THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 279/2015

In the matter between:

BSB INTERNATIONAL LINK CC **APPELLANT**

and

READAM SOUTH AFRICA (PTY) LTD **FIRST RESPONDENT**

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **SECOND RESPONDENT**

Neutral citation: *BSB International Link CC v Readam South Africa (Pty) Ltd* (279/2015) [2016] ZASCA 58 (13 April 2016)

Coram: Ponnan, Majiedt and Swain JJA and Victor and Kathree-Setiloane AJJA

Heard: 3 March 2016

Delivered: 13 April 2016

Summary: Review – municipality – illegal building – sections 7 and 21 National Building Regulations and Building Standards Act 103 of 1977 (the NBSA) – adjacent property owner – locus standi at common law – demolition order – exercise of discretion – stark dichotomy between discretion at common law and discretion in terms of s 21 of the NBSA.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mayat J sitting as court of first instance).

1 The order of the court a quo is amended in the following respects:

(a) Paragraph 1 is deleted and replaced by:

'The purported decision taken by the first respondent on or about 5 March 2013 in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the NBSA) to approve the building plan or plans submitted to it under Reference No 2012/12/0397 in respect of Erf 426, Parkmore Township, Registration Division IR, Province of Gauteng, measuring 991m² is reviewed and set aside.'

(b) Paragraph 4 is amended by the addition of:

'and a suitably qualified engineer has certified that the partial demolition of the building will not compromise the structural integrity and safety of the building or adjacent buildings.'

2. Save to the extent set out above the appeal is dismissed with costs.

JUDGMENT

Ponnan and Swain JJA (Victor and Kathree-Setiloane AJJA concurring):

[1] This is an appeal against an order granted by the Gauteng Local Division, Johannesburg (Mayat J) at the instance of the first respondent, Readam South Africa (Pty) Ltd (Readam), directing that a building owned and constructed by the appellant, BSB International Link CC (BSB), be demolished to the extent necessary to ensure

compliance with the Sandton Town Planning Scheme (the scheme). The order granted reads as follows:

'1. It is declared that the building erected on ERF 426, PARKMORE TOWNSHIP, REGISTRATION DIVISION IR, PROVINCE OF GAUTENG, measuring 991 metres square ("the property"), has been erected and continues to be erected without the prior approval of building plans by the First Respondent [the City of Johannesburg Metropolitan Municipality] in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977 ("the NBSA"), as required by section 4 of the NBSA, and is accordingly unlawful.

2. It is further declared that the building erected on the property and presently being erected on the property, has been erected and continues to be erected in contravention of the provisions of the Sandton Town Planning Scheme, 1980 ("the Scheme"), and is accordingly unlawful.

3. The Second Respondent [BSB] and / or its successors in title to the property is / are directed to partially demolish the building erected on the property so as to ensure that such building shall be fully compliant with

   3.1 the coverage limit of 60% imposed by the Scheme;

   3.2 the parking requirements imposed by the Scheme; and

   3.3 the remaining provisions of the Scheme.

4. It is declared that no such partial demolition of the building on the property in terms of paragraph 3 above shall take place unless and until building plans have been approved by the First Respondent in terms of section 7 of the NBSA.

5. It is declared that no such partial demolition of the building on the property in terms of paragraph 3 above shall take place unless and until the First Respondent has satisfied itself that the building plans and all buildings depicted therein are compliant with the 60% maximum coverage limitation imposed by the Scheme, and also compliant with the requirements of the Scheme relating to on-site parking for motor cars as well as other applicable provisions of the Scheme.

6. Irrespective of whether or not the building on the property has been partially demolished and modified in terms of 3 above, the building on the property shall not be used in contravention of the Scheme, nor shall the property be occupied until a valid certificate of occupancy has been issued by the First Respondent in terms of section 14(1)*(a)* of the NBSA.

7. The Second Respondent is interdicted from occupying or permitting occupation of any building on the property until such time as a valid certificate of occupancy in terms of section 14(1)*(a)* of the NBSA has been issued by the First Respondent in respect of such building.

8. The Second Respondent is directed to pay the Applicant's costs.'

[2] Although the City of Johannesburg Metropolitan Municipality (the municipality) was cited as the first respondent, it filed no answering affidavit and took no part in the proceedings. This was despite the fact that the primary relief sought by Readam in terms of Rule 53 of the Uniform Rules of Court, was directed at reviewing and setting aside the building plans approved by the municipality in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the NBSA).

[3] The supine and uncooperative attitude of the municipality made the task of the court a quo in resolving the dispute between BSB and Readam all the more difficult. It also resulted in an incomplete record being produced by the municipality as required in terms of Rule 53.

[4] It is clear from the evidence that BSB has also played no small part in frustrating Readam's attempts to obtain details of the approval of the building plans by the municipality. It also exploited the ineptitude of the municipality, with the clear objective of obfuscating and delaying matters to enable the building to be completed prior to the court adjudicating the dispute between the parties. The goal being, no doubt, to present the court with a fait accompli, in the form of a completed building. Against this background it comes as no surprise that BSB, in response to Readam's application, launched a counter-application founded on the complaint that it was prejudiced in its defence of the main application, by the inadequate record furnished by the municipality. BSB also sought orders against Readam and the municipality directing Readam to itemise all documents and other information which Readam contended were missing from the record filed by the municipality. Unsurprisingly, an order was also sought staying the review proceedings pending the municipality's furnishing of the missing portions of the record.

[5] In support of its counter-application BSB also relied upon an agreement reached between BSB and Readam at a case management meeting held before Claassen J, where the learned judge directed that the provisions of Rule 35 relating to discovery, inspection and the production of documents, would serve as the basis for obtaining the missing portions of the record allegedly required by BSB.

[6] The counter-application was correctly dismissed on the facts. Somewhat surprisingly BSB thereafter sought leave to appeal primarily on the basis that the court a quo had erred in dismissing its counter-application (for discovery of the full record). BSB asserted that it had accordingly been denied a proper opportunity to be heard and defend itself against the challenges made by Readam. The present appeal is with the leave of this court.

[7] The relief sought by BSB on appeal is that as a consequence of the inadequate record the order of the court a quo falls to be set aside in its entirety and replaced with one compelling discovery by the municipality. According to BSB, the matter should thereafter only be enrolled when the municipality has complied with that order. Assuming in favour of BSB (without deciding) that the dismissal of the counter-application is appealable,[1] as we shall show it is clearly without merit.

[8] BSB submits that there is a dispute of fact on the papers as to whether the requirements of the scheme have been contravened as regards: (a) the permissible coverage of the building on the site and (b) the provision of adequate parking. Each of those requirements will be considered in turn.

Coverage

[1] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I-533B; *Absa Bank Ltd v Mkhize & two similar cases* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) paras 17-19; *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 646 (SCA) paras 50-52.

[9] In terms of the scheme, the property is zoned business 1 and is situated in Height Zone 0. The building comprises new retail and/or office space. Clause 25 of the scheme regulates coverage by reference to Table H. It is clear in respect of a development such as this, that the maximum coverage of a property by a building cannot exceed 60 per cent.

[10] As correctly submitted in Readam's heads of argument, the initial allegation made by Readam in its founding affidavit, based upon the evidence of Mr Kevin Wilkens, a town planner, was that the coverage of the property by the building as at April 2013 was at least 80 per cent. The response by BSB in its answering affidavit was:

'The allegations herein made are denied. The evidence is in any event inadmissible'.

No basis was given as to why it was contended that the evidence, which was confirmed by Wilkens in a supporting affidavit, was inadmissible.

[11] As pointed out by Readam in a supplementary affidavit filed in terms of Rule 53(4), if BSB genuinely held the view that there was no contravention of the maximum coverage limitation of 60 per cent, it was open to it to adduce evidence from its architect or some other suitably qualified expert, who could have authoritatively stated the precise area of the property covered by the building.

[12] Readam, had engaged the services of a land surveyor, Mr Kevin Meluish, who measured the coverage of the site by the building as at October 2013 and found this to be 853,58 m² or 86.13 per cent of the total area of the property which is 991m². The following response of BSB is revealing:

'This appears to be a gratuitous précis and restatement of allegations and arguments and interpretations thereof already made in earlier affidavits. This is primarily a matter for submission and I repeat what has been stated in the earlier affidavits filed in this matter. The argument herein contained will be dealt with at the hearing of this application.'

[13] The direct expert evidence of Mr Meluish, which addresses a central issue in the dispute between the parties, ought not to have been simply glossed over by the deponent to BSB's affidavit, Mr Mike Slim, its sole member. What had been stated in

the earlier affidavit by Mr Kevin Wilkens was simply denied by Mr Slim. When counsel for BSB was asked why the measurements made by Mr Meluish were not disputed he submitted somewhat faintly that the coverage of the site had already been denied and it was not necessary to do so again. It is quite clear that BSB in not countering Mr Meluish's evidence failed to raise a genuine and bona fide dispute of fact in this regard. As stated in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at 375H-I:

'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[14] That there was no foundation for BSB's denial of the extent of the coverage of the property is illustrated by the fact that BSB admitted in a later supplementary affidavit, that it had made application to amend the scheme to permit an increased coverage of 85 per cent. This, however, was refused in April 2014. Counsel for BSB made the startling submission that it was the intention of BSB to continue building and if it eventually transpired that the building exceeded that permitted in terms of the scheme, the offending portion of the building would be demolished. This submission ignores the requirement that the building would have to proceed in terms of lawfully approved building plans in the first place, which self-evidently did not happen here.

Parking

[15] Clause 18 of the scheme read with Table F provides that effective and paved parking for motor vehicles together with the necessary manoeuvring space shall be provided to the satisfaction of the municipality, for shops, six parking bays per 100m² of gross lettable shopping area and for offices, four parking bays per 100m² of office area.

[16] Readam submits that if the building was built in conformity with the coverage permitted of 60 per cent of the site and if the ground floor was utilised for retail purposes, this would require 35 parking bays. It is undisputed that BSB has provided

no additional parking over and above the present 10 parallel bays located in the road widening servitude. It is clear that the building as erected makes no provision for the requisite number of parking bays required by the scheme.

[17] BSB submits that it did have approved building plans. But, if the municipality had purported to approve the plans despite the fact that the scheme had not been complied with in respect of either coverage or parking, the approval would contravene s 7(1)*(a)* of the NBSA and Readam would have been entitled to an order reviewing and setting aside the approval.[2] It follows that the court a quo ought to have granted the primary relief sought by Readam to review and set aside the purported approval of the plans by the municipality and not an order (as per paragraph 1 of the high court's order) declaring that the building was erected without the prior approval of the municipality. This order granted by the court a quo was based upon a finding that the building plans had been cancelled by the municipality arising out of a document included in the record filed by the municipality. This document which on the face of it contained the approval notification of the plans in question, had two transverse lines drawn across it with the word 'cancelled' written in manuscript. No other evidence was furnished to explain the document or its significance. The court a quo accordingly erred in finding that this document standing alone proved that the municipality had cancelled the building plans. The order granted will accordingly be amended by the deletion of paragraph 1 of the high court's order. It will be replaced with an order as originally sought by Readam, reviewing and setting aside the unlawfully approved building plans.

[18] Tellingly, the evidence adduced by Readam that insofar as the permissible coverage and parking were concerned, BSB had contravened the scheme, became either common cause or undisputed. In those circumstances the possible relevance of the content of the record to either of these issues remains unexplained. In any

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[2] *JDJ Properties CC & another v Umngeni Local Municipality & another* [2012] ZASCA 186; 2013 (2) SA 395 (SCA) para 22.

event, BSB had been aware since April 2013 that the complaint by Readam was that it (BSB) was building in contravention of the scheme and without building plans. BSB as the owner and developer was accordingly entitled at any time to documentation in the possession of the municipality, most of which would have emanated from its architects and other consultants. Nothing prevented BSB from accessing and placing the record before the court. In reality, the record such as it was must have been available to it, consisting, as it must have, in the main, of documents that it would have supplied to the municipality. In this context the relief sought was nothing short of audacious and may well have constituted an abuse. It would thus amount to an exercise in futility to accede to BSB's request that the order of the high court be set aside and that the municipality be compelled to make discovery.

[19] The primary contention of BSB having been disposed of, what remains is to consider the correctness of certain of the orders of the high court, which were sought to be assailed on appeal by BSB.

The partial demolition order

[20] The court a quo in dealing with the relevant legal framework examined the provisions of the scheme, the Town Planning and Townships Ordinance 15 of 1986, as well as the provisions of the NBSA.[3] It held: (i) . . . 'our courts have always recognized that there is a duty on the relevant local authority to enforce the provisions of the relevant town-planning schemes'[4]; (ii) 'In the present case, the applicant has presented undisputed evidence demonstrating that the municipality has in any event dismally failed to take any measures against clear contraventions of the applicable Scheme. As such, the applicant effectively has no alternative adequate remedy other than a final interdict . . .'[5]; (iii) . . . 'there is no basis for this

[3] Paragraph 14 to 25 of the judgment.

[4] Paragraph 62.

[5] Paragraph 63.

court to exercise its general discretion against the granting of a final interdict'[6] and (iv) '. . . the applicant has satisfied the requirements of mandatory interdict sought in paragraph 6 of the amended notice of motion[7]'.

[21] Where the court a quo sourced a power of demolition from was not explained. The only power to be found in the NBSA to order the demolition of a building is that in s 21 of the NBSA, which provides:

'**Order in respect of erection and demolition of buildings**

Notwithstanding anything to the contrary contained in any law relating to magistrates' courts, a magistrate shall have jurisdiction, on the application of any local authority or the Minister, to 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 such magistrate is satisfied that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorisation granted thereunder.'

[22] In *Lester v Ndlambe Municipality and another* [2013] ZASCA 95; 2015 (6) SA 283 (SCA) it was decided that a court hearing an application in terms of s 21 of the NBSA, had no latitude not to order the complete demolition of a building once the jurisdictional fact, namely that the building was erected contrary to the NBSA, was established. It was held that the conclusion that s 21 did not lend itself to an interpretation other than that there was no discretion not to order demolition of the building, was unassailable. The law could not and did not countenance an ongoing illegality which was also a criminal offence. To do so would be to subvert the doctrine of legality and to undermine the rule of law. It was for this reason that a partial demolition order could not be granted.

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[6] Paragraph 64.

[7] Paragraph 65.

[23] If s 21 found application here then on the authority of *Lester* the partial demolition order issued by the court a quo may not have been competent. However, it is clear that only a local authority or the Minister has locus standi to bring an application in terms of s 21 before a magistrate. The statutory right to seek the remedies provided for in s 21 is clearly intended to enable local authorities and the Minister, to ensure compliance with the provisions of the NBSA in relation to town planning schemes. Consequently, an individual with standing to bring an application to review and set aside the unlawful approval of building plans by a local authority would not have locus standi to pursue the remedies provided for in s 21. Such an individual would be restricted to seeking a mandamus in appropriate circumstances to compel the municipality or the Minister to act in terms of s 21 of the NBSA, should the municipality or Minister have failed so to act.

[24] That, however, could hardly mean that Readam was without a remedy. For, it is 'of the essence of a town-planning scheme that it is conceived in the general interests of the community' (*The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 70D). And, as the high court observed, '. . . the contravention of the Scheme by BSB, at least in relation to parking in the vicinity, has a direct adverse (and harmful) impact on the applicant'.[8] At common law the power to order the demolition of a building ordinarily finds application in the case of an encroachment by a building onto a neighbour's property. The relevant principles are clearly expressed in the title on 'Things' by C G Van der Merwe in 27 *LAWSA* (2 ed) para 158 in the following terms:

'When a land owner erects a structure on his or her land he or she must take care that he or she does not encroach on his or her neighbour's land. This rule of neighbour law is not only applicable in cases where the building itself or its foundations encroach on neighbouring land, but also where roofs, balconies or other projections encroach on the air space above a neighbour's.

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[8] Paragraph 61.

In the case of encroaching structures the owner of the land which is encroached upon can approach the court for an order compelling his or her neighbour to remove the encroachment. . . Despite the above rule the court can, in its discretion, in order to reach an equitable and reasonable solution, order the payment of compensation rather than the removal of the structure. This discretion is usually exercised in cases where the cost of removal would be disproportionate to the benefit derived from the removal. If the court considers it equitable it can order that the encroaching owner take transfer of the portion of the land which has been encroached on. In such circumstances the aggrieved party is entitled to payment for that portion of land, costs in respect of the transfer of the land as well as a solatium on account of trespass and involuntary deprivation of portion of his or her land.'

[25] Importantly, here we are not concerned with an encroachment on Readam's land. In *De Villiers v Kalson* 1928 EDL 217, Graham JP embarked upon a detailed discussion of the prior authorities on this point. He said (at 229-230):

'[i]t 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.'

In concluding that there was a discretion vested in the Court the learned judge president added (at 231):

'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.'

[26] The high court appeared not to appreciate that it was possessed of the kind of discretion alluded to by Graham JP. What tips the scales against BSB is that it was warned that it was acting illegally and in spite of such warning, it deliberately persisted. If anything, it engaged in obfuscatory behaviour to delay finalisation of this litigation whilst pressing ahead with its illegal conduct. Such conduct can hardly be countenanced by a court. To do so will make a mockery of ordered town planning and by extension the law. The order granted by the court a quo which directed that the property be demolished to the extent necessary to ensure compliance with the scheme, can accordingly not be faulted.

[27] That conclusion notwithstanding, 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. Several important factors appear not to have received due consideration in the interpretive exercise undertaken by *Lester.* First, given the draconian nature of the power (namely to order demolition) the purpose of s 21 must obviously be to ensure judicial oversight. Judicial oversight without a judicial discretion seems, on the face of it, to be a contradiction in terms. The absence of a discretion would in those circumstances run counter to the proper exercise of judicial oversight. Second, if the magistrates' court is merely to perform a rubber-stamping function then a review can hardly lie to the high court at the instance of anyone aggrieved by that decision. Third, in terms of s 21 of the NBSA a court has the power 'to 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'. Consequently, after the commencement of the erection of the building, but before completion of its erection, a court can grant an order either prohibiting the person from 'proceeding with the erection' or an order of demolition. If a court possesses such a discretion then it is difficult to see why, once erection of the building is complete, a court no longer possesses a discretion to even grant a partial demolition of the building to the extent of its illegality. Fourth, irrespective of the extent of the illegality a demolition order must follow. Thus, even a fairly trivial illegality must elicit the rather disproportionate sanction of total demolition. Whether our Constitution would countenance that has to be debateable. Fifth, in terms of s 26(3) of the Constitution no one may have their home demolished 'without an order of court made after considering all of the relevant circumstances'. That plainly envisages the exercise of a broad general discretion. Thus certainly insofar as a home is concerned, with which we are admittedly not concerned here, an interpretation of s 21 that there is no discretion appears not to square with the Constitution. Sixth, the definition of 'building' in s 1*(d)* of the NBSA includes 'any part of a building' which suggests that any relief granted in terms of s 21, may be directed at part of a building. That, it goes without saying, will entail the exercise of a discretion.

[28] It thus seems incongruous to require judicial oversight over the grant of a demolition order in terms of s 21 of the NBSA but then remove any discretion from a court whether to grant a partial or total demolition order. The exercise of a discretion to order the partial demolition of a building to the extent of its illegality, accords with the principle of legality, because in granting such an order a court in no way abrogates its duty to enforce the law. For, these reasons, which are probably by no means exhaustive, it may well be that the interpretation placed on s 21 by *Lester* does not survive careful scrutiny. But, it is not necessary for now to express any firm view on its correctness.

[29] In a case such as this a court is possessed of a broad general discretion to be exercised after affording due consideration to all the relevant circumstances. Obviously, 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. Depending on the circumstances this may require evidence to be given by experts such as engineers and architects to ensure that the structural integrity and safety of the building is not compromised when partially demolished. Accordingly, paragraph 4 of the order of the court a quo which declares that no partial demolition of the building shall take place unless and until building plans have been approved by the municipality, will be amended to include a further requirement that an engineer must certify that partial demolition will not impair the structural integrity and safety of the building, or adjacent buildings.

The certificate of occupancy

[30] BSB alleges that it was originally granted a temporary certificate of occupancy of the building dated 15 May 2013, which was due to lapse on 31 May 2014. In anticipation of this a new temporary certificate was issued dated 15 May 2014.

[31] In the amended notice of motion dated 31 October 2013, Readam sought the review and setting aside of the temporary certificate of occupancy dated 15 May 2013. BSB therefore submits that although the court made no order in this regard, it erred in holding that the second temporary certificate of occupancy expiring in May 2015 was susceptible to be set aside, because the issue of the second certificate rendered the relief sought against the first certificate moot. It is however clear that the grounds upon which the first certificate was challenged - namely that because the approval of the plans was unlawful, any issue of a temporary certificate of occupation in reliance upon the legal validity of the plans, would itself be unlawful – is logically unassailable.

The interdict preventing occupation of the building pending the issue of a valid certificate of occupancy in terms of s 14(1)*(a)* of the NBSA

[32] The court a quo granted an order directing BSB not to permit the occupation of the building until such time as a valid certificate of occupancy was issued. BSB submits that in the absence of any joinder of the occupants it was not permissible for

the court to grant such an order. Importantly, the order that issued in this respect operates only as against BSB and no one else.

[33] It is ordered that:

1 The order of the court a quo is amended in the following respects:

(a) Paragraph 1 is deleted and replaced by:

'The purported decision taken by the first respondent on or about 5 March 2013 in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the NBSA) to approve the building plan or plans submitted to it under Reference No 2012/12/0397 in respect of Erf 426, Parkmore Township, Registration Division IR, Province of Gauteng, measuring 991m² is reviewed and set aside.'

(b) Paragraph 4 is amended by the addition of:

'and a suitably qualified engineer has certified that the partial demolition of the building will not compromise the structural integrity and safety of the building or adjacent buildings.'

2. Save to the extent set out above the appeal is dismissed with costs.

V M Ponnan
Judge of Appeal

K G B Swain
Judge of Appeal

MAJIEDT JA:

[34] I have read the judgment of my colleagues, Ponnan and Swain JJA. I agree with its outcome and the underlying ratio decidendi. I write separately because I

respectfully disagree with their obiter dictum relating to this court's approach and finding in *Lester v Ndlambe Municipality & another.*[9] On the facts and issues that arose in this case, it was unnecessary to deal with this issue.

[35] The obiter dictum seeks to examine the 'stark dichotomy . . . between our common law and our statutory law in respect of substantially the same remedy' as far as a court's discretion is concerned.[10] It concludes that '. . . it may well be that the interpretation placed on s 21 by *Lester* does not survive careful scrutiny. But it is not necessary, for now, to express any firm view on its correctness'.[11] As I see the matter, the reason my colleagues did not deem it necessary to decide the correctness or otherwise of *Lester* is precisely because this case has nothing to do at all with demolitions under statutory law, as was the case in *Lester*.

[36] As an adjoining landowner whose rights were adversely affected by the unlawful construction of the building, Readam South Africa (Pty) Ltd (Readam) approached the court below for a common law remedy, as it was entitled to do.[12] Demolition in terms of s 21 of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) did not feature in the affidavits, the judgment of the court below or the written submissions in this court. So when it was raised by members of the court during the course of counsel's argument, they were unsurprisingly not prepared to deal meaningfully with this aspect when pressed to do so. Counsel for Readam therefore filed supplementary heads of argument after the hearing in which he pertinently pointed out that *Lester* had no bearing on the basis upon which Readam sought relief in the court below or upon the competency of that court to order a partial demolition (under the common law). I agree with that submission.

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[9] *Lester v Ndlambe Municipality & another* (514/12) [2013] ZASCA 95; 2015 (6) SA 283 (SCA).

[10] Paragraph 26.

[11] Paragraph 27.

[12] *JDJ Properties CC & another v Umngeni Local Municipality & another* (873/11) [2012] ZASCA 186; 2013 (2) SA 395 (SCA) paras 34-35.

[37] My colleagues have provided a detailed analysis of the different remedies under the common law (neighbour law) and the statutory law (s 21 of the Act) insofar as demolition is concerned. This court did the same in *Lester* and it is not necessary to regurgitate the principles. It is self-evident that a land owner who complains about the encroachment of its rights by an adjoining land owner has no right to approach a magistrate's court for a demolition order in terms of s 21, which my colleagues have cited in full in para 20. That right is expressly reserved for the Minister of Economic Affairs and a local authority. An affected land owner can only seek a remedy in common law. My colleagues appear to recognise this in para 23. It is necessary to advert briefly to the papers to demonstrate why *Lester* has no bearing on this case.

[38] Readam approached the court below on the basis that the encroaching BSB structure contravened the Sandton Town Planning Scheme (the Scheme). It made no mention of s 21 anywhere in its papers. There was no need to. Section 4(1) of the Act[13] was mentioned in Readam's papers only in the context that any purported approval by the second respondent (the municipality) would have been a nullity by virtue of the contraventions of the scheme in terms of s 7(1)(*a*) of the Act.[14] Section 21 of the Act and *Lester* feature nowhere in the papers or in the comprehensive, well reasoned judgment of Mayat J. The reason is not hard to find: this case had nothing to do with it.

[39] A useful comparison can be drawn (as Readam's counsel has done in its supplementary heads) between Readam's position here and that of Mr Haslam, one of the shareholders and directors of the second respondent company (High Dune) in *Lester.* His holiday home, registered in the name of the company, adjoined the home

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[13] Section 4(1) reads as follows:
'(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.'

[14] Section 7(1)(*a*) reads:
'(1) If a local authority, having considered a recommendation referred to in section 6(1)(*a*) – (*a*) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof.'

of Professor Lester, which was the offending structure in that case. The municipality sought a demolition order in respect of Lester's unlawfully erected home (this was common cause) in terms of s 21 of the Act. The second respondent was initially cited by the municipality as a respondent with a direct interest in the matter. The second respondent, however, successfully applied on an unopposed basis to be joined as a co-applicant with the municipality. It made common cause with and supported the relief claimed by the municipality. As stated (in *Lester* para 21), the second respondent did not seek any common law remedies, nor did it rely on the common law (neighbour law) principles – it supported the municipality's claim for a public law remedy under s 21. A detailed discussion ensued in *Lester* (in paras 22 and 23) on the differences between a s 21 demolition and one based on neighbour law. That was necessary in view of the high court's erroneous approach in *Lester* that that was a neighbour law case. In the present instance the converse applies – this is a neighbour law case, based on the private law remedy of partial demolition available to an affected land owner. Readam could not and did not seek a public law remedy under s 21 of the Act, nor did it rely on any of the provisions of the Act at all. Hypothetically, absent the municipality's participation in *Lester*, the second respondent there had a neighbour law remedy available to it. That would have entailed an order for either partial or total demolition in the discretion of the court.

[40] I do not propose traversing afresh the ratio decidendi in *Lester* – the judgment speaks for itself. An attempt to appeal to this court's unanimous judgment was unsuccessful – the Constitutional Court dismissed Professor Lester's application for leave to appeal with costs on 10 September 2013.[15] While an obiter dictum is not binding authority, it does have some persuasive value, particularly coming from this court. In *Turnbull-Jackson v Hibiscus Coast Municipality*[16] Madlanga J explained it thus:

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[15] *Matthew Robert Michael Lester v Ndlambe Municipality & another* CCT 115/13.

[16] *Turnbull-Jackson v Hibiscus Coast Municipality & others* (CCT/04/13) [2014] ZACC 24; 2014 (6) SA 592 (CC) para 61 (footnotes omitted).

'Literally, *obiter dicta* are things said by the way or in passing by a court. They are not pivotal to the determination of the issue or issues at hand and are not binding precedent. They are to be contrasted with the *ratio decidendi* of a judgment, which is binding.'

But the learned Judge adds:

'Only that which is truly *obiter* may not be followed. But depending on the source, even *obiter dicta* may be of potent persuasive force and only departed from after due and careful consideration.'[17]

[41] Our courts have on many occasions emphasized the need to observe the doctrine of precedent. The rationale for it was explained as follows by Brand AJ in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another:*[18]

'Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that the decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'

Hahlo and Kahn[19] state that:

'In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same.'

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[17] Paragraph 56.

[18] *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* (CCT//8/10) [2010] ZASCA 19; 2011 (4) SA 42 (CC) para 28 (footnotes omitted).

[19] HR Hahlo and Ellison Kahn *The South African Legal System and Its Background* (1968) at 214.

[42] Given the centrality of the doctrine of judicial precedent in our legal system, and of the strong persuasive force of obiter dicta from this court, I do not consider it correct or appropriate for this court to call into question a prior judgment of this court in regard to an issue that has no bearing on the outcome of the present matter.

[43] To conclude: this matter was litigated as a private (neighbour) law case by an aggrieved and affected land owner with legal standing to pursue the remedy available to it. The court below correctly decided the matter on that basis. The order for a partial demolition of the unlawful structure was, in the exercise of the court's discretion, properly made as the appropriate remedy in the circumstances. Section 21 of the Act, and the issues in *Lester*, have no bearing whatsoever on this case. *Lester* concerned a public law statutory remedy in an instance where the unlawful erection of the offending structure constituted a criminal offence. It remains binding authority, notwithstanding the reservations expressed obiter by my colleagues.

S A Majiedt
Judge of Appeal

Appearances:

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