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PRACTICE ADVISORY – May 2014

Demolition of Unauthorised Building Works

[Lester v Ndlambe Municipality and Another \(514/12\) \[2013\] ZASCA 95 \(22 August 2013\)](#) dealt with the construction of a house in Kenton-on-Sea by Professor Lester, the value of which was estimated to be worth approximately R8.0-million. The design of the building went through numerous iterations, which were all objected to by a neighbour and which subsequently initiated no less than six separate legal proceedings to halt approval or construction of the house. The Ndlambe Municipality approved certain of Lester's various building plans, but the courts overturned all but one early approval on the grounds of procedural irregularities. Although the neighbour was successful in all its legal proceedings, Lester did not appeal the municipality's refusal to approve his plans, nor did he appeal the courts' findings. In fact, he disregarded all findings and interdicts against him and proceeded to complete the building works to a design which was not approved. In a final action, the municipality sought a demolition order against Lester, which the Court granted: it was this judgement that Lester appealed in the SCA.

The following aspects of the SCA's judgement should be of particular interest to architects:

1. The National Building Regulations and Building Standards Act (103 of 1977), section 4(1) stipulates that "*No person shall without the prior approval in writing of the local authority ... erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act*". Section 4(4) renders the contravention of 4(1) a criminal offence and section 21 empowers a magistrate, "*on the application of a local authority ..., 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 ..."*". Crucially, the SCA found, at [21], that
"The language of the provision gives a magistrate no latitude not to order the demolition once the jurisdictional fact, namely that the building was erected contrary to the Act, is established."
2. Although, at [22], the Court accepted the principle that "*Neighbour law has long recognised that in matters of encroachment, courts have a discretion to award damages instead of ordering the removal of the offending structure, the deciding factor being the disproportionality between removal of the encroachment measured against the damage or inconvenience of the plaintiff*", it rejected its application *in casu* on the grounds of the illegality of the structure and the criminal conduct of the owner (in terms of section 4(4) of the Act). At [23], the judgement states,
"the law cannot and does not countenance an ongoing illegality which is also a criminal offence. To do so would be to subvert the doctrine of legality and to undermine the rule of law"
3. The Court also explored the level of obligation on the local authority to take steps against a person erecting a building in contravention of section 4(1) of the Act, stating at [26] and [27]
"The power to approach a court for a demolition order in s 21 is unquestionably a public power bestowed upon local authorities. As such, its exercise must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, as stated, is inextricably linked to the rule of law. ..."

[The local authority] **was statutorily and morally duty-bound to approach the court below for a demolition order in order to uphold the law. The court a quo, in turn, had a concomitant duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention and criminal offence."**



4. Finally, the Court considered the failure of the owner to appeal the local authority's decision to refuse its approval of the building plans application and, at [28], quoted the Constitutional Court in *Camps Bay Ratepayers' Association and Another v Harrison and the Municipality of Cape Town* 2011 (4) SA 42 (CC) 62,

“Administrative decisions are often built on the supposition that previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence.”

In summary, the judgement establishes the legal principle that municipalities have a duty, in appropriate cases, to apply to a magistrate's court for a demolition order in regard to buildings erected without approved plans, and that the courts have no discretion but to grant such an order where the illegality is proven.

Nonetheless, it is important to note that the owner's failure *in casu* to appeal the refusal of the local authority to approve his plans (which he could have done to the Review Board established in terms of [section 9 of the Act](#)) bound him to comply with it, irrespective of the correctness or otherwise the refusal.

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