

SOUTH AFRICA / JUDGMENT

Ten Napel and Another v Ekurhuleni Metropolitan Municipality and Others (44339/2020) [2021] ZAGPJHC 566 (30 September 2021)

[2021] ZAGPJHC 566

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

44339/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 44339/2020

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

NO

Date:

30/9/2021

In

the matter between:

TEN
NAPEL, JAN
LOURENS
First Applicant
DU
RAND,
HUGO
Second Applicant
And,
EKURHULENI
METROPOLITAN MUNICIPALITY
First Respondent
SHILANE,
NYEPANE
PETRUS
Second Respondent
SHILANE,
MAPASEKA
RUTH
Third Respondent

JUDGMENT

FISHER J:

Introduction

- [1] This kind of application is one which gives a court much cause for reflection. It involves property rights of a neighbour in relation to the breach by his fellow neighbour of the statutory township zoning scheme and building regulations. The applicant seeks an order that a structure on the respondent's property, which has been built at considerable expense to the respondent, be demolished because it was built illegally.
- [2] The order sought impacts directly on the property rights of the respective neighbours. This judgment deals with the legal principles relating to the discretion of a court to order demolition of a building.
- [3] The structure is near completion and comprises a block of eight flats which have been built on the respondent's property in Baird Avenue Parkhill Gardens, Germiston ('the property').
- [4] The second respondent, to whom I will refer as 'the respondent' in that the third respondent who was his wife died some time before the application, is a retired police officer. He says that he has invested a substantial portion of his pension pay-out to develop the block of flats in issue.

[5] The respondent concedes that the structure is illegal in that he has not been granted the necessary rezoning of the property and has no approved building plans. He says that he was misled by the professionals whom he employed to assist him in his development of the property to believe that he could start building without the necessary approvals. He says that he is now on course to regularise

the illegal structure in that he has now put in the necessary applications and undertaken to comply ex post facto with the requirements for the legalising of the structure. He contends that there is a good prospect of legalisation of the structure in the future in accordance with the application which he has now brought for the rezoning of the property and the amendment of the building plans.

[6] He seeks on the basis of these alleged impending prospects and his alleged innocence in trusting the professional advice given to him as to his entitlement to build, to persuade the court to stay or postpone the proceedings pending the outcome of the applications

which may legalise the structures.

[7] The applicants reside in homes which are respectively adjacent to and across the road from the property. They lodged objection immediately

on it coming to their attention that it was a non-compliant structure. They attempted to do this through the administrative channels of the first respondent, which I shall call 'the Municipality'. When it became clear to them that these process were not having the desired effect in that the respondent continued to build unabated, they had no choice but to seek redress from this

Court.

[8] This is part B of the application, part A having been disposed of by way urgent interim relief in terms of which the respondent was interdicted from continuing with the building operations pending the outcome of part B.

[9] Relief was also sought against the Municipality essentially ordering it to perform its function of enforcing the by-laws and the relevant legislation to which it was subject, including the relevant Town Planning Scheme, the National Building Regulations, and the Building Standards Act 103 of 1977 ('the Building Standards Act').

[10] Costs in relation to Part A were asked for against the Municipality in the event only of its opposition. These costs are dealt with later.

Legal principles

[11]

It is 'of the essence of a town-planning scheme that it is conceived in the general interests of the community'[1]

[12]

The importance of the rights which these restrictive conditions create in favour of other landowners, has been dealt with by the SCA in *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*.^[2] The court sated as follows:

‘Restrictive conditions of the kind in question inure for the benefit of all other erven in a township, unless there are indications to the contrary. They are inserted for the public benefit and, in general terms, to preserve the essential character of a township’.^[3]

^[13] Clearly the demolition of a property is devastating for the owner of the property and is a far reaching remedy. The respective rights of the property owner of the illegal structure and those of the community affected by such illegality are equally acute. Questions are raised as to whether a court can entertain continued illegality and, if so, under what circumstances.

[14]

At common law, the power to order demolition of a building ordinarily finds application in the case of an encroachment by a building onto a neighbour’s property.^[4] In this instance the exercise of the court’s discretion is often informed by the ability to offer compensation in the form of damages in order to avoid the far reaching consequences of demolition. But this can only occur by agreement.

[15]

In *Lester v Ndlambe Municipality and Another*^[5], the SCA had occasion to examine whether a court had the authority to order the transfer of portion of a property encroached upon in the absence of agreement. It held that it did not.

^[16] The Court found also that, when a municipality brings an application under section 21 of the Building Standards Act, the doctrine of legality requires courts to enforce the statutory prohibitions and that a court faced with such an application had no discretion but to order demolition.

^[17] In this case section 21 has no application. The applicants ask for an order which arises out of the application of the common law and more specifically neighbour law.

[18]

The power of a court to order demolition of an illegal structure on the land of another has been recognised for decades. In *De Villiers v Kalson*^[6], Graham JP embarked upon a detailed discussion of the prior authorities on this point. He said ‘it will be observed that in none of the South African cases were the facts quite similar to the facts disclosed in this case, for in the present case there has been no encroachment upon the ground of another, but an encroachment upon his rights . . . I am inclined to think that this difference makes little or no change in the plaintiff’s rights for many of the same arguments used in favour of the view that the Court has no discretion but must grant an order for the removal, apply equally well to encroachment on land and encroachment on rights, such as exist in the present case.’^[7]

[19] In concluding that there was a discretion vested in the Court the learned judge president added:

‘After all there must surely be some discretion vested in a Court even in cases involving breaches of what are termed negative covenants in the English Law, and I can find no authority in our law which states that under no circumstances can the Court exercise such a discretion. It is quite clear that for the reasons stated in so many of the English cases, the wrongdoer who encroaches on another's rights cannot be heard to say, unless there are some very special circumstances, that a monetary compensation is sufficient, for that would be tantamount to compelling the plaintiff to consent to expropriation, but on the other hand it would be equally inequitable to place the plaintiff in a position to extort wholly excessive completion from the defendant by granting an order for the removal of the buildings in cases in which the facts disclose that a remedy in damages would fully meet the justice of the case. . . I have therefore come to the conclusion that I have a discretion in this case to grant an order giving the defendant an option of paying damages in place of removing his building if the plaintiff has satisfied me that he has sustained damages.’[8]

[20] This is not however a case where damages is an option. A court nonetheless has a discretion which resides in the power to allow for a period of time to allow for the regularization of the position. There is nothing that can be done to appease the applicant neighbours but to have their legal rights vindicated.

[21] The court will thus have to take into account relevant circumstances in order to come to a just decision. These would include:

- a. the nature and extent of the deviation from the law;
- b. the reasons for such deviation with specific reference to the culpability of the respondent;
- c. the steps taken by an applicant in relation to stopping the irregular building from progressing which has been reached,
- d. the strength of the prospects of the regularisation of the unlawful position;
- e. the time that it will take to regularise the position;
- f. the effect of the order on the parties personally;
- g. the general interests of the community.

[22] The lack of discretion which a court has in an application brought in terms of section 21 may be interpreted to suggest the seriousness

with which the Legislature regards the failure to adhere to the necessary building requirements. This may arguably also be a factor

which sets the tone for the exercise of the discretion in a matter such as this. The conundrum which arises is why a court should have no discretion in the one type of application but a broad discretion in the other, when both applications are aimed at achieving the same result? Put differently: Why should an applicant who exercises his rights as neighbour under the common law be in a worse position than one who seeks an order compelling a municipality to act in terms of section 21?

[23]

The lack of discretion under section 21 was revisited by the SCA in BSB[9] an obiter dictum in terms of which the Court said as follows in relation to its pronouncement in Lester:

‘ It is nonetheless necessary to observe that if the municipality had properly performed its functions and approached the court in terms of s 21 of the NBSA, the court would, on the strength of Lester, have been obliged to grant an order of total demolition. If Lester is correct a stark dichotomy would exist between our common law and our statutory law in respect of substantially the same remedy. For, in terms of the former, a court would have a broad general discretion, whilst in terms of the latter, a court would have no discretion’[10].

[24] The concern expressed by the Court was that the interpretation in Lester of section 21 could lead to a relatively minor infraction requiring a demolition which would be disproportionate.

Background

facts

[25] The title deed of the Respondent's property is subject to the following restrictive condition of title:

‘(3) The owner of the lot from time to time shall not have the right to erect more than one dwelling house with all the necessary

out-buildings on the lot, nor to construct or erect reed or grass huts thereon;....’

[26] This is the same as the zoning on all the properties adjoining it. The general character of the neighbourhood is one of single dwelling stands.

[27] During 2019, the respondent who owns the property approached his neighbours, including the applicants, to discuss removing the existing conditions of title which prescribe that only one dwelling could be built on the property. He stated to the applicant that he wished to erect a second dwelling for his direct family. The applicants had no difficulty with this proposal. There are in the neighbourhood a number of home owners who have, with the necessary approval, added what are commonly known as granny flats or garden cottages.

- [28] During early 2020, the respondent started with the construction of the 'second dwelling' which he had discussed with his neighbours. Soon after the construction started, the applicants became concerned that the respondent was not in fact constructing a garden cottage. Their suspicions were confirmed when a second floor was added. It soon became clear that the respondent was constructing a double storey block of flats, with four flats on the ground floor and another four flats on the first floor. The appearance of the structure was no longer reconcilable with an intention to build a second dwelling for a relative. It is not in dispute that the intention of the respondent is to construct lettable units for his commercial benefit.
- [29] In February 2020 the applicants began a process of objection through their Ward Counsellor with the Municipality. This resulted in a notification to the respondent to stop the building operations. This was ignored.
- [30] Due to the Covid -19 lockdown work ceased on the building during March 2020. Work commenced again in mid-October 2020. immediately thereafter the applicants recommenced with the process of objection by communicating directly with officials at the Municipality.
- [31] On 03 November 2020 the applicants were informed by email that the Municipality's Building Inspector had issued a second notice
- that the works be stopped.
- [32] This second order to stop building also did not have the desired effect. On 09 November the builders were on site and working at pace. Trucks were off-loading bricks and the works were nearing completion. By 25 November 2020 the project had reached a point where the interior walls were up and the external doors installed. The Municipality was informed of this and confirmed that the matter had been handed over to its legal department.
- [33] By this stage the respondent had brought an application for the rezoning of the property to allow for nine residential units to be built. On 25 November 2020 the respondent and officials of the Municipality met and an agreement in terms of which the respondent was afforded three months to finalize the application for rezoning and the respondent agreed that no further construction on the project would take place.
- [34] The respondent did not, however, cease the building operations but continued until the order in the A portion of this application was obtained by the applicants in the urgent court.
- [35] The respondent has lived in the property more than 20 years. He says that in early December 2019 he decided that he wanted to develop eight residential units on his property for the purposes of letting them out. To this end, he says, he approached Mr Simphiwe Ngoqo, of Zimbali Consultant (Pty) Ltd ('Zimbali') who conduct the business of inter alia town and regional planners in order to get the necessary approvals for the project, including the rezoning thereof. In support of this the respondent attaches a detailed but unsigned quotation from Zimbali.

- [36] The respondent does not dispute that he started construction before the rezoning had been approved and before he had approved building plans. He says that he was advised that he could do so by Mr Ngoqo.
- [37] The respondent admits that he got the notices from the Municipality to stop construction. He admits that he ignored the notices. He says that this was because he assumed that Zimbali was 'on top of the situation.' He says that it later came to his attention that Zimbali had not carried out its mandate. He says that he has since appointed a new Town Planner, Mr Jan Schoeman who is attending to the application for rezoning. He acknowledges that the building plans are non-compliant in that the balconies of the block of flats look over neighbouring properties. He says this will be amended. He says the building plans were drawn were drawn by a person who he knows only as 'Kenny' of Bana Ba Mologadi Architects.

Discussion

- [38] The respondent admits that he knew that a process of approval was necessary in order to enable the development of his property to take place. This stands to reason. Most people understand that there are town planning schemes and building regulations to be overcome for development on residential property to take place. The fact that the respondent is a retired police officer is indicative of a basic understanding of legal principles. Regardless of any specialised knowledge as to town planning law or building law this would, to my mind, entail an understanding that the thing that permission is sought for may not be done until such permission is given by the relevant authorities
- .
- [39] The fact that the development was started before the permission was granted suggests a disregard for the legal prescripts pertaining to the preservation of the rights of the community in which the respondent lives. I do not put any store by the respondent's assertion that he believed that he could build without the permission because he was told that he could do this by Zimbali.
- [40] The nature and extent of the development is significant as is its deviation from the legal prescripts. It entails a movement from single dwelling residential property to a high density residential situation. There is no case made out for the contention that approval is likely to be granted for such a development.
- [41] The respondent admits that the proposed building plans are substantially non-compliant from a structural point of view also.

Conclusion

- [42] In applying the above factors in relation to the exercise of my discretion I must regrettably find against the respondent.

- [43] The reasons for the marked deviation from the law is explained only by the assertion that the respondent believed that he did not have to comply with the law because he was applying for permission to depart therefrom. This, is an untenable explanation.
- [44] As I have said no case is made out as to any prospects of success in relation to achieving the rezoning and removal of restrictive conditions applicable to the property. Such an application is subject to objections of, at least, the applicants and will in all likelihood take a substantial period of time to be brought to conclusion including the exhausting of internal remedies and the perhaps a judicial review.
- [45] There is no reason why the neighbourhood should be faced with the unfinished and empty structure indefinitely. The applicants make the point that the presence of the structure and the uncertainty of the process surrounding it is detrimental to the value of their properties and their ability to attract buyers. To my mind this stands to reason.
- [46] Against this I must weigh the fact that the respondent has invested approximately R800 000 of his pension pay-out in the development.

Unfortunately, this wasted investment occurred as a result of the failure of the respondent to follow the law. It appears that he has taken the position that it is easier to ask for forgiveness than for permission. For this reason, he continued building works in the face of notices to stop construction and continued to build even after he had agreed with the Municipality that he would not do so.

- [47] To my mind the applicants adopted the correct procedure as soon as they noticed that there was an infringement of the law. They have been in constant contact with the Municipality reporting all the while what was happening on the property on an almost daily basis. The fact that the applicants had to resort to an urgent application to enforce their rights suggests that the system has failed them.
- [48] In sum, the respondent has, on his own version, broken the law. The presence of the structure continues this unlawful position. This Court cannot in the circumstances of this case allow for any perpetuation of the flouting of these important legal prescripts.
- [49] Although it was not sought, I have deemed it prudent to order that the demolition take place under the supervision of a structural engineer.

Costs

- [50] Costs were sought against all respondents on the attorney- client scale. The costs were sought against the Municipality on the basis that it failed to carry out its statutory function. The position of the Municipality is that at the time that the application was brought, it had already entered into a legal process in that it had referred the matter to its legal department. Whilst this may be so, the Municipality saw fit to oppose part A of the relief claimed. It argues that it did so to bide its time whilst it took legal advice on whether to actually oppose the application. The advice was ultimately that it should not persist with its opposition and it

followed that advice.

- [51] The applicants in the notice of motion asked for costs against the Municipality in part A, only in the event of opposition. It is of no moment that the opposition was merely to buy time whilst legal advice was sought. The fact is, the applicants prepared for the part A hearing on the basis that there would be opposition from the Municipality. The noting of opposition should not be used as a stopgap. Thus the applicants are justified in seeking the opposed costs against the Municipality in relation to part A.
- [52] The applicants also seek the costs of part B of the application against the Municipality. There was no opposition by the Municipality to the part B relief. The applicants argue that costs against it are warranted because of its failure to properly exercise its function. To my mind there is no basis for a costs order against the Municipality in relation to part B.
- [53] As far as the respondent is concerned, there is no reason why the costs should not follow the result.
- [54] I am disinclined in all the circumstances to order costs on a punitive scale.

Order

- [55] I thus make an order which reads as follows:
1. The new multi-dwelling structure on Portion 2 of Erf 57 Parkhill Gardens Township ('the structure') is unlawful for being constructed in contravention of the first respondent's Town Planning Scheme of 2014 and of restrictive condition no. 3 contained in Title Deed No T26269/2001 and without the prior approval of building plans by the first respondent as required in terms of sections 4 and 7 of the National Building Regulations and Building Standards Act, no. 103.
 2. The second respondent is ordered forthwith to cause the structure to be demolished in its entirety and to remove all rubble emanating from the demolition from the structure, such demolition and removal to be at his own cost.
 3. The second respondent is, at his cost, to take all necessary precautions, including the employment of a structural engineer, to guard against any risk or damage being occasioned by such demolition to buildings which are situated close to the structure and which are at risk of damage as a result of the demolition.
 4. The second respondent is to pay the costs of this application, inclusive of those of Part A.
 5. The first respondent is to pay the costs of part A of the application, such liability for payment to be joint and several with that of the second respondent, the one paying the other to be absolved.

FISHER J

HIGH COURT JUDGE

Date of Hearing: 26 August 2021.

Judgment

Delivered: 30 September 2021.

APPEARANCES:

For the applicants:

Adv M Verster.

Instructed by:

BMV Attorneys.

For the 1st Respondent:

Adv A Pillay.

Instructed by:

N-Incorporated.

For the 2nd & 3rd Respondents: Adv S Maritz.

Instructed by:

Mark-Anthony Beyl Attorneys.

[1] The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council 1971

(1) SA 56 (A) at 70D.

[2] 2011

(4) SA 149 (SCA).

[3] Ibid at at para 37.

[4] BSB International Link CC v Readam South Africa (Pty) Ltd (279/2015)

[2016] ZASCA 58; [2016] 2 All SA 633 (SCA); 2016 (4) SA 83 (SCA) (13 April 2016) at 25 and 26.

[5] 514/12)

[2013] ZASCA 95; [2014] 1 All SA 402 (SCA); 2015 (6) SA 283 (SCA) (22 August 2013)

[6] 1928 EDL 217

[7] Ibid at(at 229-230):

[8] Ibid at 231

[9] Supra n.4

[10] Ibid at para 27.

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