REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

22/2/2017 .....
DATE SIGNATURE

CASE NO 2016/27211

In the matter between:

READAM SA (PTY) LTD	APPLICANT
AND	
BSB INTERNATIONAL LINK CC	FIRST RESPONDENT
MIKE SLIM	SECOND RESPONDENT
CITY OF JOHANESBURG	THIRD RESPONDENT

JUDGMENT

SUTHERLAND J

INTRODUCTION

[1] This is an application to commit the first and second respondents for contempt of Court because they did not comply with an order of the SCA[1] to demolish an unlawfully erected building. The parties are all called by their names, Readam (a property owner who complained about the unlawful erection of a building next door to its property) BSB (a property development business, which built the unlawful building), Slim (the controlling mind of BSB) and the COJ (which wrongly approved plans which let the unlawful building be built).

[2] The critical default is the failure of BSB to take the necessary steps envisaged by the order to effect the partial demolition of the building which had been unlawfully erected by BSB.

[3] At the heart of the controversy is non- compliance with paragraphs 3,4 and 5 of the SCA order:

> '1. 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 991 m2, is reviewed and set aside.

[1] Reported as BSB International Link CC v Readam South Africa (Pty) Ltd and another 2016 (4) SA 83 (SCA)

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 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'.**

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.'

THE BACKGROUND

[4] The case has a long history which needs to be traversed to give context to the current controversy. The essential facts are these:

4.1. Readam has owned erven 428 and 430 Parkmore Township, in Johannesburg, for many years. On 17 November 2011, BSB bought the adjacent erf 426. On 5 March 2013, BSB obtained, from COJ, approval to erect the controversial structure. The approval was in flagrant violation of the Sandton Town Planning Scheme of 1980, in three respects; first its footprint covered more than prescribed maximum of 60 % of the area, indeed the coverage is calculated at 80%, second, it exceeded the three storey height limit, and third, less than the prescribed parking facilities had been provided. These are common cause facts, including, of no little importance, the gross irregularities committed by, as yet undisclosed, officials of COJ who were responsible for the blatantly improper approval.[2] This official act was pivotal

[2] These facts about gross irregularities were the subject matter of an affidavit by A E Nortje, the Senior Legal Adviser of COJ which affidavit was filed on 31 May 2013.

in facilitating the unlawful erection, to completion, of the building, and was the decision reviewed and set aside by the SCA order.

4.2. Despite protestation by Readam during the building operations, BSB did not cease the building work and COJ took no steps to enforce the Sandton Town Planning Scheme 1980, thereby aiding and abetting a visible and manifest defiance of the law.

4.3. Readam therefore instituted interdict proceedings on 22 April 2013, including a prayer for an interim interdict. This was about 5-6 weeks after the unlawful approval. The building project would have been in its infancy then. Regrettably, for reasons not apparent to me from the papers before me, the interdict was refused. In consequence, building work progressed, in the face of COJ, which did nothing to stop it. Ultimately, the matter was heard by Mayat J who delivered a judgment on 17 October 2014 which was in substantially the form eventually upheld by the SCA, with marginal modifications by the latter Court. This event occurred about 16 months after the interdict proceedings had been initiated.

4.4. Exactly when the matter was argued is not disclosed. However, in the period between the institution of the interdict proceedings and the judgment of Mayat J, three steps were taken by BSB. First, on 22 August 2013, BSB bought erf 424 which adjoined Erf 426 where the unlawful building was being erected.

BSB took transfer on 18 February 2014. Second, BSB procured from COJ a certificate of occupancy for the building, despite it being incomplete.[3] Third, on 24 April 2014, BSB filed an application for rezoning of erf 426 to allow from 5 storeys and a greater coverage allowance. This application was in due course refused by Planning Tribunal of COJ on 24 April 2014.

4.5. Between 17 October 2014, when Mayat J gave judgment, and 13 April 2016, when the SCA upheld her judgment and dismissed the appeal that BSB had noted, a period of 18 months elapsed. During this period, BSB took two further steps. First, BSB filed an application to COJ to consolidate erf 426 and erf 424. The 'approval' for this consolidation was achieved on 1 June 2015 pursuant to Section 92 of the Town Planning and Townships ordinance 15 of 1986 as 'new' erf 1511. Section 92 provides for such an application to be approved if the local authority does not respond, and in this case the inertia of COJ allowed it to occur by such default. Second, on 3 June 2015, ie two days after the consolidation, presumably based on the notion that the consolidation had resulted in new facts to consider, a further re-zoning application was filed again to obtain permission to build up to 4 storeys and have a coverage of 85% with a floor area ratio (FAR) of 3:4. (Readam lodged an objection on 1 July 2016.)

[3] A E Nortje, the deponent to the answering affidavit of COJ ,in these proceedings, frankly admits that he cannot offer any explanation on behalf of COJ how that happened.

4.6. After 13 April 2016 when the SCA order was given, axiomatically BSB and indirectly, COJ would be required to apply their minds to compliance with the order. As regards those aspects of the order requiring the vacation of the unlawful building and prohibiting further occupation by anyone, by the time I heard the matter on 9 February 2017, fulfilment had been achieved, and therefore that aspect requires no further comment, save as regards the joinder of COJ in these proceedings, and no consideration of any relief is required.

4.7. After 4 months had elapsed from the date of the SCA order, Readam, through it attorneys, having corresponded extensively with BSB and COJ about non-compliance, launched the present contempt proceedings. During that interim, BSB or Slim did two things. First, in The Star newspaper, published on 1 June 2016, it was reported that Slim stated, in effect, that he and BSB would not comply with the SCA order. He is quoted as saying:

> "Mike Slim, the owner of BSB said that there would be no demolition. 'We own the property next door so we will be able to adhere to the coverage requirements and we will get things corrected'; he said."

Slim has not repudiated the report. Second, at BSB's instance, the town planning tribunal convened on 28 July 2016, to consider the second re-zoning application. It was postponed pending the outcome of the contempt proceedings.

[5] What is plain from the papers filed is that no effort whatsoever has been made by BSB or Slim to comply with the SCA order, save as already alluded to as regards terminating occupancy of the building. The consistent stance of BSB has been that it can circumvent compliance by means of a parallel process of the consolidation of erven and by a rezoning of the erven.

THE CRITICAL ISSUES IN THE CONTEMPT APPLICATION

[6] The critical question is, therefore, whether the deliberate course of conduct by BSB and by Slim to 'get things corrected' (to use Slim's reported parlance) constitutes a wilful defiance of the order. Implicated in that question are two wider issues: first, whether the SCA order, properly interpreted, allows for such a course of conduct, and second, whether as a matter of principle and public policy, a litigant can be allowed to unilaterally choose not to comply with a direct order of court, thereby effectively white-anting the authority of the court and *de facto* achieving the objective of the unlawful enterprise by way of a *fait accompli.*

[7] The role of COJ, which was criticised by the SCA for its 'supine and uncooperative attitude' in the management of the litigation up to the appeal, needs to addressed separately. Readam has chosen not to press for relief against COJ, and has eschewed any allegation that the officials of COJ have colluded with BSB to defy the order. This stance, doubtless a pragmatic and perhaps prudent one, given the prospects of an

ongoing relationship with COJ, is in my view, from what I glean from these papers, a generously benign stance. I was moved during the hearing to describe the conduct of the COJ as an example of arch-bureaucratic sloth, and on reflection, that too, may be a benign assessment, taking into account its pattern of conduct from the inexplicably irregular approval of a building plan manifestly non-compliant with the scheme to date.

THE TEST FOR CONTEMPT AND THE RIGHTFUL FATE OF EVASIVE CONDUCT

[8] Two forms of conduct contemptuous of a court exist. The most obvious and most appropriately labelled 'contempt' is that of disturbing actual court proceedings or being rude to the judicial officer. The second kind is what is in evidence in this matter, and which might be more usefully labelled 'defiance of a court order'.

[9] The decision on *Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)* (Fakie) is the leading authority on contempt in this sense. Upon its authority, a wilful and mala fide defiance must be established beyond a reasonable doubt. No onus of proof rests on a person accused of contempt, but a burden to adduce evidence from which an inference of absence of wilfulness or mala fides can be deduced does rest on such a person, once proof is adduced of the existence of an order, service on the person, and non-compliance. The objective of contempt proceedings always embraces a public interest dimension. Such orders are both coercive (ie to compel compliance) and punitive. Cameron JA held at [39] – [42]:

"[39] .... A court, in considering committal for contempt, can never disavow the public dimension of its order. This means that the use of committals for contempt cannot be sundered according to whether they are punitive or coercive. In each, objective (enforcement) and means (imprisonment) are identical. And the standard of proof must likewise be identical.

[40] This approach conforms with the true nature of this form of the crime of contempt of court. As pointed out earlier (in para [10]), this does not consist in mere disobedience to a court order, but in the contumacious disrespect for judicial authority that is so manifested. It also conforms with the analysis in Beyers (in para [11] above), where this Court held that, even though enforcement is the primary purpose of committal, it is nevertheless not imposed merely because the obligation has not been observed, 'but on the basis of the criminal contempt of court that is associated with it'. The punitive and public dimensions are therefore inextricable: and coherence requires that the criminal standard of proof should apply in all applications for contempt committal.

[41] Finally, as pointed out earlier (in para [23]), this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in Burchell (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt.

[42] To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[10] Generally, where, as in this case, non-compliance calls for an explanation that points away from defiance, a party might plead impossibility of performance, or the existence of an impediment inhibiting performance. However, BSB does nothing of that sort. What it does is frankly confess to taking no steps towards compliance and moreover confesses to doing so deliberately. Does the conscious decision to act thus, therefore mean that the element of 'wilfulness' is proven? The word 'wilful' is a dangerous one. It is a pejorative term. It embraces more than just the notion of 'intentionally' but also the mantle of rebuke; ie the intention is unsavoury. In this sense the usual mantra which

requires both 'wilful' conduct and 'mala fide' conduct seems to be tautologous. A negligent failure to perform can never be wilful. A mala fide failure is always wilful.

[11] In the answering affidavit filed by Slim on behalf of BSB and himself, an extensive account is given to offer an exculpation. It adds, mostly, only detail to the explanation already described.

[12] A couple of sly ideas which are offered by BSB and Slim can be disposed of at once.

12.1. First, the notion that the SCA order is moot because the erf 426 in respect of which it was given does not any longer exist because it has been subsumed into a new erf 1511, is just silly. The effect of the consolidation and the re-labelling of pockets of land matter not one jot. The order remains operative.

12.2. Second, the notion that the failure to set out deadlines to comply with the order, (admittedly a naïve aspect of the order, especially given the pattern of recalcitrance and obstruction by BSB prior to the appeal being decided) means that there can be no contempt for non-compliance is wrong. Deadlines to comply in any Court order serve only the purpose of making proof of non-compliance easier. In this case, on the facts, BSB and Slim declare openly that they have no intention whatsoever of complying with the SCA order. Once a litigant bound to comply evinces that stance, intentional

non-compliance is proven, even if given within the hour of the order being handed down. On these facts, it is not necessary even to consider whether a reasonable time has elapsed. The reason that no plans relevant to demolition have been drawn and submitted and no engineer's report is available is that BSB has not set in motion the steps to procure them, an omission they say is deliberate.

12.3. Third, BSB and Slim contend that Readam's zeal to have the order enforced is mala fide and is motivated by its own commercial ambitions in the neighbourhood. Readam's true aim, it is said, is to squeeze BSB into a financial settlement advantageous to Readam. In addition, BSB claims that Readam is itself in violation of the town planning scheme. The short answer to these contentions, even if accepted as true is – so what? A bad motive by an applicant to bring allegedly unlawful conduct to the attention of a court can never be relevant to whether relief to address the unlawful conduct is appropriate. Furthermore, an attempt by BSB to complicate these contempt proceedings with a 'counter-claim' against Readam based on its supposedly unlawful actions was disallowed by me at the hearing because it had no place in these proceedings and was not in any proper sense of the phrase a 'counter application'. The proper business of these proceedings is the question of whether or not there has been compliance with the SCA order. Other scuffles belong elsewhere. If BSB wished to indulge in a tit for tat 'counter' application in which Readam's violations of the Town Planning

> Scheme were to ventilated, the proper time and place would have been when the court was dealing with the substantive applications, or in wholly separate proceedings. Indeed, Readams's violations of the Town Planning Scheme, if proven, have no bearing on BSB's violations and the concept of a 'counter claim' is inapposite. That the kettle calls the pot black is merely the stuff of life and is of no interest to a court.

[13] The true gravamen of the excuse offered by BSB for non-compliance is the assertion that it was proper to deliberately not comply because it was envisaged that through the consolidation of the erven and a re-zoning application, what has been unlawful since 2013 shall enjoy the prospect of 'becoming lawful' *ex post facto*. In other words, since the order, BSB has been busy devising a strategy, which it expects will render the SCA order moot and legitimise its unlawful enterprise. The component pieces of this strategy include the idea that as long as there is a rezoning application pending, COJ will not look at any building plans because, axiomatically, a consideration of such plans has to be undertaken within the context of the prevailing regulatory scheme.

[14] An aspect of this course of conduct thought to be important by Slim is the idea that he can show that this strategy was not dreamt up only after the SCA order was handed down. To this end, he emphasizes the timing of his acquisition of the additional erf, no 424 and a first, failed, re-zoning application, before even the judgment of Mayat J, and the achievement of consolidation of the erven and the second re-zoning application prior

to the SCA order. In short, 'all along' BSB had in mind a 'regularising' of its unlawful conduct.

[15] The flaw in this account is manifest; ie, 'all along' even before the Courts on 17 October 2014 and again on 13 April 2016, declared the erection of the building to be unlawful, BSB appreciated that it had acted unlawfully. BSB's appeal against the order of Mayat J was described as meritless (the amendments to the order being ancillary to the controversy on appeal) and served merely to delay resolution by another year and a half, whilst the unlawful enterprise was allowed to flourish.

[16] The pith of the explanation, then, is that BSB and Slim want to be excused from compliance on the basis that they can bring their unlawful conduct into line with new regulations. I shall return to this point to address why it is inappropriate in principle. However, even on the facts the explanation is wanting. The unlawfully erected building remains a violation of the law. Even if it were to be assumed that the re-zoning application is to run its course (The Planning Tribunal has suspended its proceedings pending the outcome of the contempt proceedings) and a garage at present situate on the additional 'old' erf 424 is demolished to afford a recalculation of coverage and a provision of the stipulated number of parking bays, the unlawfulness continues until these occurrences take place. In this regard, Readam points to two obvious problems.

16.1. First, the garage has a lease until 2022. BSB counters that by claiming to be in negotiations to buy the garage. This need not be doubted, but until a

binding agreement exists, the remaining term remains uncertain, not to mention any time lapse in the demolition of the garage, and ancillary steps.

16.2. Second, is a contention about the likely FAR which COJ will allow. The planning officials of COJ have apparently expressed 'support' for the second re-zoning application, but subject to conditions they will recommend to the planning tribunal. One such condition is that new erf 1511 be subject to a FAR of 1:2; ie the area of the erf upon which the building is founded shall be one third of the whole area. Readam contends that the achievement of that FAR on erf 1511 is impossible. With the current buildings on old erf 424 it is plainly unachievable. But, even if the buildings on Erf 424 are demolished, the existing unlawfully erected building shall still cover 43% of the new consolidated erf, thereby failing to meet that FAR limit. In answer, BSB evades the factual allegations and says this is, among others, a matter for the planning tribunal, thereby confirming, at best, a serious uncertainty about the matter.

IS A CONTEMPT PROVEN?

[17] The conclusion is inescapable that BSB and SLIM are in indeed in contempt.

[18] The strategy pursued by them is inconsistent with any fair meaning to be attributed to the SCA order. Properly interpreted, a demolition *must* occur, not *may* occur. The

only brake on actual demolition are the requirements of safety, thus the involvement of an engineer, and in keeping with the principle of legality, proper plans for the building (the irregular plans having be set aside by SCA order) in modified form being processed and approved by COJ. The order cannot be read to mean that it is open to BSB to take steps that exclude a demolition. The SCA order is not an injunction to engage in a process of obtaining authorisations, permissions and consents to keep a building which was an unlawful enterprise from the very inception of the project.

[19] Moreover, as a matter of principle, to accept BSB's evasive conduct as legitimate is inappropriate.

[20] The full bench decision in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T)* addressed the circumstances where the City had obtained an interdict against the appellant to prevent the use of a residential property as offices in contravention of the town planning scheme, and thereafter, the appellant had sought to suspend the operation of the interdict pending an application to re-zone the property so as to allow its use as offices. Harms JA had this to say at p 347H – 349F:

> "On the assumption that the learned Judge a quo did have a discretion to postpone the operation of the interdict, it is necessary to consider whether he erred in the exercise of its discretion. The learned Judge did assume that he had a discretion and correctly assumed that it was for the appellant to prove facts justifying the deferment of the implementation of the interdict. The only facts relied upon by the appellant are the following:
>
> (a) the cost expended in purchasing and repairing the property.

(b) the appellant's belief that it could utilise the property for business purposes when it purchased the property.
(c) the fact that the appellant will have to incur substantial costs in relocating its business and refitting new offices and also a loss from disruption of business;
(d) the already submitted application in terms of the Removal of Restrictions Act 1967.

As far as the last-mentioned factor is concerned the learned Judge assumed that the appellant had an equal chance of success but that there was no reason to believe that the application will in fact be successful. Appellant's counsel submitted that, since there are factual disputes with regard to the probable success of the application to the Administrator, the Judge a quo ought to have accepted the evidence of the appellant in accordance with the principles stated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5. What was lost sight of is the fact that the rules as formulated in that case did not deal with the situation where the onus in respect of an issue is on the respondent in application proceedings. In such a case the rules work in reverse. The matter is considered on the basis that the applicant's allegations are true subject to the exceptions mentioned in the Plascon-Evans judgment. Cf Cresto Machines (Edms) Bpk v Afdeling Speuroffisier, SA Polisie, Noord-Transvaal 1972 (1) SA 376 (A).

Having regard to the totality of the evidence it seems that the learned Judge was unduly kind to the appellant in his finding in this regard. For purposes of this appeal I shall, however, assume that he was correct. Considerations that weigh against the grant of a suspension of the interdict are the following:

(a) Lower Houghton is a residential suburb with a special character and quality known to everyone. There is only one site in Houghton Estates where office use has been granted by the Administrator. The nature of that site differs completely from that of the appellant's because it is situated immediately adjacent to the Killarney area where there is a large build-up of commercial activity, whereas the appellant's property is completely surrounded by residential properties.
(b) Appellant's case was that a decision by the Administrator could be expected within four months after June 1986. Respondent disputed that convincingly on the papers. The fact of the matter is that even today no decision has been reached and that

indicates that the respondent was correct in stating that a lengthy period was required for finalisation of the pending application.

(c) It is not correct to allow the appellant to present the townships board and the Administrator with a fait accompli created by its own illegal act in considering the application.

(d) The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with a hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict.

(e) The appellant did not take any steps to determine whether its use of the property would be lawful. The evidence of a director of the appellant who was apparently not involved in the purchase of a property or the initial use thereof, was as follows:

'I had not seen the title deeds of the property prior to the purchase thereof and the respondent was unaware of this restrictive condition in the title deeds. In fact I did not peruse the title deeds after registration of the property into the name of the respondent. However, I did appreciate at the time of purchasing the property that office buildings were not permitted in terms of town planning scheme zoning. I believed that this meant one could not rebuild any office block but believed that there was no restriction against using existing buildings for offices as long as the building was not altered.'

The Court a quo stated in this regard that 'one cannot find on the evidence that the respondent was and still is bona fide in its conduct'. That finding was attacked before us. The finding must be read in the light of the learned Judge's other findings in this regard:

'In my view it was incumbent upon a person in the position of Prast (the deponent referred to above) to investigate and ascertain the respondent's rights more carefully. Apparently he made no enquiries from any source whatsoever. This conduct shows a very careless and indifferent attitude towards the matter. The respondent's present predicament arises from that inactivity. In my view the respondent has only itself to blame from the position it finds itself in.'

I agree with this latter approach. I do not find in the affidavits any basis for the belief allegedly held by Mr Prast. In the absence of a basis or reason it becomes difficult to accept his bald allegation. However, acting on the assumption that the appellant did hold its belief, its belief can in the circumstances hardly amount to exceptional circumstances.

(f) A suspension or postponement of the interdict would amount to the condonation of criminal behaviour."

[21] The approach of the Court was thus to deny the opportunity to present a *fait accompli,* which outcome would be tantamount to condoning criminal behaviour. (ie, paragraphs (c) (d) and (f)).

[22] In *Lester v Ndlambe 2015 (6) SA 283 (SCA)* a residence which had been erected unlawfully was ordered to be demolished. The rationale was that the principle of legality had to be upheld in the face of contending private interests. The dictum in *United Technical Equipment* (supra) was invoked. At [23]–[24] Majiedt JA held:

"[23] Section 21 authorises a magistrate, on the application of a local authority or the Minister, to order demolition of a building erected without any approval under the Act. This is undoubtedly a public-law remedy. Alkema J questioned how a statutory breach which gives rise to the same claim under private law or public law can afford a court a discretion under private (neighbour) law but not under public law. The answer is simply that 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. In United Technical Equipment Co (Pty) Ltd v Johannesburg City Council the full court was seized with an appeal against the granting of an interdict in the local division in terms whereof the appellant company (qua respondent a quo) was restrained from using property, which was zoned residential in terms of the town-planning scheme, for business purposes

(offices). It was common cause that by using the property as offices the appellant was committing an offence. The appellant's case was that the court should have suspended the interdict pending the final dismissal of his application to the administrator for rezoning of the property. Harms J, writing for the full court, considered whether a court has a general discretion to grant or refuse an interdict. The learned judge pointed out that in the leading case on interdicts, Setlogelo v Setlogelo, this court granted a final interdict, having been satisfied that all the requisites for the granting of a final interdict had been met, without considering at all whether it should, in the exercise of a discretion, refuse the interdict. Harms J also referred to Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd where the court refused to suspend an interdict under similar circumstances because, as Clayden J put it:

'where the breach of law interdicted is a breach of a statute a stricter approach is adopted'.

As Harms J correctly explains, what Clayden J meant to convey was not that there is a rule that a statutory right is stronger than a common-law right, but simply that the statutory breach referred to is a breach which is visited with criminal sanctions (as is the case here). The following dictum of Harms J is apposite:

'It follows from an analysis of these cases that discretion can, if at all, only arise under exceptional circumstances. Furthermore, I am not aware of any authority which would entitle the court to suspend the operation of an interdict where the wrong complained of amounts to a crime.'

[24] 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 Standard Bank of South Africa Ltd v Swartland Municipality Moosa J had to deal with an application that a demolition order, issued in the Malmesbury Magistrates' Court, be set aside and for Standard Bank, as mortgagee, to be joined. In stressing the courts' duty in enforcing demolition orders, the learned judge stated that:

'The unauthorised 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, and more especially since the Constitution became the supreme law of the country.'
> Moosa J referred to the oft-quoted dictum of Chaskalson CJ in Pharmaceutical Manufacturers of SA: In re Ex parte President of the Republic of South Africa and Others, which bears repetition:
> 'The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law."

[23] In the judgment of the SCA in this matter, the Court grappled with the distinctions in process between a local authority which seeks demolition under section 21 of the National Building Regulations and Standards Act 103 of 1977 (NBRSA) and a private complainant seeking substantially the same relief, and, in an obiter dictum, doubted the correctness of remark in paragraph [23] suggesting a distinction of substance. Notwithstanding that aside, the emphasis on giving effect to the principle of legality was unequivocally asserted.

IS THERE A BASIS TO ALLOW BSB AN OPPORTUNITY TO APPLY TO VARY THE ORDER?

[24] Conscious of the vulnerability of BSB and Slim to a finding of contempt, Counsel for BSB has argued that an opportunity ought to be allowed to BSB to apply for a variation of the order; ie to procure judicial sanction for their chosen course of conduct. In my view, the effect aspired to would be to purge the contempt. Whatever the formulation of such relief, it would, in essence, have to contradict, fundamentally, the obligation to demolish the building, as ordered. It would be tantamount to a rescission.

[25] Leaving out of account several niceties, among which are whether it is now too late to seek such a variation, the proper time to raise such a case being when the substantive relief was being decided, or the proper form in which such relief might at this stage be sought in these proceedings, there are inescapable critical issues that require evaluation.

[26] The first critical issue is whether it is competent to seek a 'variation' that wholly contradicts the purpose of the order that has been given. If in principle, there is an opening for such an opportunity, it must follow that good cause would have to be shown why the compliance required of the litigant was either impossible or was not in the public interest. The mere fact that compliance would be financially disadvantageous cannot be sufficient. (*Lester v Ndlambe Municipality, supra*)

[27] The second critical issue is what, if any, 'new' facts or circumstances exist that were unknown when the judgment was given or could not have been capable of presentation to the court at a time relevant to the giving of the order.

[28] In my view, in neither example, is there a case made out in these papers that could assist BSB in this regard. Its sole rationale is that the illegality can in due course be expunged, a proposition which trivialises the unlawful enterprise which has persisted, despite warnings, and despite court orders requiring it to cease.

[29] If the examination shifts to that of a 'rescission', in my view the prospects are bleaker. A rescission of the SCA order would be to allow exactly what earlier authorities

have cautioned against; ie allowing an unlawful enterprise to be presented as *a fait accompli* and a serious undermining of the principle of legality. Such an approach would constitute a licence for property developers to ride roughshod over laws and regulations with impunity and allow the gross dereliction of duties by local authority officials to be perpetrated without any accountability. Society ought not to have endure such feral conduct.

[30] In my view, the prospects of success of a variation, in the terms necessary to rescue BSB and Slim from a finding of contempt, are absent.

THE ROLE OF THE COJ

[31] It has been argued that COJ ought not have been joined. That cannot be correct, given the terms of the SCA order and the effect of the SCA order on COJ's role in achieving its objective. It was not improper to claim relief against COJ when Readam launched the application. At that time the question of irregular occupancy under the protection of an irregular certificate of occupancy issued by COJ was a live issue, albeit now resolved. Moreover, the aim of the contempt proceedings had as its primary purpose the acceleration of compliance and the putting of all parties, including COJ on terms to expedite compliance. No impropriety attaches to seeking such relief in the circumstances that prevailed.

[32] It is correct that the SCA order does not direct COJ to take the initiative in complying with the order, but COJ is, nevertheless, implicated in the process necessary to achieve full compliance. Its role is that of receiving the revised plans of the building for approval and in respect of demolition work, to satisfy itself that the remainder of the partial demolished building is compliant with the regulations and has received from an engineer a clearance about structural stability of the remainder. It was therefore proper of COJ to wait on the submission of these documents.

[33] However, the gravamen of Readam's complaint about COJ's inertia is that because the existence of the building constitutes an ongoing unlawful act, COJ had a duty to expedite an ending of such unlawfulness. It is difficult to suppose why that proposition is not sound, both on logical grounds and on grounds of policy. On 20 June 2016, about 9 weeks after the SCA order, Readam's attorney commenced a correspondence with COJ demanding action about the absence of progress in complying with the order by BSB. The detail is not important. The drift was to demand that COJ rectify the irregular occupation it had allowed to take place in terms of the 'unexplainable' certificate of occupancy, to disabuse COJ that the re-zoning application could afford an excuse for feet-dragging, and to question, perhaps not convincingly, that the consolidation of the erven was an irregularity.

[34] Initially, Readam sought a contempt order against COJ, but abandoned that after COJ had on 13 September 2016, filed an answering affidavit. Readam contends that its stance towards COJ was always justified, but even if that stance was wrong, once it had

given notice that no relief for contempt was to be sought, nor would costs be sought, COJ ought not to have persisted in participating in the proceedings to oppose the remaining relief, and Readam ought not to liable to bear its costs after that moment. This is not a wholly accurate perspective of the implications of the relief as claimed. Albeit that the contempt allegations were abandoned, Readam persisted with a prayer that COJ comply with the SCA order and seeks to put COJ on terms to react swiftly after submission of the relevant documents by BSB. Accordingly, it was not inappropriate for COJ, in this respect, to oppose that prayer if it so chose. There can be no impropriety in choosing to participate further. The merits of any further opposition by COJ is a distinct question, addressed separately.

[35] The argument advanced on behalf of COJ is that in the absence of any directive in the SCA order for it to do more than respond to BSB's submission of prescribed documents, it cannot fairly be faulted for any 'inaction'.

[36] The proposition upon which COJ relies is that the only channel through which it might conceivably have been able to accelerate compliance with the order would have been its power in terms of section 21 of the National Building regulations and standards Act (NBSA) to apply to a magistrate for a demolition order, which is what the local authority did in *Lester v Ndlambe Municipality (Supra).* However, it is correctly contended that the probabilities of such an application being met with a successful defence of *res judicata*, given the existence of the SCA order, were better than excellent. In addition, it may be remarked that the reservations expressed in the Judgment of the SCA about the

application of section 21 to whole as distinct from partial demolitions would also be a sufficiently weighty consideration to cause COJ to hesitate. In my view, on no reasonable conspectus of the circumstances would a section 21 application have been appropriate after Mayat J had given her order. The ventilation of reasons why such an inappropriate step could not be taken is therefore a distraction rather than an explanation of the COJ's proper role.

[37] COJ's involvement in issue of the certificate of occupancy and more notably, in the second re-zoning application is of greater importance, albeit on these papers not altogether clear. Although a planning tribunal shall decide on the re-zoning application, the way in which the officials of COJ addressed the second re-zoning application warrants examination. Given the terms of the SCA order, which must have been known to the officials, it is not obvious that processing this application has been dealt with prudently. The impression gained from the papers is that a rather plodding approach was taken to the whole debacle. Indeed, for example, it is not apparent from these papers that the officials responsible for the irregular approval of the initial building plans have been held accountable, still less a proper investigation into the issue of the 'unexplainable' certificate of occupancy. Moreover, the apparent failure of COJ to apply its mind to the consolidation application, in the context of facts that must have been known, also leaves much to be desired. The overall impression is that the officals of COJ were content to facilitate BSB's strategy to circumvent compliance with the order by studied inertia.

[38] What is sought by Readam against COJ in the prayers is no more than to put COJ on terms to respond quickly to the process required by the SCA order. The resistance by COJ to the prayers sought against it is really limited to the proposed obligations therein. That prayer reads:

> "Ordering and directing [COJ] to comply with the order and more particularly to consider and approve the demolition plans without delay, but by no later than 14 days after the submission thereof by [BSB] and in doing so to ensure that the partial demolition of the building is in full compliance with all of the provisions of the scheme and the order."

[39] This prayer is so anodyne that save for a quibble about the suitability of the time periods, for which no other options are suggested, it hardly holds attention. In the main it simply states what are the steps COJ must take under the law. Indeed, one criticism is that the prayer to ensure the demolition occurs in accordance with the regulations is redundant for that reason. The high point of the criticism is the use of the word 'approve' in the phrase 'to consider and approve'; the submission being that COJ might not approve of the plans submitted. This criticism implies a reading that is not fair; even though the text could be drafted to eliminate absolutely the possibility of ambiguity, the removal of the power of COJ to refuse a non-compliant proposal cannot reasonably be read into the text, and a modest refinement dispatches that quibble.

[40] Given the inertia manifested by COJ, and indeed its lack of enthusiasm to bring this debacle which its irregular conduct allowed to occur, putting COJ on terms was wholly appropriate.

[41] It is correct that COJ is not, nor was ever, in contempt of the SCA order. The initial stance of Readam that it was in contempt was incorrect, even if COJ displayed indifference to the debacle whose origins, it ought not to be overlooked, derive from the irregularities perpetrated by its own officials by approving the initial flawed plans and its unexplained failure to appreciate its error and stop the construction.

[42] The question of the costs as regards COJ is dealt with hereafter together with all other costs questions.

THE SANCTION AGAINST BSB AND SLIM

[43] In summary, BSB and Slim having deliberately not complied with the SCA order, and having embarked on an illegitimate strategy to circumvent complying with the order, are indeed in contempt.

[44] The prayers for an order of incarceration, suspended on condition that further defiance does not occur is appropriate. *(See: Twentieth Century Fox film Corporation & Others v Playboy Filma (Pty) Ltd & Another 1978 (3) SA 201 (W))* No specific sanction is sought against BSB and for that reason alone, I do not consider what would have been an appropriate sanction.

THE COSTS

[45] Where a litigant is held to be in contempt of an order it is appropriate that costs be borne, as prayed, on the attorney and client scale.

[46] The costs, insofar as 'counterclaim' which was disallowed are concerned, ought to be on the party and party scale insofar they are capable of being distinguished from other costs, a task for the taxing master.

[47] The answering affidavit of BSB and of Slim required condonation in order to be admitted because it was hopelessly out of time and arrived shortly before the hearing. The explanation was anaemic and amounted to very little more than an excuse that Slim was very busy, mostly in Botswana, where on site he was constricted by poor communications, and was ham-strung in giving instructions. Puzzling is the inability to use weekends he says he was in Johannesburg to meet his attorneys, and more so as he apparently found time to engage potential purchasers of the building. He also candidly admits he was cash strapped and was in default of his obligations towards his instructing attorney. However, it mattered little how poor the explanation was, as his counsel correctly argued, in a case concerning contempt and the risk of incarceration, it was unthinkable not to admit the affidavit. Nevertheless, the costs of opposition thereto ought, in the circumstances, to be borne on the attorney and client scale.

[48] As regards COJ, its costs, up to the filing of the Applicant's replying affidavit ought to be awarded to it. Thereafter, its further opposition, having been unsuccessful, requires it to bear the costs of Readam's persistence in obtaining an order against it.

THE ORDER

[49] I was presented with a draft order by counsel for Readam. I adopt it with modifications, as follows:

[50] The First and Second Respondents are declared to be in contempt of the order handed down in the above Honourable Court on 17 October 2014 under Case No 14167/2013, as amended by order of the Supreme Court of Appeal delivered on 13 April 2016 under Case No. 279/2015 ("the SCA Order");

[51] The First and Second Respondents are ordered to comply with the SCA Order forthwith and, more particularly:

51.1. Submit, within thirty days of the date of this order, to the Third Respondent for consideration and approval in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977 ("the NBSA"), building plans ("the Demolition Plans") in respect of the partial demolition of the unlawful building ("the Building") presently situated on that portion of Consolidated Erf 1511 Parkmore (JHB) Township which was previously known as Erf 426 Parkmore (JHB) Township;

51.2. engage, within 30 days of the date of this order, the services of a suitably qualified engineer to assess and certify whether or not the intended partial demolition of the Building in accordance with the Demotion Plans will or will not not compromise the structural integrity and safety of the Building or of the buildings adjacent to it, and cause such report as the engineer may give to be submitted to the Third Respondent and to the Applicant, within 30 days of their submission, to COJ.

51.3. ensure that the Demolition Plans demonstrate that the Building, after the partial demolition thereof, will comply with the coverage limitation of 60 % in relation to former erf 426, as imposed in terms of the Sandton Town Planning Scheme, 1980 ("the Scheme"), the parking requirements of the Scheme and the height restriction of 3 storeys, and that the Building will thereafter comply generally with all of the other provisions of the Scheme; and

51.4. within 60 days of the approval by the Third Respondent of the Plans to facilitate the partial demolition of the Building, commence work, in accordance with the said Plans and thereafter complete such required demolition within a further period of 90 days.

[52] The Third Respondent is directed to facilitate compliance with the order and with this order, more particularly by:

52.1. Considering and approving, with or without amendments, the plans to facilitate demolition, with 30 days of receipt of an engineer's report certifying them to be appropriate and fit for purpose, and having done so;

52.2. Take such steps as are within its power to ensure that after demolition, the remainder of the building is in full compliance with the scheme and of the SCA order.

[53] In the event that the time periods set out in this order cannot, for good cause, be complied with, any affected party may approach the court on these papers, duly amplified by such explanations, on affidavit, as fully sets out why fulfilment is not reasonably possible and what revised time period is alleged to be necessary to achieve fulfilment, for appropriate relief.

[54] The Second Respondent is committed to incarceration for a period of 30 days, which committal is suspended on condition the orders contained herein are complied with.

[55] In the event that any affected party seeks the implementation of paragraph [54] of this order, on the grounds that the condition has failed, the second respondent shall present himself at each such hearing as is set down and convened to enquire therein.

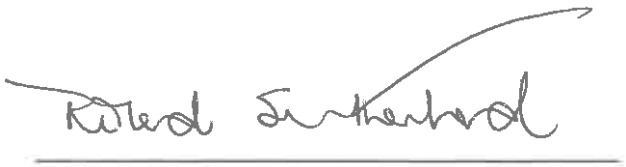
[56] The First and Second Respondents shall, jointly and severally, the one paying the other to be absolved, pay the costs of this application on the attorney and client scale, including the costs of two counsel.

[57] The First Respondent shall bear the costs of the Applicant's opposition to the counter claim filed by the First Respondent on the party and party scale, including the costs of two counsel.

[58] The First and Second respondent shall jointly and severally, the one to paying the other to be absolved, pay the costs of the applicant's opposition to the application for condonation of the late filing of an answering affidavit on the attorney and client scale, including the costs of two counsel.

[59] The Applicant shall bear the costs of the Third Respondent up to the filing of the applicant's replying affidavit to the third respondent's answering affidavit.

[60] The Third respondent shall bear the costs of the Applicant's resistance to the Third Respondent's further opposition from the date of the filing of the Applicant's replying affidavit on the party and party scale, including the costs of two counsel.



Roland Sutherland

Judge of the High Court,

Gauteng Local Division, Johannesburg

Heard: 9 February 2017
Delivered: 27 February 2017

For the Applicant:
Adv G Porteous,
with him, Adv S Schulenburg
instructed by Strauss Scher Inc.

For the First and Second Respondents:
Adv L Putter SC,
with him, Adv D Vetten.
Instructed by Martini-Palansky Attorneys.

For the Third Respondent:
Adv S D Mitchell,

Instructed by Lennon Moleele & Partners.