THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 562/10**

In the matter between:

Standard Bank of South Africa Limited	**Appellant**
and	
The Swartland Municipality	**First Respondent**
Michiel Smith Truter Basson	**Second Respondent**
Mario Brand	**Third Respondent**

Neutral citation: **Standard Bank v The Swartland Municipality (562/10) [2011] ZASCA 106 (1 June 2011)**

Coram: **LEWIS, CACHALIA, SHONGWE, THERON and MAJIEDT JJA**

Heard: **10 May 2011**

Delivered: **1 June 2011**

Summary: **Mortgagee should be joined in proceedings that affect property in which it has a real right: where there is no defence to claim for demolition mortgagee cannot interdict municipality from proceeding with demolition.**

ORDER

On appeal from: Western Cape High Court (Cape Town) (Moosa J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

LEWIS JA (CACHALIA, SHONGWE, THERON and MAJIEDT JJA concurring)

[1] This appeal is against the refusal by the Western Cape High Court (Moosa J) to grant either a final interdict or one *pendente lite* to the appellant, the Standard Bank of South Africa Ltd (the bank), to prevent or to stay the demolition of a structure by the first respondent, the Swartland Municipality, on land owned by the third respondent, Mr M Brand. At issue is whether the bank, which holds two mortgage bonds in the property, should have been joined as a party to an application in the magistrate's court, Malmesbury, brought by the municipality for the demolition of the structures. Judgment was given by default. The bank was not given notice of the application let alone joined as a respondent.

[2] The bank brought an urgent application to the high court for the stay of the demolition order. Only the municipality opposed the application in the high court. The owner, and the second respondent, the deputy sheriff who was ordered to demolish the structures, did not.

[3] The basis of the application by the bank was that, as mortgage holder, it had a real right in the property, and thus also the structures erected on it. It should, it argued, have been joined as a party and been given the opportunity to defend the application. Moosa J held not. He considered that the bank had only a 'financial' interest in the property, not in the outcome of the proceedings, and that it could not ask that the structures be allowed to stand since they had been erected illegally and that suspending the demolition order would perpetuate the illegality. But he gave leave to appeal to this court against his order.

[4] The issues before us are thus whether the bank should have been joined as a party to the application in the magistrate's court for the demolition of the structures, and if so, whether it is entitled to either an interim or a final interdict staying or prohibiting the demolition of the structures which the municipality contends have been erected illegally. Before turning to these some factual background is required.

[5] In 1998 Brand acquired land at 3 Simmentaler Street Malmesbury (Erf 7407). On 11 August 2006 he granted a mortgage in favour of the bank. In October and November of 2006 he erected various structures on the land without first obtaining permission from the municipality. It is not disputed that these structures were

unlawfully erected. First, the municipality had refused consent to build pursuant to plans put before it, and other structures were erected without building plans even having been submitted. And secondly, some of the structures were built in contravention of the zoning regulations operative in the area. Brand had been warned by the municipality in writing not to proceed with the buildings in accordance with the unapproved plans.

[6] In April 2007, when the structures had already been illegally erected, Brand obtained a second mortgage bond from the bank over the property. Two years later he was in default, and on 30 April 2009 judgment against Brand was given to the bank allowing it to foreclose on the property. Fortuitously, the magistrate's order that the illegal structures be demolished was given the day before – on 29 March.

[7] On 4 May 2009 a writ of attachment was issued. And on 26 May Brand sent the bank the demolition order. The bank's attorney immediately contacted the municipality's attorney and 'without prejudice' discussions took place. These came to nought. A sale in execution of the property was scheduled for 16 July 2009. The municipality proposed, however, to proceed with the demolition. But eventually the municipality and the bank agreed that neither the sale in execution nor the demolition would take place before the bank had instituted an urgent application to stay the demolition. The agreement was made an order of court on 8 June 2009 and the urgent application was instituted on the same day.

[8] The basis of the application was that the bank had a right in the property as bond holder, and that it should have been joined as a party to the application in the magistrate's court. As I have said, Moosa J in the high court held that it did not have an interest in the outcome of that litigation – an application for the demolition of an illegally erected structure. I turn to that question.

Joinder and a mortgagee's interest

[9] It is trite that a mere financial interest in the outcome of litigation does not give a party the right to be joined in legal proceedings.[1] But a mortgagee, as the holder of a real right in property, which includes buildings on the land, erected lawfully or otherwise, in my view clearly has more than a financial interest in the outcome of proceedings for the demolition of those buildings. In *Home Sites (Pty) Ltd v Senekal*[2] Schreiner JA said that where a person claimed to have a servitude in land, and the validity of the servitude might become an issue in litigation between other parties, she had a clear right to be joined – to be given an opportunity to be heard and joined as a party. He cited in support of this the criterion stated in *Collin v Toffie*:[3] where a person has a 'direct and substantial interest in the results of the decision' the matter cannot be 'properly decided' without her being joined as a party.

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[1] See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169-170, and the authorities cited in *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed by Andries Charl Cilliers, Cheryl Loots and Hendrick Christoffel Nel at 217 and in *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa* Vol 1 (looseleaf) eds H J Erasmus and D E van Loggerenberg at 175.
[2] *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 520-521.
[3] *Collin v Toffie* 1944 AD 456 at 464.

[10] In my view the bank had a clear and substantial interest in the outcome of the application in the magistrate's court. The value of the property in which it had real rights would no doubt be affected by the demolition of structures erected on it. The bank's ability to sell the property for the amount owed to it was placed in jeopardy. It was accordingly necessary for the municipality to join the bank as a respondent in the application.[4]

[11] The municipality's response that it was unaware of the existence of the two bonds does not assist it. Bonds are registered in the Deeds Office and the municipality is deemed to have knowledge of their existence: *Frye's (Pty) Ltd v Ries*.[5]

[12] The high court thus erred in finding that the bank did not have a right to be joined. But that does not mean that the magistrate's demolition order is a nullity. The consequence is that the bank cannot be met with the *exceptio rei judicata*.[6] That brings me to the question whether the bank was entitled to relief in the high court.

Was the bank entitled to a temporary or final stay of the demolition order?

[13] The bank argued that since it had a right to be joined it is entitled to the relief claimed. It pointed out that the application for demolition was brought in terms of s 21 of the National Building Regulations and Building Standards Act 103 of 1977. The

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[4] As to necessary joinder see also *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) paras 29-39 and L T C Harms *Civil Procedure in the Supreme Court* B-103.
[5] *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582A-583F.
[6] *Jones & Buckle* above at 179, citing, amongst others, *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 655ff and *Home Sites* above at 520-521.

bank, as a person having an interest in the property, was entitled, it contended, to apply to the municipality in terms of s 18 of the Act to permit a deviation from the applicable building regulations and might, if successful, have been able to avert the demolition. If it had known of the demolition proceedings it would have made such an application. If the bank were granted permission to deviate, the municipality would not have succeeded in its application for the demolition order. The argument is entirely speculative. It certainly does not show that the bank had a prima facie right to interdict the demolition, let alone a right that would found a final interdict.

[14] As argued by the municipality, the bank's proper course of action would have been to seek rescission of the order. Although it would not have been able to appeal against the order, not being a party to it, it could, in terms of rule 49(1) of the Magistrates' Courts Rules of Court, have applied for rescission, on good cause shown, within 20 days after obtaining knowledge of the judgment. The subrule gives a person 'affected by such judgment' the right to file an application for rescission.

[15] Quite apart from the fact that the bank did not make such an application, it is difficult to see how it could have shown good cause. The structures were illegal. In *Silber v Ozen Wholesalers (Pty) Ltd*[7] this court held that good cause includes the existence of a substantial defence. The bank had no defence to the claim for demolition, given that the structures were erected without permission and in contravention of the municipality's zoning and the Act. Even if it had been joined as a respondent, as it should have been, it could not have defended the application since

[7] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353G-H. And see the other authorities cited in *Jones & Buckle* above Vol 2 in its commentary on rule 49.

the Act gives the municipality the right to demolish illegally erected structures. In the circumstances the bank was not entitled to the relief that it sought in the high court.

[16] The appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

APPEARANCES:

APPELLANTS:	F S G Sievers Instructed by William Inglis, Cape Town Lovius Block Bloemfontein.
RESPONDENTS:	J W Olivier SC Instructed by Terblanche Slabbert Pieters , Malmesbury; Naude's Attorneys, Bloemfontein.