

**In the High Court of South Africa
(Western Cape High Court, Cape Town)**

Case No: 20966/11

In the matter between:

CITY OF CAPE TOWN

Applicant

and

THERAPEIA CENTRE CC

First Respondent

SEND IT/ SA GIFTING

Second Respondent

JUDGMENT DELIVERED ON 18 SEPTEMBER 2012

BUIKMAN, AJ:

1. The Applicant instituted proceedings against the First Respondent for an order in terms of section 21 of the National Building Regulations and Building Standards Act 103 of 1997 ("the NBR Act") for the demolition of certain parts of a building owned by the First Respondent and which is used for commercial purposes ("the demolition application"). The Second

Respondent is cited only inasmuch as it has an interest in the relief claimed, it having previously occupied an offending portion of the building in respect of which the Applicant had not issued an occupancy certificate in terms of the NBR Act.

2. There are two separate areas of the First Respondent's property which the Applicant seeks to have demolished – one pertains to a timber deck which encroaches upon the Applicant's property and the second being certain offending renovations carried out to the first floor of the premises where the First Respondent, in summary, enlarged and extended an office, built a balcony and increased the height of the roof. All these structures and renovations, it is common cause, are not in accordance with approved building plans.
3. The demolition application was postponed on 22 March 2012 at the behest of the First Respondent when it was first set down for hearing. A *rule nisi* was issued, time periods were set for the filing of papers and the matter was postponed to the semi-urgent roll on 30 May 2012.
4. Four days before the matter was due to be heard in Court, and almost a month after its answering affidavit had to be filed, the

7. Mr Muller, the sole member of the First Respondent, appeared in person and sought a postponement of the applications ostensibly to obtain legal representation. It appears however that he wishes to launch a new application against the Applicant on the basis that it is interfering with the First Respondent's business and wants legal advice in this regard.
8. Given the history of the matter, and the fact that the First Respondent did not bring a substantive application for the postponement of the demolition and review application save to advise me from the bar that it wishes to institute new proceedings against the Applicant, the application for the postponement was refused.

Background common cause facts

9. The First Respondent owns immovable property in Kenilworth, Cape Town, which is zoned for business use.
10. In February 1998 the Applicant rejected an application by First Respondent to acquire a portion of the Applicant's property, which is situated directly adjacent to the First Respondent's property. The Applicant advised the First Respondent that it proposed to erect an electrical substation on its property.

11. Notwithstanding the fact that no plans had been approved, the First Applicant built the timber deck which encroached on the Applicant's property.
12. In 2006, after the deck's construction, the First Respondent submitted a further application to the Applicant to acquire a portion of the Applicant's property (this time for a larger portion than it had first applied for) in order to permit an extension to the existing business activities on the First Respondent's property.
13. On 14 August 2006 the Applicant resolved that an area of approximately 155 square metres be sold to the First Respondent subject to the condition that the relevant portion be rezoned from "municipal purposes" to "business use".
14. In 2007 the First Respondent submitted building plans for further renovations to be done on its property. The timber deck structure is not reflected on these plans. These plans were approved on 26 February 2009.
15. Instead of building in terms of the approved plans, the First Respondent enlarged an office area on the plan, which was

shifted eastwards, with a row of pillars having been erected from the ground floor to support the resultant overhang. The roof pitch was also materially different from that shown on the approved plans and instead of building two sash windows, the First Respondent inserted doors opening onto a first floor balcony, itself not depicted on the approved plans.

16. In October 2009 the relevant sub-council of the Applicant turned down the First Respondent's rezoning application and hence the sale lapsed.
17. The First Respondent failed to avail itself of its right to lodge its appeal rights timeously and the appeal process was accordingly treated as invalid.
18. Various attempts were made by the Applicant to enforce compliance with the approved building plans. On 7 May 2009 the First Respondent was given until 7 July 2009 to rectify or demolish the deviations. This led to a criminal summons being issued in October 2009. The First Respondent ignored the summons but eventually paid an admission of guilt fine. Mr Muller maintains that it did so because it was "logistically and

administratively" more expedient to deal with the matter in this way.

19. The First Respondent also allowed a tenant to occupy the premises thereby contravening the NBR Act in that no certificate of occupancy had been issued by the Applicant.
20. On 11 January 2011 the Applicant issued another notice advising the First Respondent that the balcony on the property did not conform to the approved building plans. This notice was not collected from the post office. A further notice was despatched by email to the First Respondent on 22 March 2011. Again no response was received from the First Respondent. On 21 June 2011 the Applicant's attorneys directed a letter of demand to the First Respondent, which was sent by registered post as well as to the email of Mr Muller. This letter too was not collected from the post office.

The review application

21. The First Respondent seeks to review and set aside the decision of the Applicant taken in October 2009 to refuse the First Respondent's application to rezone a portion of the

Applicant's land, which the First Respondent wished to purchase.

22. The review application is relevant to the timber deck structure in as much as it is a defence to its demolition. In the event that it is successful, then the Applicant will have to reconsider the First Respondent's application for rezoning which may mean that the First Respondent might succeed in acquiring the land on which the timber deck is presently an encroachment.

23. Dealing with the review application, Mr Muller argued that the application should not be before this Court but should instead be dealt with by the offices of the Public Protector. He contended that various external bodies needed to evaluate the application before this Court could make a determination. Although he did not agree that he was abandoning the First Respondent's review application, it seems that the thrust of Mr Muller's argument was that the review application was premature.

24. This argument is of course at variance with that raised in the founding affidavit of the review application. In this affidavit, the First Respondent contends that this Court must review the

Applicant's decision and that it has the necessary jurisdiction to do so.

25. Having regard to the fact that the review application is before me, I need to adjudicate it on its merits. There is no reason that it should be postponed so that various unnamed parties, including the Public Protector, ought to first consider the merits of the rezoning application.
26. Mr Janisch, for the Applicant, argued that there is no merit in the review application on the grounds set out in the founding affidavit. The First Respondent, he argues, did not give a sufficient explanation for the inordinate delay in bringing the application in regard to the fact that it was launched two years after the date when it ought to have been brought. The First Respondent had 180 days to bring its review proceedings in terms of section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 and, given that it received registered notice of the Applicant's final decision on appeal on 18 June 2012, it ought to have launched the review application by no later than 18 December 2010.

27. I agree with Mr Janisch that the reasons given for the delay in the founding affidavit are indeed weak. Mr Muller was ostensibly "very disillusioned" with the process after the conclusions of the internal appeals. He states at paragraph 58 in his founding affidavit that he was not aware of the right of review until he sought assistance in opposing the Applicant's demolition application. This averment conflicts with that advanced by Mr Muller at the hearing of this application. He contended that he was in fact informed by his legal representatives at the time that there was nothing that could be done. This is also contrary to the number of emails and correspondence annexed to the founding affidavit exchanged between the Applicant and the First Respondent from which it is clear that Mr Muller was quite aware of the First Respondent's rights, including its right to administrative justice. There can be no doubt that the impetus for the review application was the demolition application.

28. The arguments raised by the First Respondent in its review application are also without merit:

28.1. the First Respondent failed to exhaust the internal remedies available to him to achieve administrative

redress before approaching this Court. In this regard the First Respondent failed to file his appeal in terms of the Systems Act timeously and also failed to file his application to appeal the rezoning decision within the requisite time in terms of the Land Use Planning Ordinance;

28.2. the grounds that are set out in the founding affidavit to substantiate the review, in the main, relate to the Applicant's bias and alleged administrative and procedural unfairness. All these arguments have been extensively dealt with by the Applicant in its answering affidavit and to which there is no reply.

29. In the circumstances, I am satisfied that there is no merit in the review application, which falls to be dismissed.

The demolition application

30. The demolition order that the Applicant seeks relates to two distinct areas of building works on the premises the first being the timber deck (demarcated in blue on plan "NOM1" and "NOM2" to the notice of motion) and, second, the renovations to

the first floor shown in yellow on annexures "NOM1", "NOM2" and "NOM3" to the notice of motion. The Applicant also wants an order interdicting and restraining the First Respondent from permitting any person occupying any portion of the first floor unless the Applicant has issued the requisite certificate of occupancy in respect thereof.

31. I am advised that the timber deck has in fact now been removed save for the supporting pillars, which still encroach on the Applicant's property.
32. Mr Muller referred me to the fact that on 24 July 2012 the First Respondent submitted new plans "as-built" plans to the Applicant to obtain its approval for the illegal structures. Although these new plans do not form part of the papers filed of record, Mr Janisch suggested that any demolition order be suspended pending the final determination of these new building plans.
33. It is not disputed that the structures that were built were illegal. In the answering affidavit filed of record, the First Respondent sought to excuse the fact that it just went ahead and built the timber deck without the Applicant's permission based on a

"legitimate expectation" that the property on which the deck encroaches would be sold to the First Respondent.

34. In exercising my discretion as to whether or not to grant a demolition order, I need to weigh up the prejudice to the parties and, also, to have regard to the dictates of legal and public policy. (See Ndlambe Municipality v Lester and Others [2012] ZAECGHC 33 (3 May 2012))
35. The offending structure forms part of a commercial premises and not a residential dwelling. Furthermore, it is clear that the First Respondent has demonstrated a flagrant and sustained disregard of the law over a long period of time. Every attempt by the Applicant to enforce compliance has been thwarted. Despite admitting its guilt and a conviction pursuant to a criminal summons, the First Respondent did not seek to remedy the deviations save that it has now, on the eve of the hearing of this application, taken down the timber deck (save for its pillars), and has submitted new plans to approve the offending renovations.
36. Having regard to all the circumstances, I see no reason why I should not grant the Applicant the demolition order it seeks.

However, now that the First Respondent has submitted new plans to approve the deviations it has built, I will suspend the demolition order pending the final determination by the Applicant of the new plans and on the conditions set out in the order below. I mention in this regard that Mr Muller had no objection to such an order being granted.

37. Mr Muller did resist an order that the First Respondent be interdicted and restrained from permitting any person to occupy any portion of the first floor of the building on its property unless and until the Applicant has issued a certificate the renovations have been approved of occupancy in respect thereof. Although he argued that this was not logistically feasible, he was unable to give any reason for this contention. Clearly, allowing the property to be occupied, in the absence of an occupancy certificate as is required by section 14 of the NBR Act, is unlawful. There is no reason why I should not grant such an order in light of the fact that the First Respondent previously permitted people, more particularly the Second Respondent, from occupying the unlawful property and thus committed an offence in terms of section 14(4)(a) of the NBR Act.

Costs

38. Mr Janisch argued that this is a matter that warrants a special order as to costs and seeks an order that the First Respondent pay the costs of the demolition application and the review application on an attorney and client scale.

39. I have already referred to the First Respondent blatant disregard for the law and the Applicant's processes which gave rise to the demolition application. The manner in which the First Respondent conducted the litigation is also worthy of censure. The review application never had any prospect of success. This is also apparent from the fact that no replying affidavit was filed. In its answering affidavit to the demolition application crude, unsubstantiated and entirely unjustified references are made to "maladministration, bias, mischief and possible personal pocket lining of officials." I agree with Mr Janisch that the First Respondent clearly has no respect for the law or the officials of the Applicant.

Accordingly, I believe that it just that the First Respondent be ordered to pay the Applicant's costs on an attorney and client scale

to ensure that it is not out of pocket in respect of the expenses the First Respondent caused by the litigation.

Accordingly, I make the following order:

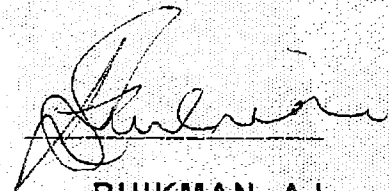
1. The First Respondent's review application is dismissed with costs on a scale as between attorney and client.
2. The First Respondent is ordered:
 - 2.1. to demolish the timber deck structure situated partly on Erf 65382 Kenilworth (*"the property"*) and partly on Erf 64568 Kenilworth, the extent of which is shown in blue on annexures "NOM1" and "NOM2" hereto, including the supporting pillars; and
 - 2.2. to demolish the first floor structure of the building on the property the extent of which is shown in yellow on annexures "NOM1", "NOM2" and "NOM3" hereto, including the balcony comprising the southern portion thereof, the roofing structure and the ground floor pillars supporting the eastern extent thereof; and

- 2.3. to restore the building on the property to the state as shown in the building plan approved on 26 February 2009 (plan no. A78501).
3. The First Respondent is interdicted and restrained from permitting any person to occupy any portion of the first floor of the building on the property unless and until the Applicant has issued a certificate of occupancy in respect thereof.
4. The relief in paragraphs 2.2 and 2.3 above is suspended pending the final determination of the First Respondent's application for building plan approval in respect of the deviations referred to in paragraph 2.2 above originally submitted on 24 July 2012 under plan no. 02097/2012, on the following conditions:
- 4.1. the First Respondent shall have finally submitted the said application, in its entirety, by no later than 16h00 on Monday 24 September 2012, failing which the suspension shall lapse;

- 4.2. the First Respondent shall have submitted any further amendments to, or information pertaining to, the said plans which the Applicant may require in due course within two weeks of such requirement being imposed, failing which the suspension shall lapse;
 - 4.3. the suspension shall also lapse in the event that the said application is finally not approved by the Applicant (which shall include the dismissal of any internal appeal in terms of the Local Government: Municipal Systems Act 32 of 2000); and
 - 4.4. the suspension shall also lapse in the event that the First Respondent commits or permits any breach of paragraph 3 above.
5. Should the First Respondent fail to comply with the order in paragraph 2.1 by 30 September 2012 or to comply with the order in paragraph 2.2 within 30 days of the date the suspension lapses, the Applicant is authorized to carry out the said demolition and to recover the reasonable costs thereof

from the First Respondent, and the First Respondent is directed to permit the Applicant access to the property and the building for purposes of so doing.

6. The First Respondent and/or the Sheriff is prohibited from selling or passing transfer of the property to any third party (whether voluntarily or by way of sale in execution) without such third party first accepting the obligations in terms of paragraphs 2, 4 and 5 above, and the Applicant is authorised to note the contents of this Order as a *caveat* against the title deeds of the property.
7. The First Respondent is directed to pay the Applicant's costs pertaining to the demolition application, on a scale as between attorney and client, including the costs pertaining to the previous hearing dates for the said application on 22 March 2012 and 30 May 2012 and any costs pertaining to the First Respondent's application to stay the said application dated 24 May 2012.



BUIKMAN, AJ