IN THE SUPREME COURT OF ESWATINI

Case No. 43/2022

HELD AT MBABANE

In the matter between:

DIESEL SERVICES (PTY) LTD **Appellant**

And

MATSAPHA TOWN COUNCIL **Respondent**

Neutral Citation: *Diesel Services (PTY) LTD Vs Matsapha Town Council (43/2022) [2023] SZSC 27 (14th July 2023).*

Coram: **S.P. DLAMINI JA, J.P. ANNANDALE JA AND N.J.HLOPHE JA.**

Date Heard: **25th MAY 2023.**

Date handed down: **14th July 2023.**

SUMMARY

Civil Appeal – Appellant erected a structure within Respondent's area of authority without a permit – Respondent brought proceedings to interdict same, the papers to which were weak and intended relief could not be obtained – It transpired Appellant had applied for a permit which was still under consideration – After Appellant had continued with structure to near completion, Respondent revived application, filed two supplementary affidavits and in the last one sought a demolition of the structure.

As structure was being built Appellant would change plans to accord with what the review of the plans required – Appellant contended that the consideration of the plans had taken longer than permitted hence its continuing with building - Court a quo granted order for demolition under further or alternative relief – No proof Appellant granted an opportunity to address the issue of the demolition sought.

Whether it was appropriate for the court a quo to grant such a remedy in the said circumstances and in the manner such was done- Supreme Court reverts matter to the High Court to inquire into the question of an appropriate relief with the parties having supplemented their papers in that regard including whether there was any irregularity posing a danger by the structure as it stood.

JUDGMENT

HLOPHE JA

[1] This is an Appeal from a judgment of the court *a quo* per Judge T. Dlamini, in which he ordered the appellant to demolish a certain structure which the latter had built without a permit in an area situated within the boundaries of the Matsapha Town Council, where the building of a structure is controlled, and may not be done without a permit issued by the relevant department of the Town Council.

[2] The material facts of the matter are mainly common cause and they are that the Appellant, a business entity in Matsapha, constructed a structure within the Matsapha Industrial Site, on a plot fully described as Portion 2 of Lot 445, Matsapha, which it owned, without having first been granted a permit to do so, given that the area in question is part of a controlled area under the auspices of the Respondent herein.

[3] It would appear from the facts that on or around the 9th June 2021, the Respondent's inspectorate noted that construction was taking place on the plot in question whilst driving around the Matsapha town. In fact it is alleged that at the time one of the directors of the Appellant Mr. Tommy Kirk and some workmen of his were busy on site, moving up and down thereon, it being apparent they were putting up a foundation. Although the deponent to the Respondent's founding affidavit claimed that when they engaged the Respondent's said director, advising him to stop what he and his men were doing there without having first obtained a permit to put up the structure in

question, the latter refused to cooperate and allegedly continued with what he and his men were doing.

[4] Of course in the papers later filed of record in court in answer to an application for an interdict filed by the Respondent, the Appellant denied the account given by the Respondent, particularly that it had refused to heed the call for it to stop building and that it had instead undertaken to continue with the alleged exercise. It had been contended by the Appellant that what they were doing at the place as referred to by the Respondent was the covering with concrete, of drainage pipes and electric cables. The latter cables had hitherto been routed overhead and the idea was to divert them to underground.

[5] It is not in dispute that the Respondent had at the same time served Appellant, through its director Mr. Kirk, with a document known as a 'Contravention Notice' whose purpose, it was contended, was to notify the Appellant to stop construction of the structure until a permit had been sought and obtained. It was only to transpire later and in answer by the Appellant, that it had in fact and prior to commencing the exercise, applied for the permit concerned sometime in May 2021. It appears that the response to the said application was only given after the Respondent had lodged the application in Court, seeking to *inter alia* interdict the construction complained of. It can be deciphered from the papers in question that the response to the application for a permit was a refusal to grant the permit requested. Notwithstanding the refusal, certain corrections were made. The Appellant appears to have taken

advantage of those and adjusted its plans accordingly and later remodelled the structure such that it ended up being in line with the requirements.

[6] Proof that the appellant would model its structure in line with the corrections made is in that the to and fro consideration of the plans resulted in the document issued later by the Respondent known as a 'Deferral Notice'. The deferral notice appears to have contained the final corrections that needed to be put in place by the Appellant when one considers the nature and tone of its contents. I associate the terming of that document as a deferral notice in line with this observation. The deferral notice stated the following on what the appellant needed to have done on the reviewed plans:-

> *"1. Indicate parking on site.*
>
> *2. Provide area of existing building.*
>
> *3. Comply to 2m set back at rear of building as stipulated in the Matsapha Town Planning Scheme 2019 or apply for special consent according to sub-clause (31.1) (a) in the Matsapha Planning Scheme".*

[7] Otherwise the proceedings that were filed on an apparent urgent basis by the Respondent, seeking the reliefs set out herein below, did not yield the urgent fruits intended. It had a number of challenges. For instance whereas the application was meant to be urgent, it was not accompanied by a certificate of urgency, which was an anomaly. The allegations were on the face of it very shallow and did not give a good, full, detailed and sufficient account as to

what had actually happened and why the then Applicant was supposed to be favored with the reliefs sought. The reliefs sought were the following:-

> *"1. That the normal time limits and forms pertaining to service be dispensed with and have this matter enrolled on an urgent basis.*
>
> *2. Directing Respondent to comply with the Contravention Notice served upon it on the 9th June 2021.*
>
> *3. That pending Respondent's compliance with the provisions of Section 11 of Act No.38/1968, Respondent and or anyone purporting to act upon its mandate, be interdicted from conducting operations for the construction of the building works presently underway upon Portion 2 of Lot* 445 , Matsapha.
>
> *4. Costs of suit.*
>
> *5. That this Honourable Court grants such further or alternative relief as shall appear to be met".*

[8] Supplementary founding affidavits were filed twice before the matter could be heard with an interlocutory application for condonation filed by the Respondent, being a third set of papers to be filed by it; in terms of which it sought an order allowing it the *ex post facto* filing of a certificate of urgency. In fact the last of the two supplementary founding affidavits was at the instance of the court *a quo,* after it had apparently appeared to Judge Dlamini who was seized with the matter, that the answering affidavit and the supplementary one already filed of record, had lots of gaps. In fact, the two earlier affidavits founding the Respondent's case had said nothing about a demolition of the structure built by the Appellant. They were insistent on the initially filed case where an interdict was being sought.

[9] The following time limits between the filing of the various affidavits are worth taking note of. The initial application and founding affidavit were filed on or about the 10th June 2021. The first supplementary affidavit was filed on or about the 6th July 2021 after an answering affidavit which became a real challenge to the issues raised in the founding affidavit had been filed around the 17th June 2021, effectively bogging down the application and making the relief sought impossible to attain on the papers initially filed. For one who had seen that answering affidavit, it did not come as a surprise that settlement negotiations were thereafter initiated between the parties. The Supplementary affidavit filed at the instance of the court *a quo* was filed 9 days after the first supplementary founding affidavit. It gave a fairly detailed account of the circumstances of the matter. It also sought to change course in as far as the reliefs sought were concerned. It for the first time sought a demolition of the structure built as opposed to the interdict it had initially sought but apparently failed to prosecute owing to the lacklustre papers it had filed; conduct that allowed the Appellant to build the structure to the point where insisting on the reliefs initially sought by the Respondent was proving futile. Of further concern is the fact that as the structure was rising yet the initial plans were being reviewed and approved from time to time by the Respondent with the Appellant changing the structure accordingly. The result of that conduct was ensuring that the structure eventually produced was not *strictu sensu* one done at least without the Respondent's approval.

[10] It deserves mention as well that although the interdict to restrain the continuation with the building of the structure was initially sought as a matter of urgency, it was not persisted with as such in Court. What one sees

from the papers is that a somewhat water-tight answering affidavit was filed by the Appellant. It in my view answered the case of the then Applicant somewhat sufficiently. It *inter alia* raised an objection with regards the failure to file a certificate of urgency as well as correcting several other apparent factual inaccuracies such as suggesting that certain papers were filed on a holiday whilst also alleging that certain other official functions of the Respondent in relation to the matter were performed on a Saturday. I am raising this point so as to indicate the fact that the initial application filed had very limited chances of succeeding if the matter had to be contested in Court.

[11] It did not come as a surprise when it later transpired that the matter was being settled amicably with the Appellant allegedly undertaking through his attorneys not to continue with the construction in question. The point being made here is that had proper and up to standard papers been filed by the Respondent, it is highly likely that an interdict would have been obtained and possibly the construction of the structure would have ceased there and then and the cessation of the construction works would not have necessitated the cooperation of the alleged offender in the name of the Appellant.

[12] So much reliance appears to have been placed on the alleged settlement by the Respondent and the conclusion to draw is that the Appellant was not at the same level and possibly did not need it as did the Respondent. It cannot be denied though that prior to its commencing the construction of the building as allegedly discovered on the 9th or so of June 2021, the Appellant had filed an application for permission to establish an extension of an already

existing structure, which it was revealed was required by the Appellant's tenant, the Eswatini Revenue Authority for a warehouse. The plans submitted at the time requested permission to include building on a road reserve.

[13] The extension in question had apparently commenced before there was a response from the local authority, the Respondent herein. It was then that a "Notice of Contravention" was served on the Appellant's Director, Mr. Kirk. This was followed by the response to the application from the Respondent for a permit to construct a structure. It advised Appellant that his application was unsuccessful *inter alia* because the Respondent had no power to allow him to build on a road reserve and directed it to seek such permission from the appropriate authority at Central Government.

[14] Whereas reviewed drawings were made available to the Respondent addressing the shortcomings picked or observed in the earlier drawing, it is unclear what happened thereafter because the Respondent was to later discover that the structure was at the time already up with steal structures having been erected together with a corrugated roofing having been installed. The Respondent contends that the Appellant took advantage of the week of the unrest that rocked the country in June 2021 and rushed the structure to the level it got to, mentioned above.

[15] The Appellant explained this development by saying that in terms of the applicable laws or regulations governing the undertaking of the Respondent, if a person who or an entity which, wished to carry out a construction, made

an application to the local authority to be allowed to do so, did not get a response approving or declining the application within six (6) weeks, he or it would be entitled to commence the construction of the said structure except that it had to be taken up to foundation level. The director of the Appellant, Mr. Kirk, clarified further that it was as a result of the Respondent's failure to communicate its determination on the application before the lapse of a six weeks period that it put up the structure concerned and pushed it to the level it was in when the proceedings commenced.

[16] Whereas the Respondent allegedly issued the Appellant with the second Notice of Contravention with a demand that it stopped continuing with the building in question, the Appellant's director denied receipt of the said notice by the Appellant.

[17] It was after this alleged development (that is, the filing and serving of the second Contravention Notice), that the Respondent approached Court by means of a Notice of Reinstatement for the hearing of the matter *inter alia* stopping continuation with building the structure concerned. It is common cause that instead of hearing the matter, the court *a quo* ordered the parties to file their supplementary affidavits. It was in the affidavit filed in furtherance of the order of court that the Respondent clarified that the interdict hitherto sought as a relief was no longer suitable, it having been overtaken by events. In other words the appellant had allegedly completed building the structure as at that point and the order sought purporting to stop the building of the structure was no longer suitable.

[18] In his said supplementary affidavit, the Chief Executive Officer of the Respondent requested that the latter be granted instead a demolition order for the structure built by the Appellant on the grounds that it had been constructed without a permit.

[19] The case advanced by the Appellant in the court *a quo* was that the Respondent had unjustifiably refused to approve its permit and had sought to rely on unsubstantiated grounds to justify the said refusal. These include among others the following:-

19.1 The Respondent sought to insinuate that it was not entitled to a permit to continue building because it had not provided for parking on the property concerned. This was allegedly not necessary because what was being done there was an extension of an existing structure which already had a car park.

19.2 It had allegedly not provided for an offloading bay which again was allegedly not necessary for the same reason as stated above.

19.3 Whereas the point about failure to provide for the parking bays was being raised by the Respondent as a requirement to be met as it considered the Appellant's drawing, it was allegedly not a requirement applied evenly and to all property owners given that there were those who were allowed to park on the road side parking including being allowed to do their loading and

offloading from there as well. Photographs of random parking and offloading from vehicles by certain businesses in the vicinity were taken and were annexed to the papers filed of record. The two major examples in Matsapha were those of the Appellant's two neighbors in Build It Hardware Store and the Spar Supermarket.

19.4 Respondent had allegedly purported to respond to the Appellant's application after the lapse of 6 weeks as the period allowed for Respondent to consider and complete the process, failing which the party who had applied for the permit is then allowed to continue with building the structure he or she desired, at least up to the foundation level. The regulation allegedly allowed an entity in that situation of the Appellant to build the structure applied for.

[20] The court *a quo* dismissed this argument on the grounds firstly, that from the facts of the matter, it was clear that the Appellant was ignoring that it had submitted revised drawings on the 18th June 2021 which meant that six weeks would have lapsed on the 30thJuly 2021, although that is arguable when considering that what was actually filed on the said date was not the application but a revised drawing, the application itself having been filed on or around the 9th May 2021. The facts however revealed that the construction as on the 15th July 2021 had reached roofing level which was already covered with corrugated iron. On the professed understanding, 6 weeks had actually

not lapsed if everything was reckoned from the filing of the revised drawings, the 18th June 2021. The second ground for rejecting the six weeks argument was that even if six weeks had indeed lapsed, the building had gone beyond the allowed foundation level as in that case it had reached the roofing level, which had already been completed.

[21] The court *a quo* said the following at paragraphs 40 to 42 of its judgment with regards the conclusion it had reached:-

> *"40. On the totality of the facts stated above, it is my finding and conclusion that the respondent committed an intentional and unlawful defiance of the Applicant's authority, and thereby violated the laws administered by it. I am inclined, and do agree, with the submission made on behalf of the Applicant that the Respondent, represented by its director, has become a law unto itself and has no respect for the local authority and the laws it administers.*
>
> *41. The interdict which the Applicant seeks has now become moot, as the respondent has finished constructing the building. In the case of* ***Jan Sithole and 7 others VS The Government of the Kingdom of Swaziland and 7 others, Appeal case no 50/2008*** *(unreported), a full bench of the Supreme Court stated what I quote below:-*
>
> *"It is so trite that a Court cannot interdict something that has already occurred (and) that no authority for the statement is required (paragraph 9).*

42. *A demolition order is an appropriate relief under the circumstances, and may be issued by this Court under further and/or alternative relief. It supports the case and order which was initially sought (to stop the construction until there is compliance with the relevant provisions of the law).*

43. *In the case of* ***River Gate Properties (Pty) Ltd And Another V Mohammed Asmal N.O. and 2 Others (97167/16) [2018] ZAGP JHC 89,*** *Molahleli J dealt with a matter involving a complaint relating to the erection of a building done without compliance with the provisions of the National Building Regulations and Building Standards Act 103 of 1977 of the Republic of South Africa. The complaint is similar to the one in casu. He cited with approval the case of* ***Standard Bank of South Africa Ltd V Swartland Municipality & others 2010 (5) 479*** *where the following is stated;*

> *"The unauthorized and illegal conduct of the third respondent [in unlawfully erecting a structure without approved plans] is contra boni mores and contrary to public policy, and cannot be condoned by the Court. It militates against the doctrine of legality, which forms an important part of our legal system"* (own emphasis).

44. *For the infraction dealt with by Molahleli J, the Court ordered the first and second respondents, in their capacity as trustees of*

the third respondents, to demolish the illegal structures erected on the property under the control and management of the. municipality."

[22] Following its being dissatisfied with the judgment of the court *a quo*, the Appellant noted the current appeal, and set out the following as its grounds of appeal:-

> *"1. The court a quo erred both in fact and in law by granting an order for demolition of the Appellant's extended structure.*
>
> *2. The court a quo erred both in fact and in law by ordering the demolition of the structure when no such prayer was sought in the notice of motion.*
>
> *3. The court a quo erred both in fact and in law by allowing the application for demolition on the papers as they were in Court.*
>
> *4. The court a quo erred both in fact and in law by not considering that the Respondent is a public body that should not refuse with issuing the building permit in a reasonable time, manner and also in good faith.*
>
> *5. The court a quo erred both in fact and in law by not considering the alternatives provided by the relevant laws of the country, which alternatives do not include demolition"*

[23] There can be no doubt that the Appellant built the structure complained of without approval in the overall, that is in the sense of desisting from doing

anything until the plans were finally approved. It cannot be gainsaid that it is important for all functions in establishments like the Respondent to be done according to law at all times. Having said so, it is not clear what negative effect, structurally, the manner in which the Appellant carried out the entire exercise of building the structure he did has, if any. I am however sure it should not count for nothing and certainly ought not be treated like that of a case where there was never even an application and also no variations in the plans considered by the Respondent, which were complied with along the way by the structure being put up, particularly where there were delays in the consideration of the submitted plans. This should be different from that of a situation where no application was ever made and where nothing on the structure can be shown to have been approved at any time. It seems to me that a distinction should be made between a structure that does not comply at all with the requirements from one where the structure put up complies with the requirements of such a structure and plan, with the difference being only on the fact that the commencement of the building did not await fully fledged approval before it commenced. I do not think that sight should be lost completely of a structure built on plans that are approved from time to time in such a way that the product is compliant although the procedure that secured it was fully not compliant.

[24] It cannot be denied in the matter at hand that after the first request per the submitted plans was made, there was eventually a response by the Respondent on what the plans should provide, which later translated itself in the structure eventually put up. We have not been told that the structure as it stood had not complied with the reviewed plans. Sight should not be lost of the fact that the

regulation relied upon by the court *a quo* to order demolition of the structure in question grants the court a discretion to exercise on whether or not to order such a drastic measure.

[25] I say this because it does appear *ex facie* the papers filed of record that after the reviewed drawings were prepared, the non-compliant aspects had been corrected in the structure that was eventually put up. For instance, the first Notice of Contravention MTCI, which was issued on the 9th June 2021, advised or directed the Appellant to correct the infractions noted at the time within 7 days of the date of the notice. The letter of the11th June 2021 on the other hand, spelt out exactly the works that had to be done for compliance to be achieved. It for instance urged the Appellant to liaise with the proper authority with regards building on the road reserve, which was later done when considering the subsequent notice known as the Deferral Notice as it no longer referred to the earlier observed shortcomings but identified new and less serious shortcomings on their face as outstanding.

[26] I also note the assertion per paragraph 3 of the letter of the 11th June 2021, which stated that in terms of the Matsapha Town Planning Scheme 2019, all parking, refuse and loading areas should be confined within the building. It was noted that there had been shown, per the submitted application and locality plan, parking bays on the road reserve, even though no authority had been obtained for it. It is a reality that in the last founding supplementary affidavit, the issue around the parking bays and refuse areas, being on the road

reserve, are shown as having been resolved. At paragraph 11 of the then Respondent's Answering affidavit, it is for instance stated as follows:-

> *"11. I further submit that today the 19th July 2012, there were government officials from the Ministry of Works and Transport who had come to inspect the construction. They took (sic), measured the distance between the road reserve and the building. They concluded by stating that the distance was double that which was allowed by the law. The allowed distance is 19 meters from the centre of the road and the building is at least forty (40) metres from the road. This means that there is no encroachment as the Applicant would want the Court to believe.*
>
> *12. The Government officials were led by one Mr. Shongwe, who informed us that he would furnish the Applicant with a report from their inspection. In fact he was surprised as to why the permit was not granted and also why the government was not cited in the proceedings before Court".*

[27] There is also annexed to the said supplementary answering affidavit, a letter from some Consulting Civil and Structural Engineers dated the 19th July 2021. It suggests on its face that it is a report of sorts from the said Consulting Civil and Structural Engineers to the Appellant herein. It was more about confirmation of an inspection of a Road reserve on portion 2 of Farm 445, Matsapha. After clarifying that the property in question was owned by the Appellant and that the latter wanted to extend an existing building for occupation by a tenant of the Appellant, it disclosed that it had been engaged

by the said Diesel Services (Pty) Ltd, to submit drawings for the proposed building to the Matsapha Town Board. It revealed that the said Town Board had raised a concern that seemingly the building or the parking bays (meant for the intended new building) were to be built on the road reserve. It clarified that to answer the question asked, (i.e. whether or not there was an encroachment), an inspection was conducted on site on the 19th July 2021. This inspection had been attended by the Directors of the Appellant as well as an officer of the Ministry of Public Works and Transport, one Mandla Shongwe.

[28] The outcome of the inspection concerned was recorded as follows at paragraph 3 of the Report or letter:-

> **"3.0. <u>Inspection outcome and Comment</u>**
>
> 1. *Based on the physical inspection and measurements taken on site, the inspection team collectively witnessed physically and confirmed that the building and the parking bays are outside the road reserve limits.*
> 2. *Mr. M. Shongwe suggested that the client, (Diesel Services) must engage the services of a land surveyor to peg out the extent of the road reserve along MR103 road <u>in order to confirm that the building is not within the road reserve as physically observed</u>..."*
>
> (underlining added)

[29] The documents annexed to the supplementary affidavit, particularly the Notice of Contravention dated the 6th July 2021, but bearing the Respondents date stamp of the 9th July 2021, served to again warn the Appellant that it was required to stop carrying out the operations it was carrying out without a permit. However as the operations were ongoing alongside an application for a permit to conduct the said operations, there was issued a Deferral Notice, annexure "MTC5," allegedly under Section 37 of the Building Act of 1968. On a section of the Notice written "Comments", the Respondent's officer mandated, wrote what is referred to in paragraph 6 hereinabove which reads:-

> *"1. Indicate parking on site.*
>
> *2 Provide area of existing building.*
>
> *3 Comply to 2M set back at rear of the building as stipulated in the Matsapha town Planning Scheme or apply for special consent according to sub-clause (31.1) (a) in the Matsapha Town Planning Scheme."*

[29] It should be noted that at paragraph 17 of the supplementary affidavit, the 'Deferral Notice' annexure 'MTC5', is referred to as a letter served on the Appellant to report the outcome of the reviewed drawing submitted by the Appellant. What it recorded is as shown above. A merited comment is that there is not much outstanding for the Respondent to comply with. This observation is confirmed by what is stated at paragraph 14 of the Respondent's supplementary affidavit as read with paragraph 9 of the Replying Affidavit. The long and short of it is that it was there accepted that the alleged contravention as concerned the alleged encroachment on to the road reserve

was indeed resolved. This was put in the following terms in paragraph 14 of the Supplementary founding affidavit as well as on paragraph 9 of the Replying affidavit:-

"14. **Of the Supplementary Founding Affidavit**

Ad 2nd Application for a Permit.

Notwithstanding the above outcome, Respondent was however advised to revise its plans so as to make them to comply with the Matsapha Building codes. Indeed, Respondent took heed of the advice because another application was filed on the 18th June 2021. Apparently, the plans which accompanied this application showed that the overlap (encroachment) onto the Road Reserve had been corrected'.

Paragraph 9 of the Replying affidavit on the other hand reads as follows:-

"9. Ad Para 17

The issue of the construction being constructed on a road reserve was corrected as Respondent issued revised plans which fixed that problem as stated in paragraph 14 of the Applicant's Supplementary Affidavit."

[30] It is important to record that paragraph 9 of the Respondent's answering affidavit does not only confirm that the problem of encroachment was resolved but it also confirms that what else had been expressed as a shortcoming in paragraph 17 was in paragraph 9 of the Replying affidavit admitted to have been resolved. That paragraph (17 of the answering (supplementary) affidavit) is couched in the following terms:-

"17. The Applicant has stated that the reason they may refuse the Application was because the construction was on a road reserve. That is not so. In accordance with the law one has to construct not less than 19 meters from any public road and the construction is at least 40 metres (forty) from the public road. This is in compliance with the laws. The aspect of parking bays is of no moment as the construction is merely an extension and the Revenue Authority premises already have a parking bay. Furthermore a parking is not deemed a construction in terms of the building Act and Regulations."

[31] I have had to go to the extents I have above in an attempt to try and establish what this serious violation the Appellant is accused of is. It is true that the Appellant built the structure in question without authority or permit as is the usual procedure. However, it is my view that the seriousness of that violation is tempered when considering that the plans on the basis of which the building was built were being reviewed with the result that the established structure was accommodating the reviews in the plans. I have already indicated above when agreeing with the court *a quo* that the Appellant did violate the procedure for setting up a building, but I am not sure if other than a failure to adhere to that procedure there is any other serious violation to warrant a drastic order in the realm of the one issued by the court *a quo*, particularly if the only outstanding shortcomings the new building suffers from are those stated ex facie 'annexure MTC5', which are stated as Appellant's having to indicate a parking lot or area on site (which is in any event shown *ex facie* the papers as not being necessary now as it is catered for in the existing structure),

to provide an area of the existing building as well as to comply with a '2m set back at the rear' of the building. I am sure in attributing blameworthiness in the circumstances of the matter it would be advisable to consider even that on the part of the Respondent as embodied in the delays in approving the plans in an apparent urgent situation as well as that embodied in the papers filed to result in a failure to secure an interdict as earlier planned.

[32] I am sure the need to provide a parking area at or for the existing building is not so serious a short coming as to necessitate the demolition of the building just because it was not provided earlier for. It should be easy to obtain. The same rectify applies with regards the '2M set back at the rear' of the building.

[33] The question therefore is, in the circumstances of the matter, was the court *a quo* justified to order a demolition of the structure in question if its only shortcoming or non-compliance was in reality the failure to provide the area of the existing building together with a compliance with a 2m set back at the rear of the building?

[34] From what the court *a quo* said in deciding to order the demolition of the structure is concerned, it is clear that it only effectively concerned itself with the failure to comply with the usual procedure and therefore that because of that failure, it had to follow that any product of that process should lead to a demolition order . I do not think that the court *a quo* was correct in approaching the matter in the manner it did in the context of the peculiar circumstances of the matter. The Respondent's remedy seems to have lied

more on an interdict prior to the constructed structure being completed. In circumstances where the Respondent itself acknowledges that the structure does in the main comply with what a building established within an area under the control of a Town Council, particularly that of the Respondent, should be like, it would be difficult to find that the court *a quo* was correct in ordering the remedy it did.

[35] The reality in law is that whether to order a demolition should be a result of the proper exercise of a discretion by the Court concerned. For starters that discretion would not have been properly exercised if demolition was not part of the prayers sought in the Notice of Motion. The significance of a prayer having to appear *ex facie* the Notice of Motion is to alert all the parties of the case they are going to encounter so that they are prepared for it fully and can assist the court as much as possible for it to come to a correct conclusion. There was no prayer issued so, as to call upon the Appellant to show cause why it could be ordered a demolition the structure in question which would again have put the Appellant on notice and enabled it to meet this now completely different case from the original one.

[36] There is no indication that for instance the Appellant was ever called upon to address the Court on the regulation relied upon by the court *a quo* to order the demolition as it did. That would have included its applicability to the matter in question. Between them I think the parties particularly the Appellant who was to be at the receiving end of the decision arrived at by the court *a quo*, should have been called upon to submit on what he understood the

section relied upon to mean. If this was done there was a violation of the *audi altreram partem* rule (i.e. to hear the other side rule).

[37] I do not think the demolition order should have followed as a matter of course in the context of the matter. It would be remembered that the regulation concerned is in the context of charges having been preferred against the offending party criminally and that as part of the sentence, the court has a discretion whether or not to order a demolition over and above the sentence it would have imposed. Even though the discretion to be exercised by the court is in the context of criminal law when these are civil proceedings it is in my view still a discretion which in law should be exercised both judicially and judiciously.

[38] I am of the view that the South African judgments referred to and/or relied upon by the court *a quo* are not quite on point with the circumstances of this matter and are thus distinguishable from it. There is indeed the hallowed principle of our law that every matter turns on its own peculiar circumstances or facts.

[39] Upon deciding to uphold the appeal I have had to consider what the fairest course is in the circumstances. It seems to me that reverting it back to the High Court for it to determine the question whether or not to demolish the structure with expert reports on whether or not the structure does violate the Respondent's regulations as to warrant a demolition would be appropriate. For a fresh perspective to it, the Court should be constituted differently.

[40] Consequently, I have come to the conclusion that the Appellant's appeal be upheld with the result that the following order be entered:

1. The Appellant's Appeal succeeds.

2. The Order of the Court *a quo* is altered to read as follows:-

2.1 The Application for an interdict is found to have been overtaken by events and can therefore not succeed.

3. To accommodate the demolition order which was belatedly sought, the matter is reverted to the court *a quo* for it to enquire into and determine what an appropriate remedy can be in the circumstances of the matter including an inquiry into the regularity or otherwise of the structure concerned vis-à-vis demolition.

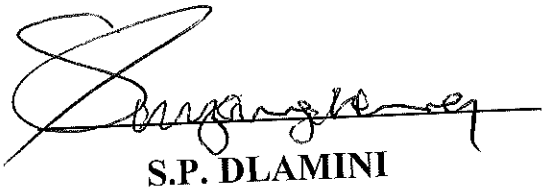
3.1 To give effect to the said inquiry, the parties are free to supplement their papers to include expert evidence on the standing of the building vis-à-vis a demolition. Should the parties wish to supplement their papers in that regard they would have to agree on how to go about it in a Pre-trial Conference.

4. Owing to the peculiar circumstances of the matter and in particular the fact that the Appellant failed to comply with the law governing the construction of buildings within a local authority and that everything that has happened is consequent to that failure, the Appellant shall bear the costs of the matter at both the High Court and this Court, at the ordinary scale.

N.J. HLOPHE

JUSTICE OF APPEAL

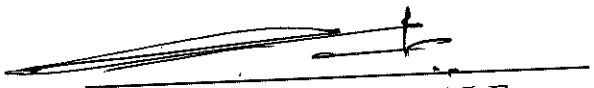
I Agree



S.P. DLAMINI

JUSTICE OF APPEAL

I Agree



J.P. ANNANDALE

JUSTICE OF APPEAL

K. Q. MAGAGULA

For the Appellant: Mr. ~~F. Tengbeh~~

For the Respondent: Mr. S. Jele.