Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 11525/2009

the matter of

THE STANDARD BANK OF SOUTH AFRICA LIMITED	**Applicant**
and	
THE SWARTLAND MUNICIPALITY	**First Respondent**
MICHIEL SMIT TRUTER BASSON	**Second Respondent**
MARIO BRAND	**Third Respondent**

JUDGMENT DELIVERED : 31 MAY 2010

MATTER HEARD ON 12 APRIL 2010

On behalf of Applicant	**: Adv F Sievers**
Attorney(s)	**: William Inglis Inc**
On behalf of 1st Respondent	**: Adv J W Olivier SC**
Attorney(s)	**: Terblanche Slabber Pieters (c/o Vanderspuy Cape Town)**

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MARIO BRAND	**Third Respondent**

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MOOSA, J:

The Demolition Order:

[1] On 29 April 2009, the first respondent in this matter obtained default judgment in terms of which the Magistrate's Court ordered the third respondent to demolish, on or before 8 June 2009, the unauthorised and illegal structures comprising a garage and a storeroom on Erf 7407 and situate at 3 Simmentaler Street, Malmesbury ("the property"). In the event of the third respondent failing to comply with the order, the Court authorised and ordered the second respondent, the Sheriff, to carry out the order by 9 June 2009 (the "demolition order").

[2] In terms of section 4(1) of the National Building Regulations and Building Standards, Act 103 of 1977 ("the Act"):

> "*No person shall without prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act.*"

It is common cause that the third respondent had failed to get written approval from the first respondent prior to erecting the said structures.

[3] The demolition order was obtained in terms of section 21 of the Act on the ground that the erection of the said structures does not comply with the provisions of the Act, in that the third respondent did not have approved plans for the erection of the said structures and the said structures contravened the provisions relating to the five metre street building line or set back.

Application to Interdict and Set Aside the Demolition Order:

[4] On 8 June 2009, the applicant brought an urgent application for, *inter alia*, the following relief:

> "*2. That a rule nisi be issued calling upon the Respondents to show cause (if any) on a date and at a time to be determined by the above Honourable Court why:-*
>
> *2.1 The demolition contemplated by the court order issued by the Magistrate, Malmesbury, under case number 246/2009 on 29 April 2009 should not be interdicted and the order set aside.*
>
> *2.2 The costs of this application not be paid by First Respondent together with any of the remaining two Respondents who may oppose the relief sought.*"

The Application was only opposed by the first respondent. The second respondent abided the decision of the Court and the third respondent did not oppose the Application.

[5] In argument before me, counsel for the applicant sought an order setting aside the demolition order issued by the Magistrate's Court of Malmesbury. In the alternative he asks that the demolition be interdicted until such time as an application may be brought in the Magistrate's Court for the order to be set aside.

The Objective Facts:

[6] It is quite clear from the objective facts that the conduct of the third respondent was wrongful and unlawful. Firstly, he submitted building plans in flagrant contravention of the Act and the Zoning Regulations and failed to rectify the plans when requested to do so by the first respondent; secondly, he ignored all the correspondence addressed to him in this matter, both by the first respondent and its attorney; thirdly, he deliberately and intentionally went ahead with the erection of the structures knowing that he had no prior written approval from the first respondent and that they contravened the Act; fourthly, he was given written warning not to proceed with the building operations prior to obtaining the necessary approval, but despite such warning, he went ahead and fifthly, he not only erected the unauthorised structures for which he had submitted plans and which were not approved, but he also erected an unauthorised jacuzzi and bathroom for which he had no plans or approval.

The Issues:

[7] The issues to be determined are firstly, whether the applicant has made out a case for a final interdict, alternatively an interim interdict; secondly, whether the applicant has

made out a case for the setting aside of the demolition order; and thirdly, whether the judgment of this court for the foreclosure on the two bonds supersedes the demolition order.

Whether a case has been made out for a final alternatively an interim interdict:

[8] The main relief sought by the applicant is couched in the form of a final order and the alternative relief sought by it is in the form of an interim order. In order to succeed in respect of the main relief, Applicant must show firstly, that it has a clear right; secondly, that such right has been infringed; and thirdly it has no other suitable remedy. In order to succeed in respect of the alternative relief, the applicant must show firstly, that it has a *prima facie* right; secondly, that it will suffer irreparable harm if the interim relief is not granted; thirdly, that the balance of convenience favour the granting of the interim relief; and lastly, the absence of any other remedy. (See: **Setlogelo v Setlogelo** 1914 AD 221 at 227; **Masuku v Minister of Justice** 1990 (1) SA 832 (A) at 840-841; and LAWSA by **Joubert,** Second Edition**,** Vol 11 at paras 396 and 403.)

[9] The applicant brought the application on the basis that it is the holder of a first and second Mortgage Bond over the property. It alleged that, as such, it had a direct and substantial interest in the outcome of the proceedings in the Magistrate's Court and should have been joined as a necessary party. It was submitted further, on behalf of the applicant, that it had obtained a judgment for foreclosure against the third respondent in this court, in terms of the Mortgage Bonds, and the property was declared executable. Such order, it was argued, superseded the demolition order of the Magistrate's Court.

[10] Most of the facts are either common cause or undisputed. In my view, the issues can be determined on the facts which are common cause or not disputed, together with

those facts which do not constitute a *bona fide* and genuine dispute of fact on the basis of the principles set out in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 626 (A).

Whether the Applicant has a clear alternatively *prima facie* right:

[11] I will deal with the issue of whether the applicant had a clear right alternatively a *prima facie* right. The applicant relied on the fact that, as a first and second bondholder over the property, it had a right to be joined by the first respondent to the proceedings of the Magistrate's Court in which the latter sought a demolition order in terms of section 21 of the Act. It is common cause that the Applicant was not joined as a party to the proceedings in the Magistrate's court. The general rule is that if a party has an interest of such a nature that it is likely to be prejudiced by a judgment given in the proceedings, such a party ought to be joined (**Kethel v Kethel's Estate** 1949 (3) SA 598 (A) and **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A)). The test is whether the party has a direct and substantial interest in the proceedings and the outcome thereof (**Collin v Toffie** 1944 AD 456 and **Home Sites (Pty) Ltd v Senekal** 1948 (3) SA 514 (A)).

[12] 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. It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial or economic interest only'".* (See*:* Herbstein & Van Winsen: **The Civil Practice of the High Court of South Africa**, Fifth Edition, Volume 1 at 217 and the authorities quoted in support.)

[13] The Appellate Division in **Amalgamated Engineering Union v Minister of**

Labour 1949 (3) SA 637 (A) sets out two tests to determine whether a third party has a direct and substantial interest: the one is whether the third party would have *locus standi* to claim relief concerning the same subject matter (the *locus standi* test) and the other is whether the third party who has not been joined can successfully raise the defence of *res judicata* concerning the same subject matter in a subsequent case and obtain a conflicting decision to that made in the first instance (the *res judicata* test).

[14] It is common cause that the third respondent did not defend the proceedings in the Magistrate's Court and the first respondent obtained default judgment against The third respondent. In my view, the applicant has no *locus standi* to claim against The first respondent any relief in the Magistrate's Court litigation. It likewise cannot successfully raise the defence of *res judicata* in any subsequent case and in the process obtain a conflicting decision to the one made in the first instance, because the applicant was not a party to the proceedings in the Magistrate's Court. In the circumstances, I conclude that the applicant fails both the *locus standi* and the *res judicata* tests.

[15] Counsel for the applicant submitted further that the registration of the instrument of hypothecation in the Deeds Office is a means of informing other creditors that *jus in re aliena* exists in favour of the mortgagee in respect of the hypothecated property. The doctrine of *jus in re aliena* vests in the mortgagee a proprietary interest in the property belonging to the mortgagor. Such right constitutes a real right (**Barclays Western Bank Ltd v Comfy Hotels Ltd** 1980 (4) SA 174 (A) at 178D).

[16] The short answer to the above submission is that the application of the doctrine to the facts of this case, is misconceived. That doctrine can never be applicable to the

unauthorised and illegal structures which might constitute part of the hypothecated property. The registration of the bonds over the property does not *per se* create for the applicant any rights in the unauthorised and unlawful structures. I accordingly conclude that the doctrine of *jus in re aliena* does not protect the applicant from the demolition of the unauthorised and illegal structures, which fortuitously became part of its security.

[17] In my view the applicant has not laid a factual or legal basis on the strength of which it is permitted to maintain such unauthorised and unlawful structures by means of an interdict against the first respondent in the face of the judgment that was lawfully obtained against the third respondent for the demolition of the unauthorised and unlawful structures.

[18] I therefore conclude that the applicant has no direct and substantial interest in the unauthorised structures which formed the subject matter of the proceedings in the Magistrate's Court or the outcome of such proceedings. As a bondholder it had an indirect financial and commercial interest in the Magistrate's Court litigation and the outcome thereof. It, therefore, cannot be said that the applicant had a legal interest in the demolition of the unauthorised and illegal structures (**United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels (Pty) Ltd and Another** 1972 (4) SA 409 (C)).

[19] It is a trite principle of our law that the court will not readily grant an interdict restraining the exercise of a statutory power in the absence of *mala fides.* In **Gool v Minister of Justice and Another** 1955 (2) SA 682 (C) at 688 by **Ogilvie Thompson**, **J** (as he then was) says the following:

> "*The present is, however, not an ordinary application for an interdict. In the first place, we are, in present case, concerned with an application for an interdict restraining the exercise of statutory power. In the absence of*

> *any allegation of mala fides, the Court does not readily grant such an interdict, that, I think, is clear from the judgment in* ***Molteno Bros & Others v South African Railways and Harbours*** *1936 AD 321…"*

There is no evidence of *mala fides* on the part of the first respondent in exercising its statutory power to secure the demolition order. On the facts of this case *mala fides* can be attributed to the third respondent.

[20] I accordingly conclude that there was no legal obligation on the first respondent to have joined the applicant as a party to the proceedings in the Magistrate's Court. It must, therefore, follow that the applicant has failed to establish the first requirement for the granting of an interdict, namely a clear right in the case of a final interdict or a *prima facie* right in the case of an interim interdict. In view of my findings it is unnecessary to deal with the other requirements of a final or interim interdict. In the circumstances, the applicant cannot succeed in his claim for an interdict, whether in the final form or on an interim basis.

[21] Even if the applicant had established all the requirements for an interdict in this matter, the court would have had serious reservation in exercising its residual discretion to come to the assistance of the applicant in the face of the unauthorised and unlawful conduct of the third respondent in firstly, failing to obtain prior written approval to erect the garage and storeroom; secondly, in erecting such structures in contravention of the Act and the Zoning Regulations; and thirdly, erecting additional unauthorised and illegal structures, such as the jacuzzi and bathroom.

[22] The unauthorised and illegal conduct of the third respondent 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. **Chaskalson, CJ** (as he then was) said in **Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa** 2000 (2) SA 674 (CC) at 687H that:

> *"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."*

This statement was quoted with approval in **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2002 (6) SA 573 (C) at 593B-D.

Whether a case has been made for the setting aside of the demolition order:

[23] The next issue the court should determine is whether the applicant has made out a case for the setting aside of the demolition order. This court is only competent to set aside the demolition order if the order is unlawful or is tainted by irregularity. It is common cause that the order was granted by the Magistrate's Court in terms of section 21 of the Act. While such judgment stands, the order is valid and legal. Such order can only be set aside by this court on appeal or review. The matter is not properly before it on appeal or review. The applicant was not a party to the proceedings in the Magistrate's Court and would lack *locus standi* to appeal against the default judgment or instituting review proceedings in the face of the third respondent having failed firstly, to defend the action; secondly, to rectify the building plans; and thirdly, to rectify the unauthorised and unlawful structures. The applicant would, furthermore, have no grounds to pursue an appeal or review in this matter.

[24] The other option the applicant would have is to apply to the Magistrate's Court for rescission of judgment. In that case, the applicant would also have difficulty in succeeding with an application in the absence of it disclosing "good cause" or a valid and *bona fide*

defence to set aside the default judgment. The applicant's counsel contended that, in terms of section 18 of the Act, the applicant can apply to the first respondent for deviation or exemption from the requirements of the Act or the Zoning Regulations. This, in my view, does not constitute "good cause" or *bona fide* defence. Counsel for the first respondent submitted that the third respondent's agent, Mr Louw, had applied to the first respondent to reconsider the non-approval of the plans, but the first respondent had refused such request. Without making a formal finding in respect thereof, it is highly unlikely that the applicant, in my view, would succeed with the application for deviation or exemption on the facts of the case.

[25] The object of rescinding a default judgment is to enable the applicant to air the real dispute between the parties (Jones and Buckle*:* **The Civil Practice of the Magistrate's Court** , Ninth Edition*,* Vol II at 49-2 and **Saphula v Nedcor Bank Ltd** 1999 (2) SA 76 (W) at 79B). In *casu* there is no dispute between the applicant and the first respondent to justify rescission of the demolition order obtained in the Magistrate's Court. In the circumstances the Magistrate is *functus officio* and the default judgment stands.

[26] In my view the applicant, in the main relief, has failed to establish a factual or legal basis to have the demolition order set aside by this court and, in the interim relief, the probabilities of success do not favour the applicant in securing rescission of the demolition order in the Magistrate's Court.

Whether the judgment of this court for foreclosure supersedes the judgment of the Magistrate's Court:

[27] Counsel for the applicant submitted that the applicant had obtained judgment in

this court against the third respondent in term of the two bonds and the property has been declared executable. He argued that this order supersedes the Magistrate's Court order for the demolition of the unauthorised and illegal structures. The demolition order in the Magistrate's Court was obtained a day before the judgment in respect of the two mortgage bonds was obtained in this court and the property declared executable.

[28] In my view, the latter judgment in which the property was declared executable was subject to the judgment in the Magistrate's Court in which an order was granted authorising the demolition of the unauthorised and illegal structures. To give it any other construction or effect, would tantamount to this court legitimising the unauthorised and illegal structures, which were ordered to be demolished by the Magistrate's court. The unauthorised and illegal structures could never have formed part of the Applicant's security arising from the two mortgage bonds. In the circumstances I conclude, that the judgment of this court does not supersede the judgment of the Magistrate's Court but rather subsumes it.

The Findings:

[29] In the light of all the circumstances, I am of the view that the applicant has failed to establish, on a balance of probabilities, that it had a clear right, which is one of the prerequisites for a final interdict or a *prima facie* right which in turn, is one of the prerequisites for an interim interdict. The applicant has failed to lay a factual or legal basis for this court or the Magistrate's Court to set aside the demolition order. The applicant must, therefore, fail in its claim to have the demolition order of the Magistrate's Court set aside by this court. It must likewise fail in its alternative claim for an interdict pending an application to be made to the Magistrate's Court for the setting aside of the demolition order.

The Order:

[30] In the premises the application is dismissed with costs.

E MOOSA