

SUMMARY OF THE JUDGMENT

DEMOLITION ORDER AGAINST NEIGHBOUR'S ILLEGAL BUILDING

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

This is a confirmatory judgment where the Supreme Court of Appeal upheld the court a quo's judgment ordering a property owner to partially demolish those building works that contravened zoning provisions, on application by a neighbour. The National Building Regulations and Building Standards Act affords this remedy only on application by a municipality or the Minister. The importance here is that it was affirmed that, at common law, a court has a discretion to grant demolition, in appropriate circumstances, on application by a neighbour or third party whose rights are affected by the contravention of building regulations.

The Judgment can be viewed [here](#).

FACTS

BSB International Link CC (BSB) owned a property in Parkmore, Gauteng and undertook building operations thereon. Its neighbour, Readam South Africa (Pty) Ltd (Readam), took issue with the building works, arguing that BSB proceeded (i) without the prior approval of building plans by the City of Johannesburg Metropolitan Municipality (the municipality) as required by the National Building Regulations and Building Standards Act 103 of 1977 (the NBSA); and (ii) in contravention of the provisions of the Sandton Town Planning Scheme.

The Gauteng High Court found in favour of BSB as it appeared that the zoning provisions were indeed not complied with and that the municipality had, at some stage, cancelled its initial approval. It therefore held that the building was unlawful and ordered BSB to partially demolish it so as to ensure that it was compliant with the zoning laws. The zoning provisions in dispute related mainly to the coverage limit of 60% and parking requirements.

The municipality was cited as respondent in the High Court hearing but did not take any part in the matter. Its uncooperative attitude made the task of resolving the dispute between BSB and Readam more difficult and resulted in an incomplete record being produced by the municipality as required in terms of the Rules of Court.

The evidence showed also that BSB went to some lengths to frustrate Readam's attempts to obtain details of the approval of the building plans by the municipality. In this exercise, BSB exploited the ineptitude of the municipality in order to delay matters to enable the

building to be completed prior to the court adjudicating the dispute. It also sought to use this fact to its own advantage: it launched a counter-application against Readam's initial claim, arguing that it was prejudiced by the inadequate record furnished by the municipality.

The High Court dismissed the counter-application on the facts. BSB nonetheless 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 from the municipality).

On appeal, the relief sought by BSB was that, as a consequence of the inadequate record, the order of the court *a quo* (i.e. partial demolition) had to be set aside and replaced with an order compelling the municipality to provide the requested documentation for the matter before the court.

HELD:

- The evidence clearly showed that BSB's building works transgressed zoning provisions, both with regard to coverage and parking space provisions.
- As such, in as far as BSB argued that it received approval for its building plans, such approval should be reviewed and set aside. This should have been the court *a quo*'s order (rather than a finding that the building was erected without prior approval). The court *a quo* based its finding on a document included in the record filed by the municipality, which on the face of it contained the approval notification of the plans in question, but 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 without corroborating evidence, proved that the municipality had cancelled the building plans.

Harm suffered by BSB as a result of the municipality's inaction

- No harm was suffered by BSB as a result of the municipality's failure to provide its records for purposes of the hearing. This was because BSB, as the owner and developer, was entitled at any time to documentation in the possession of the municipality, most of which would have emanated in any event from its own architects and other consultants. In this context the relief sought by BSB was absurd.

Its appeal on this point had to fail.

Was the partial demolition order a competent order?

- The court *a quo*, applying the available provisions of the zoning scheme and the NBSA, pointed out that only a municipality or the Minister could, under section 21 of the NBSA, approach the court for a demolition order.
- The court *a quo*, in the circumstances, could thus not order demolition in terms of the NBSA, as an individual with standing to bring an application to review and set aside the unlawful approval of building plans by a local authority (such as Readam), does not have *locus standi* to pursue the remedies provided for in section 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 section 21 of the NBSA, should the municipality or Minister have failed to do so.
- This did not mean that Readam was without a remedy as our courts recognise that the contravention of a zoning scheme may have a direct adverse (and harmful) impact on the rights of others. 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, but case law has held that encroachment is also a consideration where the rights of a neighbour are encroached upon, which would follow where zoning provisions are not adhered to.
- The court *a quo* thus had a discretion and could exercise it, taking into account that BSB was warned that it was acting illegally and in spite of such warning, it deliberately persisted.

(This discretion, the court noted, was thus in sharp contrast to a court's powers in terms of section 21, where there is no discretion to order demolition in such circumstances, on application by the local authority or the Minister.)

The appeal accordingly failed.

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