IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 3079/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

NULANE INVESTMENTS 35 (PTY) LTD **APPELLANT**

And

EKURHULENI METROPOLITAN MUNICIPALITY **RESPONDENT**

CORAM: NICHOLLS J et BALOYI AJ

JUDGMENT

NICHOLLS J:

[1] The appellant appeals against a judgment of the Kempton Park Magistrate's Court, which made an order in favour of the respondent, the Ekurhuleni Metropolitan Municipality, in the following terms:

1. *The appellant's erection of the 4 additional buildings on Agricultural Holding 282 is declared contrary to and does not comply with the provisions of Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 as it was erected by the appellant without prior written approval of the respondent.*
2. *The respondent is authorized in terms of Section 21 of the abovementioned Act to immediately demolish the 2 buildings next to the pool and the building intended to house workers. The respondent is authorized in terms of Section 21 of the abovementioned Act to demolish the 4 buildings currently occupied and used for the manufacture of engines on 31 May 2013.*
3. *Costs awarded in favour of the appellant.*

[2] The appellant consented to the first order, the declaration of illegality of the buildings and therefore opposes only the order of demolition. The respondent originally also sought interdicts preventing the appellant from continuing with further unlawful construction and restraining the appellant from conducting the business of maintaining and building machines in contravention of the zoning certificate applicable to the property. These prayers were abandoned by the respondent and the learned magistrate accordingly made no order pertaining to them.

[3] The facts giving rise to the application are as follows. On 9 May 2011, the respondent's building inspector attended at Erf 282, the property of which the appellant is the registered owner, and established that the appellant had erected additional buildings and structures on the property. One of these was being used as a plant for manufacturing and maintaining engines. It was found that the appellant failed to make any application for the approval of the additional building or submit plans therefor.

[4] On the same day, the respondent issued a notice calling upon the appellant to rectify its non-compliance with Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act') within 30 days. The appellant failed to react to the notice. On 25 November 2011 the respondent's attorneys addressed a letter to the appellant requesting it to apply for approval. The letter was then served on the appellant on 18 January 2012. On 1 February 2012 the appellant informed the respondent's attorneys that it had received no notice in respect of Erf 282, only in respect of Erf 281. The notice of 9 May 2011 referring to Erf 282 was again sent to the appellant on 9 February 2012. The appellant was given 5 days to approach the respondent to submit plans, specifications and an application relating to the additional buildings.

[5] On 28 February 2012, because the appellant had denied receiving the notice of 9 May 2011, yet another notice was issued giving the appellant 30 days to obtain written approval or remove the buildings. Thereafter the appellant approached the respondent for approval of the additional buildings. The approval was rejected on the basis that the premises are zoned for agricultural purposes and not industrial purposes. The appellant was denied permission to operate a business of manufacturing engines on the property. The respondent then launched the present application out of the Kempton Park Magistrate's Court in July 2012.

[6] For the most part, the factual allegations in the founding affidavit are admitted by the appellant. It is alleged that the balance of convenience is in the appellant's favour as the respondent would not be prejudiced if the demolition of the structures were to be stayed until the plans have been approved.

[7] The appellant's case is based primarily on three points in limine. The first is that the deponent to the founding affidavit was not authorised to depose to the affidavit or to launch the action. Coupled with this is the argument that the

learned magistrate took into account the replying affidavit of the respondent, which had been struck out by another magistrate. The second point in limine is that the tenants on the property who have a substantial financial interest should have been joined. The third point in limine is that the magistrate's court did not have jurisdiction to hear the matter because of the value of the rental involved in one of the buildings to be demolished.

[8] On the merits it is argued that the court a quo had a discretion whether to order the demolition of the buildings or not. It erred in not exercising its discretion in favour of the appellant.

Jurisdiction

[9] I will deal with the third point in limine first as this point, wisely in my view, was not vigorously pursued by the appellant's counsel. The argument relates mainly to the interdicts, which prayers were abandoned by the respondent. Nonetheless, section 21 of the Act clearly gives the magistrate's court jurisdiction and provides:

> *"21. Notwithstanding anything to the contrary contained in any law relating to the 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 authorizing 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 authorization granted thereunder."*

Joinder

[10] The learned magistrate correctly found that the question of joinder could only relate to the demolition order and held as follows:

"It is settled law that the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the court might make. What may be regarded as a direct and substantial interest has been held to be an interest in the right which is the subject matter of the litigation and … not merely a financial interest which is only an indirect interest in such litigation. This approach has been confirmed by our Supreme Court of Appeal."

[11] The court a quo went on to find that the interest of the tenants was merely financial and accordingly they had no direct and substantial interest in the proceedings. This reasoning cannot be faulted. Moreover, the right of the tenants to occupy the premises is a derivative one, entirely dependent on the appellant.[1] Once the structures of the appellant are illegal the tenants can have no direct and substantial interest in the demolition.

Authority

[12] It is common cause that the deponent to the founding affidavit, Ms Makwela ('Makwela') signed the affidavit when she was no longer acting as the Executive Director of Corporate and Legal Services of the respondent. The court a quo held that Makwela did not at any stage allege that she was authorised to launch this action but merely that she had personal knowledge of the facts (which is not disputed). There is no dispute that the person with the authority did in fact initiate the proceedings. Because of the above, it was held that it was unnecessary to deal with the question of the authority of Makwela.

[13] It is now settled law that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of proceedings and the prosecution thereof that must be

[1] *Burger v Rand water Board and Another* 2007 (1) SA 30 (SCA); *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C)

authorised. In *Ganes & Another v Telecom Namibia Ltd* [2] it was found that the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. So, too, in this case. The firm Koikanyang Incorporated instituted action at the behest of one Andile Arnold Sihlalala on 21 September 2001 in his capacity apparently as Acting Executive Director of Corporate and Legal Services of the respondent. There has been no challenge to the authority of the attorneys, merely that of the deponent. The point in limine is misplaced and falls to be rejected.

Discretion of the magistrate

[14] The Supreme Court of Appeal in the recent case of *Lester v Ndlambe Municipality,*[3] dealt with the question of whether a court has any discretion in deciding whether or not to order demolition where there has been non-compliance with the relevant statutory provision. The court pointed out that to erect a building in respect of which there were no approved plans amounted to a criminal offence in terms of the Act.

[15] Once the jurisdictional facts for a demolition order in terms of section 21 of the Act have been established the court has no discretion but to uphold the rule of law, refuse to countenance the ongoing statutory contraventions and enforce the provisions of the Act. Courts have a duty to ensure that the doctrine of legality is upheld and to grant recourse at the instance of public bodies charged with the duty of upholding the law. In this case the illegality of the additional structures has been conceded. No court can condone ongoing illegality which is also a criminal offence.

[16] The magistrate had no choice but to order demolition once the illegality had been conceded. In the circumstances, the appeal must fail.

I make the following order:

1. The appeal is dismissed with costs.

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[2] 2004 (3) SA 615 (SCA),
[3] (514/12) [2013] ZASCA 95 (22 August 2013)

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C. H. NICHOLLS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree, it is so ordered.

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J. BALOYI
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Appearances

Counsel for the appellant	:	Adv. J Botha
Instructing Attorneys	:	Joubert Scholtz Incorporated
Counsel for the respondent	:	Adv. S van Vuuren
Instructing Attorneys	:	Koikanyang Incorporated
Date of hearing	:	07 August 2014
Date of judgment	:	11 August 2014