify that the Regulations issued in terms of the National Building Regulations and Building Standards Act, 103 of 1977 ("NBRBSA"), also apply to the development. According to the COE height restrictions apply to buildings to be erected in the development. These height restrictions are indicated with reference to the number of storeys which an owner is allowed to build on his/her particular erf. Some erven are restricted to two storeys while others, such as the one belonging to the 1st to 4th respondents, are restricted to one storey buildings.

8. After the 1st to 4th respondents had commenced the building operations on the property, the applicant became concerned that its view of the Vygeboom dam might be impaired by the dwelling being erected by the 1st to 4th respondents on erf 28. One of the first approaches by the applicant to the 1st to 4th respondent was contained in a letter by the applicant's attorney dated 7 May 2008 wherein the 1st to 4th respondents were warned that their dwelling which was in the process of being erected was exceeding the provisions of the COE in that they were busy erecting a three storey dwelling instead of a one storey dwelling, which was not allowed. After some interaction between the parties revised plans were submitted to the 6th respondent which approved the plans. Subsequently, the 6th respondent indicated that it received misleading explanations from the owner of the property, that the municipality had wrongly approved the building plans and that they withdraw their approval of the building plans with immediate effect.

9. The applicant held the view that the new plans and the building that was being erected, were not acceptable since it interfered with his view of the dam and surrounding area. It held the view that the building was much higher than was allowed and that the decision to approve the building plans should be reviewed and set aside.

10. The 1st to 3rd respondents' case was that the building consists of only one storey and not three storeys as submitted by the applicant. According to the 1st to 3rd respondents the other two storeys of the house were a basement and a loft respectively and that they were consequently not in breach of the provisions of the COE and the National Building Regulations and NBRBSA. As mentioned before, this court found in favour of the applicant and made the order mentioned above. This court found that the first storey comprises of the garages and a storage area, that the

second storey comprises of living areas, bedrooms and bathrooms and a kitchen, and that the third storey comprises of further bedrooms and bathrooms. This court found that the first storey is not a basement and the third storey is not a loft as submitted on behalf of the 1st to 4th respondents and that the plans and building thus did not comply with the zoning conditions as laid down in the COE.

11.As mentioned, the 1st to 4th respondents did not appeal the aforesaid judgement and order and, instead, resubmitted the same 2008 building plans to the 6th respondent and the 7th respondent for reconsideration. The 2008 building plans were again rejected by the 6th and 7th respondents and the 1st to 4th respondents then filed an appeal to the Review Board, the 8th respondent. The applicant was not made aware of this appeal and did not partake in its proceedings. However, the 8th respondent dismissed the appeal during or about March 2012. It may be mentioned that the 8th respondent found that the first storey comprising the garages and storeroom was not a storey but a basement, but that the alleged loft constituted a second storey and that the plans could consequently not be approved.

12.Subsequent to these events and during December 2012 the applicant launched the demolition application. The deponent on behalf of the applicant set out the history of the matter and mentioned, inter alia, that he originally chose his property, being erf 26, because of the unimpeded view of the Vygeboom dam. During the discussions with

the developer at the time it was in fact agreed that the property in front, erf 28, would be limited to one storey. It is common cause that this restriction eventually formally applied to erf 28. The applicant furthermore stated that the building, as constructed by the 1st to 4th respondents, substantially impedes the view enjoyed from erf 26 and that it substantially affected the value of his property. Furthermore that the 1st to 4th respondents have been forewarned from a very early stage but that they had simply proceeded to finalise the building

despite such warnings and even despite the previous order of this court. They pointed out that the applicants use the house as a weekend/holiday residence.

13.In the answering affidavit to the demolition application the 1st to 4th respondents stated that they have submitted new or revised building plans to the 6th respondent under cover of a letter dated 3 September

2012. It was submitted that a new decision by the 6th respondent would constitute a new administrative action unrelated to the previous administrative action which was reviewed and set aside by this court. It was further submitted that in view of these developments the demolition application was premature. It was further submitted that should the application be approved, the applicant will be free to apply for the review of such a decision.

14.The 1st to 4th respondents then stated that on 25 February 2013 the Municipality, the 6th respondent, decided to approve the new amended plans. I shall refer to these plans as the "2012 plans". According to the 1st to 4th respondents the 2012 plans made provision for the demolishing of what was previously referred to as the loft.

15. Subsequent to the aforesaid developments the applicant instituted the review application under case number 32592/2013 during May 2013. That is the second application that this court has to adjudicate. The relief claimed for by the applicant is, firstly, for the review and setting aside of the decision by the 7th respondent to recommend to the 6th respondent to approve any and all building plans in respect of erf 28 and, secondly, for the review and setting aside of the approval by the 6th respondent of all and any of the building plans submitted to it by the 1st to 4th respondents in respect of erf 28. The applicant also prayed for an order that the 1st to 4th and the 6th respondent pay the costs of the application on the scale as between attorney and own client.

16. In what follows I shall set out the broad outlines of the new review application. It is not necessary to again refer to the statutory

provisions applicable to the Vygeboom development as same are common cause. I shall only refer to the relevant aspects thereof in so far as they are relevant for purposes of this application.

The Review Application

17. The most important provision for present purposes is that paragraph 4.5.2 of the Conditions of Establishment (COE) provides that the "use zone" of, inter alia, erf 28 is that of "residential" subject to the condition that the maximum height of a dwelling on the erf shall be "onestorey". There is no dispute between the parties that this is the relevant height restriction in respect of erf 28 and it is also common cause that the existing decisions and approvals could not have been made if the plans for the house allowed for more than one storey.

18. The COE does not define the word "storey". However the National Building Regulations promulgated in terms of the NBRBSA do. In the definition section the following is found:

"Storey' means that part of a building which is situated between the top of any floor and the top of the next floor next above it, or if there is no floor above it that portion between such floor and the ceiling above it (any mezzanine floor, open work floor, catwalk or gallery being taken to be part of the storey in which it is situated), and in relation to a building :-

- (a) the ground storey shall be taken as the storey in which there is situated an entrance to the building from the level of the adjoining ground or, if there is more than one such storey the lower or lowest of these;
- (b) A basement shall be taken to be any part of the building which is below the level of the ground storey,
- (c) An upper storey shall be taken to be any storey of the building which is above the level of the ground storey; and
- (d) The height expressed in storeys shall be taken to be that number of storeys which includes all storeys other than a basement." (my underlining)

19.As mentioned before the applicant's case is that the building plans now approved by the 6th respondent still makes provision for a three- storey building or, at least, one in excess of one storey. For that reason the approval was granted wrongly and unlawfully and should, according to the applicant, be reviewed and set aside by this court.

20.At the hearing of the two applications before this court the parties were in agreement that the demolition application should be considered if the review application succeeds. It was thus agreed that although the demolition application was mainly aimed at the outcome of the previous review application, it should apply *mutatis mutandis* if the present review application were to be successful. I shall consequently direct my attention first to the present review application and for that purpose consider the 2012 building plans which were approved by the 6th respondent.

21.According to the applicant the only amendments made to the original plans and which now form the approved 2012 building plans, are the following: firstly, the outside doors and windows to the third storey have been removed and are to be closed up. Secondly, the side and/or support walls for the third storey have been changed to a height of at least 800 mm. Thirdly, the bathrooms on the third storey are removed.

22.In support of the aforesaid contentions the applicant annexed the affidavit of an architect, Mr W Macke. Firstly, Mr Mocke expressed

the view that the plans incorrectly referred to the ground storey as a basement. Secondly, that the ground storey indicated on the plans, is in fact the first storey of the building. He further stated that the two sets of plans, the 2008 plans and the 2012 plans, are exactly the same except that the 2012 plans show that the two staircases to the third storey will be broken out, and that the roof structure on the two gable roofs on the North and South roofs will be brought down with approximately 400mm. This will have the effect that the wall on the concrete box gutter will have a height of 1,2 m from the ceiling line of the second storey to the underside of the ceiling under the tiles or the third storey ceiling. In the middle of the third storey the nock height will be 2,8 m and this should be counted as the third storey of the building.

23.Consequently Mr Mocke concluded that a comparison between the plans, sections and elevations of the different storeys of the two sets of plans shows that the only changes are the staircase which will be omitted and the two inner sidewalls of the North and South roofs which will be brought down by approximately 400mm. The rest of the plans remain exactly the same and consist of three storeys. He noted that from the 2012 plans it is evident from the note referred to namely, "Build new 115mm wall on bathroom slab for privacy between bedrooms", that the third storey will still be utilised for bedrooms. Consequently the ground storey consists of the garages and storage area, the first storey consists of bathrooms, living areas and a kitchen and the third storey consists of bedrooms.

24.There is no real dispute between the parties that if the aforesaid facts were to be correct, the 6th respondent was not authorised to approve the 2012 building plans. This is so because in terms of section 7 of the NBRBSA the 6th respondent could not have been satisfied that the building plans complied with the requirements of any applicable law and specifically the COE. The

applicant further submitted that, in any event this court had already found that the storey housing the garages and a storage area is in fact a ground storey and that the area which the 1st to 4th respondents earlier referred to as the loft is still in existence and had been found by this court to be a third storey. Since the status of the three levels had been decided by this court the issue is *res iudicata* applies and the 6th respondent, having been a party to the previous review where the same issue was adjudicated and pronounced upon, was not entitled to hold a different view when the 2012 plans were presented to it.

25. For the same reasons it was submitted by the applicant that the 7th respondent could not have recommended to the 6th respondent to approve the building plans. For these reasons it was submitted by the applicant that the decisions by the 6th and 7th respondents should be reviewed and set aside and furthermore that the order should be made as prayed for in the demolition application.

26. In the answering affidavit on behalf of the 6th and 7th respondents, with which the 1st to 4th respondents aligned themselves, the review application is opposed. I shall refer to this affidavit as the 6th respondent's affidavit. The first main statement to be noted is that reference is made to "the excavated part below ground level" as a "basement". The second statement is that above the basement there is one storey at ground level. I should note at this point that the 6th respondent did not discuss the definition of "storey" in the Regulations which states that the "ground storey" shall be taken as the storey in which there is situated an entrance to the building from the level of the adjoining ground or, if there is more than one such storey the lower or lowest of these and furthermore that a "basement" shall be taken to be any part of the building which is below the level of the ground storey. The 6th respondent merely stated that the reasoning of the court regarding the definition of "storey," "basement" and "loft" was wrong.

27. Having made the finding that the building consists of a basement and a ground storey, the 6th respondent discussed the other requirements mentioned in section 7(1) of the NBRBSA and came to the conclusion that none of the identified harmful consequences exist. These last mentioned issues are not in issue between the parties and need not be referred to.

28. It was submitted on behalf of the applicant that since the 2012 building plans are substantially similar to the building plans upon which this court adjudicated the previous review application, the court has finally decided the central question in issue between the same parties in finding that the building consists of three storeys and that it was consequently not open for the 6th respondent to base its decision on the ground that the building consists of only one storey. The 6th respondent could therefore not have been satisfied that the 1st to 4th respondents' 2012 building plans complied with the NBRBSA, the Regulations and the COE and could not have approved the plans.

29. The argument of the applicant is based on the principle of *res iudicata* and it was submitted that the dispute which had been finally adjudicated upon in the first review application cannot again be considered by this court for the reason that the issue is between the same persons, about the same subject matter and on the same ground.

30. On behalf of the respondents the elements of *res iudicata* were not disputed but it was submitted that in the previous judgement the court did not come to a definitive judgement in respect of the different storeys. This argument cannot be sustained. The validity of the previous decisions addressed in the previous review application depended on the defence of the 1st to 4th respondents that the first level is a basement, the second level is the ground story and the third level is a loft. The court found that the first level is the ground story, the second level is the second story and the third level is the third story. The 2008 building plans were consequently set aside on the basis that the court found that the building consists of three storeys in contravention of the NBRBSA, the Regulations and the COE. That was in fact the basis upon which the specific orders were made by the court at the end of the judgement.

31. It was further submitted on behalf of the respondents that the previous decision of the court regarding the lowest level, which they refer to as the basement was obiter, and does not bind the parties or this court. It was submitted that it was only necessary for the previous court to make a finding that there were more than one story, which it did in respect of the loft and the middle level, and that any finding in respect of the basement was unnecessary and thus obiter.

32. I disagree with this submission for two reasons. Firstly, the manner in which the matter was placed before the previous court required a decision in respect of every level of the building. Secondly, if regard is had to the definition of "storey", "ground storey" and "basement" referred to above, it is obvious that in order to establish the number of storeys of a building it first has to be established what the ground storey is. Only when that has been done would one know whether there is a basement or not and/or how many storeys there are above the ground storey.

33. The previous court, in remitting the matter back for consideration, had thus finally decided the issues between the parties based on the 2008 building plans. The fact that the court did not instruct, *inter alia*, the 6th respondent to reconsider the matter afresh in line with the findings of the court, cannot entitle the 6th respondent to ignore the findings of the court when deciding the matter after its remittance to it. To ignore the findings of a court in such an instance would make a mockery of the authority and finality of a court judgement. The findings made by a court in a judgement remain binding on the parties thereto on the basis of the principle of *res iudicata*.

34. In the present application which is based on the building plans it is common cause that the building plans are exactly the same as the 2008 building plans in respect of the first level which consists of the garages and storeroom as well as the second level which consist of, *inter alia*, the bedrooms, bathrooms, living areas and the kitchen. It was submitted on behalf of the applicant that based on the principle of legality and the binding force of previous decisions of the Court, the cardinal issues between the parties, at least in respect of these two levels, became *res iudicata* and it is not open for any other court or party to revisit the issue. I agree with this submission. The fact that the issue came before the 6th respondent again by way of new amended building plans, does not affect the principle of the matter.

35. Even if I were to be wrong in respect of the principle of *res iudicata* being applicable, I am nevertheless satisfied and thus find that the first level is in fact not a basement but the ground storey of the building. There is nothing unclear about the definition of a ground story namely the lowest level which has an entrance to the building from the level of the adjoining ground, and that a basement is that part of the building which is below the level

of the ground story. A level can thus only be a basement if it has no entrance to it from the level of the adjoining ground.

36. I accordingly find that the 6th respondent was not entitled to approve the 2012 building plans for the reason that the plans

reflected a building which consists of more than one storey. For this reason the applicant should succeed with the relief claimed in paragraph 1 and 2 of the Notice of Motion in the present review application. As far as costs are concerned, there is no reason why the applicant's costs of the present review application should not be paid by the 1st to 4th respondents and the 6th respondent jointly and severally, such costs to include the costs of Senior Counsel. I have considered the further submissions on behalf of the applicant but in my view there is not sufficient cause for a punitive order for costs.

37. It is necessary, in my view, to say something more about the third level which the applicant described as a loft. On the 1st to 4th respondents' version the 2012 building plans show that this area had been removed. The applicant submitted that this level still remained and that it contained bedrooms and consequently still constitutes a third storey. The applicant found support for the submission in the evidence of Mr Macke to which I have previously referred.

38. During argument before this court this issue and the evidence of Mr Macke was debated. The difficulty for the respondents lay not only in this expert evidence but also in the 2012 building plans which, in one of the side views, *inter alia*, still show a concrete slab underneath this area and which contain the words "build new 115mm wall on bathroom slab for privacy between bedrooms". This creates the impression, and this was also the view of Mr Macke, that the third level still contains bedrooms and should thus be regarded as a third storey.

39. On a careful consideration of this debate I am not convinced that the aforesaid view is necessarily correct. The argument on behalf of the applicant is certainly forceful but, on the other hand, the removal of the staircases from the second storey to the loft, creates a question mark for the simple reason that the question then arises as to how one would get to this third storey in order to use the bedrooms which, on this version, remained as part of the plans. Secondly, the question arises as to whether the remaining concrete slab above the bathrooms on the level below do not simply serve as the ceiling of those bathrooms alone, and for the sake of privacy, and that the space above it does not constitute a next storey. Furthermore, and if that is so, the question arises as to whether the above quoted passage relating to the 115mm wall to be erected, should in fact not be seen as a sidewall of a bedroom or bedrooms on this level but rather as a wall from the top of the concrete slab above the bathrooms to the roof in order to afford privacy to the two bedrooms next to the bathrooms on the level below.

40.The difficulty is that this matter came before this court on application and the court did not have the opportunity to consider the true facts as it would have been able to do if the matter had served before it in terms of a trial process. I am accordingly not able to find that there is still a third level in existence which can constitute a third storey as submitted on behalf of the applicant.

41.This finding in respect of the third level does not in any way affect my finding above that the building still consists of at least two storeys namely the ground story containing the garages and the storage area and the second storey containing the bedrooms,

bathrooms, living areas and kitchen. It may, however, affect the demolition application to which I shall now turn my attention.

The Demolition Application

42.In the demolition application the applicant essentially prayed for an order that the 1st to 4th respondents take all the necessary steps to demolish the building in so far as the building exceeds one story so that the only storey consisting of the garages and storage room, remains. Furthermore that the 1st to 4th respondent should do so within 60 days of the order and should they fail to do so, that the Sheriff of Carolina be authorised to effect such demolition and to enlist the services of a suitable contractor for such purpose and that such demolition shall be for the account of the 1st to 4th respondents. An order for costs on the attorney and client scale was also paid for.

43.On behalf of the applicant it was submitted in its heads of argument, mainly on the authority of *Lester v Ndlambe Municipality* and another 2015 (6) SA 283 (SCA) and *Aboobaker NO and others v Serengeti Rise Body Corporate* and another 2015 (6) SA 200 (KZD), that once it is established that the building structure is in contravention of statutory prohibitions, there is an obligation on this court to uphold the law and that this Court, by the operation of the legality doctrine and the rule of law, is duty-bound to order that part of the structure that is illegal be demolished. It was submitted that the existing structure in casu was erected in terms of invalid building plans and in contravention of the applicable legal requirements and that this court should uphold the law and grant the demolition order as sought.

44.On behalf of the respondents reliance was, inter alia, placed on the decision of *BSB International Link v Readam* SA 2016 (4) SA 83 (SCA) where the court found that in a case such as the present where a neighbour applies for the demolition of his neighbour's building on common law grounds, the court is possessed of a broad general discretion to be exercised after affording due consideration to all the relevant circumstances. The court further found, in paragraph [29], that "... before granting a partial demolition order a court would have to be satisfied that the illegality complained of is capable of being addressed by such an order and that it is practically possible to do so."

45. On behalf of the applicant this discretion was accepted but it was that in exercising its discretion this court should consider the fact that the 1st to 4th respondents had been warned of their illegal conduct but had pressed ahead regardless. It was further submitted that if this court does not exercise its discretion in favour of the applicants, the 1st to 4th respondents would be allowed to flaunt the legal requirements and prescriptions in perpetuity. It was further submitted that the 1st to 4th respondents had a choice of buying an erf in the development on which they could build a two-storey dwelling. They did not do so but now wants to force their neighbours to accept their two or more story building on an erf which allows for only one storey. The 1st to 4th respondents decided to proceed at their own risk despite advice to the contrary and it was submitted that this court should not come to their assistance and allow them to retain the spoils of their unlawful conduct.

46. On behalf of the 1st to 4th respondents it was, inter alia, submitted that the issue of prejudice favours the 1st to 4th respondents. It was submitted that the applicant would suffer hardly any prejudice if the building remains as it is, while, on the other hand, the 1st to 4th respondents will suffer a tremendous financial

loss if they have to demolish the building down to the ceiling of the first level. It was also submitted that the building as it stands does not interfere in any great degree with the applicant's view of the Vygeboom dam. This was one of the issues, I may add, which had not been ventilated in the papers before this court. I shall refer below to this and other such matters. It was also submitted on behalf of the 1st to 4th respondents that they would have been successful in an application in terms of section 18 of the NBRBSA to the 6th respondent for a deviation or an exemption from the applicable National Building Regulations. It was submitted that this court should consider the matter as if such an application was before it. It is in my view not necessary to refer herein to the other submissions on behalf of the 1st to 4th respondent.

47. In considering the question whether this court should order the demolition of the building as prayed for by the applicant, or make some other order in that regard, I have to exercise a wide general discretion. In the process of doing so I must consider the principle of legality and the rule of law but also the other facts and circumstances of the case, including those which were put forward and debated in the review application. I have to weigh the factors put forward on behalf of the 1st to 4th respondents and also the submissions made on behalf of the applicant, all relating to how I should exercise my discretion.

48. I have given much thought to all the evidence before me and to the arguments on behalf of the parties and having done so I have come to the conclusion that this court cannot finally exercise its discretion fairly merely on the evidence before it and within the confines of an application process as opposed to that of a trial process.

49. It has become abundantly clear that the decision as to whether a demolition should be ordered or not, is not as straightforward as it may have been in the previous cases referred to during argument before this court. As was stated in the matter of BSB

International Link (supra) in paragraph [27], the power to order demolition is indeed draconian in nature. A court should accordingly, in my view, and ceteris paribus, attempt to avoid a demolition order or at least to limit such an order to what is absolutely necessary.

50. During the argument of both applications before this court it became clear that there might be other avenues which the court could and should investigate in order to come to a just and justifiable exercise of its discretion in this matter. However, such avenues cannot be investigated and explored within the confines of an application process such as the present one, particularly because the issues that may be relevant and which were touched upon during argument, had been in dispute and had to a large degree not properly been investigated and covered in the affidavits before this court.

51. I cannot be prescriptive as to what may be placed before the trial court or how a trial may develop or what the court may ultimately

consider to be relevant in the exercise of its discretion or what orders a trial court may be able to give, but I may mention a few aspects which were mentioned during argument but which had not been developed properly and which may very well ultimately play a role in the exercise of the court's discretion in respect of the parties before this court. It has been mentioned above in respect of the review application that the basic reason why the lowest level of the building constitutes a ground storey and not a basement is because of the access to it from the level of the adjoining ground. The 1st to 4th respondents' difficulty might very well to a great extent be overcome if this basement area is simply filled up or if the access to this level is simply closed up and access thereto gained from inside the present second storey and possibly with windows fitted to the outside walls. The possibility of cutting away the walls of the basement to the extent that they resemble pillars instead of a closed-in area which forms part of the building, was also mooted.

52. The above constitute but a few examples of alternatives which could be investigated in a trial scenario and which might place the court in a position to exercise a discretion which has reference to all the real and correct facts of the matter instead of having to refer merely to the few, and often disputed, facts presently before this court. It might even lead to the court deciding against ordering a major demolition in favour of an order having much less impact on the existing building. I have mentioned the issue of prejudice before. It relates to the prejudice to the applicant if a demolition order is not made as well as the prejudice to the 1st to 4th respondents if such an order is made. The respective parties differed in respect of the weight to be afforded to this issue but in my view that issue need not be decided at this point. The fact remains that it is a factor which a court would consider in the exercise of its discretion as to whether to order a demolition or something less or different in order to achieve the appropriate result. When these issues were debated in court there were objections for the simple reason that the facts relating to the issue of prejudice was in dispute or that the issue of prejudice had not specifically and comprehensively been addressed in the affidavits.

53. Consequently, I find that there are in the present application too many real disputes between the parties and too many factors referred to during argument which were not initially covered by the affidavits, to enable this court to exercise its discretion in respect of the demolition application merely on the papers before this court. The demolition application should consequently be referred to trial to enable the parties and the court to fully investigate the matter.

54. As far as costs are concerned, the appropriate order in respect of the demolition application is to reserve the costs thereof for adjudication by the trial court.

55. In the result the following order is made:

In case nr 32592/2013 The Application for Review

1. The decision by the seventh respondent to recommend to the sixth respondent to approve any and all building plans in respect of the building already constructed by the 1st to 4th respondents on Erf 28, Vygeboom Country Estates, Registration Division JT, Province Mpumalanga is hereby reviewed and set aside.

2. The approval by the sixth respondent on 25 February 2013 of all and any of the building plans submitted to it by the 1st to 4th respondents in respect of the building already constructed by the 1st to 4th respondents on Erf 28, Vygeboom Country Estates, Registration Division JT, Province Mpumalanga is hereby reviewed and set aside.

3. The first, second, third, fourth and sixth respondents are ordered to pay the applicants' costs of the application which costs shall include the costs of Senior Counsel.

In case nr 70822/2012 The Demolition Application

4. The application for the demolition of the building constructed by the 1st to 4th respondents on Erf 28, Vygeboom Country Estates, Registration Division JT, Province Mpumalanga is hereby referred to trial.

5. The Notice of Motion in the application shall stand as Simple Summons and the answering affidavit as Notice of Intention to Defend.

6. The Uniform Rules of Court shall apply to the further pleadings and the further conduct of the matter.

7. The costs of the application are reserved for adjudication by the trial court.

C.P. RABIE

JUDGE OF THE HIGH COURT

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