IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER: 5449/17

In the matter between:

SKYSCAPE INVESTMENTS 110 CC	Applicant
and	
LIVINAFRICA (PTY) LTD	1sRespondent
THE BODY CORPORATE OF THE VICTORY	2nd Respondent
SECTIONAL TITLE SCHEME	
THE CITY OF CAPE TOWN	3rd Respondent

DELIVERED: 29 November 2017

JUDGMENT

NDITA, J

Introduction

[1] Two applications served before this court. In the first application, the Applicant seeks an order interdicting the Respondent from conducting building works and/or construction work within any part of ERF 2472 Camps Bay without the necessary building and or planning approvals for such building works having been obtained from the relevant authorities and without the consent of the Second Respondent. The Applicant further seeks an order directing the Respondent to:

1.1 Demolish any and all structures/facilities (including all internal walls, electrical and plumbing works) erected by it within Section 1 of the Victory Title Sectional Scheme ("the Scheme") without the said necessary approval.

1.2 Demolish any and all structures and/or facilities (including all wooden decking, electrical and plumbing works) erected by it on the common property of the Scheme without the necessary approval; and

1.3 Restore the common property to the state it was prior to the building works referred to above'

1.4 Restore the façade of the residential block to the position it was prior to the building works referred to above.

In the second application, the Applicant seeks an order declaring the First Respondent to be in contempt of court of the order of this court issued by Rogers J, on 27 January 2017 under case number 973/2017. Pursuant to the declaration of being in contempt of court, the Applicant also seeks an order committing the Second Respondent to prison for such period as the court may determine.

The Parties

[2] The Applicant, Skyscape Investments 110 CC ("Skyscape"), is a close corporation duly registered and incorporated as such in accordance with the Laws of the Republic of South Africa with its registered address at 462 Ontdekkers Road, Florida Park, Gauteng. The First Respondent, Livinafrica (Pty) (Ltd) ("Livinafrica") is a company duly registered and incorporated as such in accordance with the Laws of the Republic of South Africa with its registered address at 89 Roedebloem Road, Woodstock, Cape Town. The Second Respondent, the Body Corporate of the Victory Sectional Title Scheme ("the Body Corporate") is a statutory body corporate established in terms of the Sectional Titles Act, 95 of 1986, ("the Act") under number SS847/2008. The managing agent of the Body Corporate is

Sandak Lewin Trust, of 37 Riebeeck Street, Cape Town ("Sandak Lewin"). The Third Respondent is the City of Cape Town, a Municipality as provided for in Section 2 of the Local Government: Municipal Systems Act 32 of 2000.

Factual Background

[3] The common cause facts are that the Applicant and the First Respondent are the only two members of The Scheme, which comprises a luxury triple storey residential block ("Block") located on Erf 2472 in Camps Bay. Although the Property and the Block are sectionalized, the Scheme comprises of only two sections. Skyscape is the registered owner of Section 2, located on the first and second floors of the Block ("Section 2"). Livinafrica is the registered owner of Section no 1, located on the ground floor of the Block ("Section 1"). Mr Jos Balk ("Balk") is the sole director of Livinafrica and occupies Section no. 1.

[4] It is further undisputed that during December 2016, Livinafrica started building and construction work in Section no 1 of the Scheme as well as on

parts of the common property of the scheme. Pursuant thereto, Skyscape launched an urgent interdict in this court seeking *inter alia*, an interim interdict restraining Livinafrica from undertaking further building and/ or construction work on the property without:

4.1 all the necessary building and planning approvals having been obtained.

4.2 The requisite consent having been obtained from the body corporate.

Skyscape also seeks a demolition and/or restoration order. The matter served before Rogers J, on 27 January 2017 and the following order was issued.

"A rule nisi is hereby issued calling upon the First Respondent to show cause if any, at 10h00 on THURSDAY the 30 TH day of March 2017 why an order should not be granted along the following terms:

1.1 That the First Respondent is restrained and interdicted from (directly or indirectly)

1.1.1 Effecting; and /or

1.1.2 Carrying on with; and/or

1.1.3 Carrying out; and/ or

1.1.4 Being engaged in; and/ or

1.1.5 authorising

any and all building works and/or construction works at and/or on and/or within any part of ERF 2472, CAMPS BAY (hereinafter “the Property” without all necessary building and/or planning approvals (and authorisations) for such building works and /or construction works having obtained from the relevant authorities and without the requisite approval/consent of the Second Respondent.

1.2 That the First Respondent be ordered to:

1.2.1 demolish any and all structures and/or facilities (including all internal walls, electrical and plumbing works) erected by and for the First Respondent within Section 1 of the Victory Sectional Title Scheme (hereinafter “the Scheme”) without all necessary building and/or planning approvals (and authorisations) for such building works and/or construction works having been obtained from the relevant authorities and without the requisite approval/consent of the Second Respondent;

1.2.2 demolish any and all structures and/or facilities (including all and wooden decking, electrical and plumbing works) erected by and for the First Respondent on the common property (of the Scheme) (hereinafter “the common property”) without all necessary building and/or planning approvals (and authorisations) for such building works and/or construction works having been obtained from the relevant authorities and without the requisite approval/consent of the Second Respondent.

1.2.3 Restore the common property to the state it was in prior to the erection of the structures and facilities referred to in 1.2.2 above.

1.2.4 Restore the external façade of the residential block on the Property to the position it was in prior to the commencement of the building works and/or construction works referred to above (irrespective of whether or not the façade concerned forms part of Section no 1 or the common property);

1.3 That the Respondent is ordered to pay the costs of this application, on attorney and client scale.

[5] According to the founding affidavit deposed to by Mr Marius Ilove Matthews ('Matthews"), the sole member of the Applicant, the First Respondent has since about 2016 been engaged in a range of works/activities on the common property. Initially, it unilaterally installed a wooden cover on the Jacuzzi located on the common property and located the First Respondent's outdoor furniture and various other fittings without any consent. Matthews states that this type of conduct on the part of the First Respondent continued unabated and on or about 14 December 2016, the First Respondent commenced with:

1. Building and construction works in/or Section 1 of the Scheme; and

2. Building and construction works on the common property of the Scheme.

According to Matthews, prior to December 2012, they were seldom at the Property and the Second Respondent ("Balk") had become accustomed to having the Property and the common property to himself. During 2015, Balk obtained a court order providing for the establishment of an effective body corporate as well as interim state of affairs for the financial management of the Scheme pending the establishment of an effective body corporate. Although the minutes of the meeting of the interim Body Corporate meeting are unsigned, the Sandak Lewin Trust was unanimously to be appointed as the managing agents and were eventually appointed as such.

[6] Matthews explains that since mid-December 2016, the First Respondent has been carrying out works without the approval/consent of the Body Corporate having been obtained. He described the work that the First Respondent commenced on the common property and explained that this involved the construction of a new deck on various parts of the common property. To this end, several photographs depicting the installation of the deck and door are attached to his founding affidavit. In addition thereto, certain plumbing had been installed in the common property. As to the Section work, the First Respondent installed on the

elevation of Section 1, a new door. This too, was done without the Third' Respondent's building and/or planning approvals. Matthews further avers that throughout January 2017, he and his wife continued to hear various noises (including banging, drilling and hammering) emanating from Section 1. He states that they assumed from the nature of the noise that additional plumbing work was being done on the common property below section 1. The frustration and concern with the ongoing Sectional works according to Matthews, prompted his wife to write an email to Mr Cogill of the City of Cape Town on 09 January 2017, which reads thus:

"Good afternoon Mr Cogill

Please can you urgently assist us with this matter. Our neighbor who has the apartment directly below us has started pulling out a window to put in a door. The building is solid concert and he is using Jackhammers and angle grinders to cut through the wall. All this is being done without plans and an Engineers report.

We did not grant him permission based on the fact that out [sic] entire floor above him and our third floor pool is supported on this wall. He has continued regardlessly and I am afraid the longer we take to get this stopped there may be consequences.

Please can you help

Kind regards

A day later, and on 10 January 2017, Ms Matthews wrote another email to Mr Cogill wherein she gave him the names of the Second Respondent and explained that the latter's unit is registered under Livinafrica. In that letter, Ms Matthews further lamented the fact that Balk was removing the entire window on the ground floor *'to make it a door'*. On the same day, Balk's girlfriend, Ms Nienke van Schaik in response to Ms Matthews' request wrote an email to the following effect:

"Dear Kimberley

As requested by you, we obtained a Structural Engineer's opinion. Our architect, who has extensive experience, did not feel that it was necessary to get one and it is also not a specific requirement from the City of Cape Town for our alterations.

The plans that are with the City of Cape Town showed that LC Consulting did the Structural Engineer work. They are now part of WSP/Parsons Brinkkerhof, Structure.

I contacted them as they have all the relevant structure drawings and supplied them with architectural plans and photos, please see opinion below."

[7] On 11 January 2017, Mr Stephen John Wilkinson, a Building Inspector employed by City of Cape Town responded to Ms Matthews email in the following manner:

"Hi Kimberley

I visited the site yesterday and came to the conclusion that as the wall below the window was already three quarters removed it was pointless stopping the builders from removing the rest of the concrete. The removal of the concrete does not in any way impact on the structural integrity of the building however I will be issuing a notice on the owner to get approval for the new door that is to be installed. The reason I never stopped the builder from removing the rest of the concrete is that if I stop them now, the opening will be covered in plastic for a few months until they get approval and then the noise will start again. It is better for you that they complete in one go. I will follow this matter up."

Upon receipt of the above email, Ms Matthews promptly responded to it further bemoaning the fact that Balk continued with the works in complete disregard of the fact that he ought to have obtained permission from the Body Corporate and the Third Respondent in the first place. Therein, she states thus:

"Dear Mr Wilkinson

Thank you for your email.

Please may I ask you if it is possible that we do in fact stop this building as per the fact that there are no approved plans and that according to what we were told and adhered to in the past we had to get approval from Mr Balk before we did any changes to the appearance or façade of the building. We went according to the standard Body corporate rules and he has not adhered to any of the rules including the fact that the decking and all the garden that he is digging is common property. We have the deeds to prove it. He is adding and doing thing that have not been approved at all.

We would like assistance. I am begging you to just halt this so that we can get some order in a meeting and our Body Corporate to assist us in him destroying our garden and doing any alteration without following procedures. He has also started cutting into another wall to make another door out on the opposite side where is installing a shower in the same room and a hole down into the basement.

Surely he should have some plan and permission. We feel he can do anything interns [sic] of this building and is above the law;

Please can we ask you if he can just stop until we have the Body corporate in place and permissions have been granted with an approved plan that is signed by both parties.

I would really appreciate your assistance, this is not the first dispute we have had regarding common property and alterations.

They work weekends, public holidays and way over 5.00 pm.”

[8] It is undisputed that the First Respondent was served by the Third Respondent with an order directing him to cease all building and construction work on 13 January 2017. Matthews states that shortly after the Respondent was served with the order, he and his wife, on the same day also witnessed work continuing on the wooden decking on the common property. He further avers that the works carried on over the weekend (on both Saturday and Sunday). According to Matthews, notwithstanding having been served with a Stop Works order, the First Respondent on 19 January 2017, continued with the door installation.

[9] Matthews states that after the First Respondent had been served with a Stop Work order, he (Matthews), knowing that the continuing works were thus illegal, reported the matter to the South African Police Services, Camps Bay on 15 January 2017. On the same day, two members of the SAPS attended to the property and confronted the Second Respondent. According to Matthews, the police advised him that they were not empowered to do anything as the Respondent had denied that he was served with a Stop Work order. Matthews says that the Applicant's attorneys sent letters of demand to the Balk (on behalf of the First

Respondent) calling upon the latter to cease and desist with its unlawful and illegal conduct but the letters went unanswered.

[10] Matthews states that for all these reasons, the Applicant seeks that the interdict and relief which was granted by this court on an interim basis be made final.

The Opposing Affidavit

[11] The First Respondent, in an affidavit deposed to by Balk, its director, states that at all times, the Applicant was aware of the nature and extent of the works that was carried out and that Matthews had consented thereto, "(whether express, tacit, or implied) both verbally and in writing (via text messages and or whatsApp messages) and took no issue therewith at the commencement thereof."

According to Balk, he disclosed frankly and fully to Matthews his intention to effect the building works. To this end, he states that:

"58. Be that as it may, at all material times, there was full and frank disclosure by myself to the representative of the Applicant in relation to the building works which I

intended to undertake. There were various discussions, and no objection was raised. Given the dysfunctional body corporate, I presumed that this was sufficient. It was only after the building had commenced and there were builders on site and a certain amount of noise, that issues were raised.

59. I pause to mention that during the building works, we replaced two of the wall tiles on the outside wall of Section 2, which raised no objections. Moreover, and in order to facilitate the installation of the plumbing, Matthews moved one of his vehicle [sic]. Again no objection was raised in respect of the building works."

Balk further avers that:

"86.1 It is submitted that at a meeting on 21st December 2016 between myself and the deponent to the Applicant's affidavit, the requisite consent was given. Neither any issues nor any concerns were raised."

According to Balk, the permission allegedly given on 21 December was thereafter implied. He also denies that the building works would have had a detrimental effect on the structural integrity of the entire building.

[12] Balk sketched a historical background predating the application which had rendered the Body Corporate as a sectional title scheme dysfunctional. Balk states that the owners of section 2, namely Skyscape, had never

regarded themselves as having any use of the common property, and neither did they assert any claim in respect thereof. He further states that the Court Order of 30 July 2015 provided that no further changes to the common property areas were allowed before a functional body corporate was in effect. According to Balk, at the time the court order was granted, both parties believed that the garden area was indeed the exclusive use area of the first Respondent. According to Balk, the contents of the Notarial Register at the Deeds Office include a diagram drawn up by the land surveyor showing the garden area as an exclusive use area for the First Respondent. In any event, so alleges Balk, historically, Skyscape has also undertaken certain building works and repairs without the consent of the body corporate and the City. Moreover, balcony extensions to increase the coverage were applied for by Skyscape but the sectional title diagram had not been updated. According to Balk, the relationship between the owners of the respective sections came to a head when the First Respondent brought an application in this court which sought to regularise the administration and management of the sectional scheme. The fact that a costs order was granted against the Applicant in that application exacerbated already strained relations.

[13] More relevantly, Balk confirms that the First Respondent has undertaken certain building works on the property. It is undisputed that the First Respondent did not have the approval of the City when it commenced with the building works. To this end, Balk states that:

"A plan has subsequently been admitted to the City of Cape Town for approval, and I understand that it is in the process of being approved.

. . .

It is regretted that the plan was not submitted prior to the building works being undertaken, but given the nature and scope of the building works it is respectfully submitted that there was no undue prejudice to the Applicant or the City in this regard.

In any event we are in the process of regularizing the position."

[14] In expatiation of the no prejudice defence, Balk outlined the nature of the building works that was being undertaken by the First Respondent as follows:

14.1 The removal of a window and installation of a sliding door to access and egress the property;

14.2 The insertion of a single door at the rear end of the property;

14.3 The construction of certain bedroom cupboards;

14.4 The placement of a bath;

14.5 The installation of a new shower;

14.6 The installation of a new toilet

14.7 Certain cosmetic repairs and additions to the outside deck and garden area including the replacement of certain dead grass with synthetic grass, and certain additional decking being placed.

Balk addresses at length the issue of the common property stating that he has exclusive use of the common area of the property entitling him to effect changes without prior approval of Skyscape but surmised as follows:

"The issue of the exclusive use of the area remains a bone of contention. This very dispute has been referred to the ombud for determination terms of the Community Schemes Ombud Service Act, Act 9 of 2011. A copy of the submission is annexed as "JB19". In the circumstances, obviously this honourable Court does not have jurisdiction to determine the dispute relating to the exclusive use area."

Notwithstanding the above averment, Balk insists that the First Respondent is lawfully entitled to the rights of exclusive use of and enjoyment of the garden area 1 and as such, the Applicant has no *locus standi* to interfere in

that which is ‘presently undertaken outside. Balk further denies that Skyscape has locus standi in relation to the body corporate. According to him, it is for the body corporate to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property (Section 4(i) of the Sectional Titles Scheme Management Act, 8 of 2011.

[15] It will be recalled that Skyscape alleges that the First Respondent had, through Balk, been served with a Work Stop Order by the Third Respondent but that on the same day of service, the First Respondent continued with works in violation of the order. The stop work order states that:

“an inspection conducted on 13.1.2017 [it] revealed that you are in the process of erecting a building on Erf 2472 at 33 Camps Bay Drive, Camps Bay the works being (description and extent of works) removing the concrete wall below the existing bedroom window on the northwest side of the dwelling and building a bathroom into the bedroom.”

The notice further reads:

"I hereby order you in terms of Regulation A25(6) of the National Building Regulations, promulgated under Section 17(1) of the said Act, to stop forthwith the erection of the said building work."

[16] According to the First Respondent, at the time the Stop Works Order was issued, the re-decking had been laid, the new shower and bath had been installed, the wall beneath the window had already been demolished and plumbing had been installed. Balk states that the building inspector who had issued the stop works gave him permission to finish the work on that day, and as such, any work that continued after the service of the Stop Works was not done in contempt of the order. Balk further explains the need to complete the installation of the sliding door by referring to an incident that occurred shortly after having been served with stop works and that:

"40. A short time thereafter, it became apparent that the Applicant had perhaps deliberately left his hose running in respect of the filling up of his pool (notwithstanding the current water restrictions). As such the pool overflowed and there was a constant stream of water which was entering into our property through the cavity. A copy of the video will be provided if required.

41. In order to protect the property, the First Respondent completed the installation of the sliding door. I submit that is not in breach of the stop works order, as the demolition of the window was already completed."

[17] The First Respondent denies any statutory breach or that there is any ongoing illegality being committed by it. The First Respondent's attitude is that the building works have practically ceased and are completed, and it is in the process of obtaining the necessary planning permission. For this reason, no order should be granted by the court. This is so because no prejudice has been suffered by either the body corporate or Skyscape. Besides, so says Balk, the works as completed has enhanced the property. Balk further states that works undertaken on 24 January 2017 was merely the finishing off and cosmetic touch up to the new door which had already been installed. The balance of the works effected on the 25 January were effected on the outside decking and there was no angle grinding taking place. The First Respondent denies that the Applicant has established a clear right for the relief it seeks.

The Replying Affidavit

[18] In reply, Skyscape states that in the light of the averments made by the First Respondent to the effect that he had exclusive use of the garden area and that this is confirmed by a conveyancer's certificate is devoid of the truth. Matthews says that when he and his legal team read the body of the First Respondent's conveyancer, Van Deventer, they noticed that it made no reference to the JB6 diagrams. For this reason, he instructed his own conveyancer, Julia Ward, to investigate and file a report whose certificate records that:

18.1 The garden area 'GA1' is not referred to in Van Deventer's certificate;

18.2 The JB6 diagrams are unregistered;

18.3 The first floor garden of the Scheme ('GA1') is not an exclusive area; and

18.4 Instead, that area is in fact recorded as a common property.

As earlier pointed out, nothing much turns on the registration of exclusive use areas for Section 1, as the determination thereof, according to the First Respondent's version, is to be made by the Community Scheme Ombud Services.

[19] The crucial aspect of the First Respondent's averments is the allegation that Skyscape, through Matthews had consented to the works. To this end, Matthews's reply is to the effect that he and Balk are the two trustees of the scheme, and at no stage had he ever given his consent (written or otherwise) for any of the common works of the property. Matthews emphatically denies any general allegation that he gave the requisite consent to the First Respondent. It will be recalled that Balk in a nutshell, alleges that Matthews at all times knew about the building works and expressly gave his consent on 21 December and thereafter tacitly consented as he failed to object to what he perceived as illegal work. In short, he acquiesced to the carrying on of the works. Balk also referred to whatsApp message exchanges between the parties. According to Matthews, none of the whatsApp messages can be construed as giving consent to the building works. On 08 December 2016, Balk wrote:

"08-12-16 10:05:31: Jos Balk: Good Morning Marius

The grass patch on the other side of the building I am going to replace for decking since that will look better. It can be done next week. Will have some workers in.

Cheers Jos"

Matthews replied thus:

“11-12-16 21:18:08: Hello neighbor, confirmed that Carl must go ahead. Hope ur trip to Namibia is both fun & prosperous. Rgds M.”

On 28 December 2016, Matthews expressed his irritation with the building works and stated thus:

“28-12- 16 14:48:42 Marius Matthews: Hi Jos, im really not happy with all the construction that’s taking place here! I did not in any way agree to u changing this block into a hotel!!!! I did not agree to this new outside door being cut into the back of your tv room (now soon to be a bed/bathroom. Not to mention the ongoing noise for weeks now? This is disrespectful & I find dishonest? I will enforce the common area rights as this was never my discussion with you! I have a feeling u think u can con me & things r going to get nasty again. M”

Balk responded to the message by apologising.

[20] In a subsequent exchange, Balk reiterated that he had Matthews’ consent and states that:

“I changed a window into a door and you made a glass structure and balconies. Both alterations need to be correctly approved and administered. You gave me permission to do my change. I never gave permission to your glass structure and there was a condition for the permission with the balconies. I have not filed a complaint with the City of Cape Town since I prefer to spend my time and money on getting solar and the glass

balestrades [sic] instead of paying legal fees and fight while I think we can be very good neighbors."

[21] According to Balk, it is discernible from the aforegoing whatsApp exchanges that Matthews had expressly consented to the works or had acquiesced. Whereas Balk acknowledges that he had neither the consent of the City nor that of the Body Corporate, he seems to suggest that the fact that Matthews had also carried out unauthorised works on the property entitles him to an expectation that Matthews has no right to protest when he carries out his own unauthorised works.

The Replying Affidavit

[22] In the replying affidavit, Matthews readily conceded having effected some changes on the property without the approval of the City.

[23] Ms Julia Ward, an attorney and conveyancer from Ward & Pienaar attorneys deposed to an affidavit confirming that she conducted a Deeds

Registry search of scheme described as The Victory registered on Erf 2472 Camps Bay on 23 February 2017 and states that:

"1. The aforementioned scheme was registered in the Cape Town Deeds Registry on the 5th December 2008, which scheme is comprised of 2 (two) Sections, NAMELY, Section 1 and Section 2.

2. No exclusive use areas in terms of Sec 27 of the Sectional Title's Act 95 of 1986 ("the Act") are delineated on the Sectional Plan Diagram S.G D764/2008 for the said Scheme.

3. The Management and Conduct Rules applicable to this scheme are prescribed by Annexures 8 and 9 of the Regulations to the Act.

4. . . .

5. In terms of this additional Rule 72, certain areas on of the common property are allocated as parking, and store-room areas (P1 – P8 inclusive and Store STI and ST2) to the owners of the respective Sections in terms of Sec 27A (c) of the Act as set out therein.

7. . . .

8. The said Garden Area GA1 is however not referred to in the aforementioned Conveyancer's Certificate, nor has it been allocated as an exclusive use area to either of the 2 (two) Sections within the Scheme by virtue of the provisions of Sec 27 (A) of the Act.

Ms Ward concludes thus:

"9. As such, since the said Garden Area GA1 is not allocated for the exclusive use of either section owners in terms of the Rules and provisions of Section 27 A of the Act, such Garden Area GA1 forms part of the common property within the said Scheme."

[24] In the light of the fact that an order restraining the First Respondent from directly or indirectly effecting or authorising works on any part of ERF 2472 was issued by Rogers J, on 27 January 2017, the Applicant sought leave to file three supplementary affidavits dated 25 January, 6 March and 9 March 2017. The first supplementary affidavit deals with further building/construction works which were carried out by the First Respondent after the main application had been launched.

[25] In the first supplementary affidavit, Matthews avers that since service of notice of motion on the First Respondent on 23 January 2017, the First Respondent on 24 January 2017 continued installing a new door and effecting further construction work. To this end, Matthews attached a photograph depicting work being carried out. Furthermore, so alleges Matthews, on 25 January 2017, the workers continued working, drilling, angle grinding on the exterior block as well as performing interior work in

Section 1, including in area which is an exclusive use area for the Applicant.

[26] Mrs Matthews also filed an affidavit setting out the works that were carried out by the First Respondent post the granting of the interdict. Mrs Matthews states that on 1 March 2017, the First Respondent installed new speakers and their electrical conduits on the deck of the common area. According to Mrs Matthews, the First Respondent attempted to attach the aforesaid conduits and or wiring to its (the First Respondent's) garden furniture located on the decking on the common area. Mrs Matthews further states that she works late into the evening and only got finished at 22h00. Responding to a video supplied to the Applicant by the First Respondent depicting a cavity which according to Balk had to be closed to prevent water ingress, Mrs Matthews stated that she took a video on 14 January 2017, which showed that the window which was removed thereby creating a 'cavity' was still in place on that day. In other words, the work continued after the First Respondent had been served with the Stop Works order. Accordingly, any suggestion that work carried out after the Stop Works

order was borne out of necessity as there was no cavity before 13 January 2017.

The Applicant's locus standi

[27] As earlier alluded to, the First Respondent challenges the Applicant's locus standi to bring this application. The First Respondent also raises other defences but I deem it prudent to first deal or consider the Applicant's locus standi because if I find for the First Respondent, it is dispositive of both applications. It was contended on behalf of the Respondents that the Applicant had failed to serve the notice of the application as required in section 41 of the Sectional Titles Act, 95 of 1986 ("Sectional Title's Act") which provides that any owner wishing to bring proceedings on behalf of the Body Corporate had to first serve a notice on it to institute proceedings. In short, the Applicant did not have the requisite *locus standi* to bring the application because section 38(j) of the Act empowers the Body Corporate to do all things reasonably and necessary for the enforcement of the rules and for the control, management and administration of the common property.

Section 41 of the Sectional Titles Act provides thus:

"41 **Proceedings on behalf of bodies corporate.-** (1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36 (6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2) (a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a *curator ad litem* for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied –

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the *curator ad litem* for the body corporate, and issue such directions as it may deem necessary as to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem."*

[28] It was further submitted on behalf of the Respondent that although the Sectional Titles Act 95 was partially repealed by the Sectional Titles Schemes Management Act, 8 of 2011 ("Sectional Titles Schemes Management Act"), section 4(i) of the latter Act contains a provision similar to that of s 38 (j) of the former Act. Section 4 (i) of the Management Act empowers the body corporate to do all things reasonably necessary for the enforcement of rules and for the management and administration of the common property. Section 9 of the Sectional Schemes Management Act reads thus:

"Proceedings on behalf of bodies corporate.

(1) An owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section:

(a) when such owner is of the opinion that he or she and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 2 (7), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit; or

(b) when the body corporate does not take steps against an owner who does not comply with the rules.

(2) (a) Any such owner must serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made;

(b) If the body corporate fails to institute proceedings within the period referred to in paragraph (a), the owner may make application to the Court for an order appointing a curator ad litem for the body corporate for the purpose of instituting and conducting proceedings on behalf of the body corporate.

(3) The Court may on such application, if it is satisfied

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified, appoint a provisional *curator ad litem* and direct him or her to conduct an investigation into the matter and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the *curator ad litem* for the body corporate, and issue such directions as it may consider necessary to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem*.

(5) A provisional *curator ad litem* appointed by the Court under subsection (3) or a *curator ad litem* whose appointment is confirmed by the Court under subsection (4), has such powers as may be prescribed, in addition to the powers expressly granted by the Court in connection with the investigation, proceedings and enforcement of a judgment.

(6) If the disclosure of any information about the affairs of a body corporate to a provisional *curator ad litem* or a *curator ad litem* would in the opinion of the body corporate be harmful to the interests of the body corporate, the Court may on an application for relief by that body corporate, and if it is satisfied that the said information is not relevant to the investigation, grant such relief.

(7) The Court may, if it appears that there is reason to believe that an applicant in respect of an application under subsection (2) will be unable to pay the costs of the respondent body corporate if successful in its opposition, require sufficient security to be given for those costs and the costs of the provisional *curator ad litem* before a provisional order is made."

[29] I have cited the provisions of s 9 of the Sectional Titles Management Act as well as s 41 of the Sectional Titles Act fully to demonstrate that the content is precisely the same. Any judicial interpretation of s 41 of the

Sectional Titles Act must therefore apply to s 9 of the Management Act. As was stated by the court *in Cassim v Voyager Property Management (Pty) Ltd (574/10) [2011] ZASCA 143 (23 September* 2011) at paragraph 11:

"The jurisdictional facts provided for in s 41(1) are that an owner be of the opinion that he, she or it and the body corporate 'have been deprived of any benefit in respect of a matter mentioned in s 36(6)'. Section 36(6) provides:

'The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of -

(a) any contract made by it;

(b) any damage to the common property;

(c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; . . . '

[30] What must be determined though is whether the Applicant, as the owner of the property has the requisite standing to bring the present application in the light of the fact that the body corporate is in terms of section 4(1) responsible for the enforcement of the rules and for the control, administration and management of the common property for the benefit of all owners.

[31] It was contended on behalf of the Applicant that by virtue of the illegal conduct of Livinafrica, the Applicant has *locus standi* in these proceedings. More specifically, it was further argued that:

31.1 The law cannot and does not countenance an ongoing illegality which is also a criminal offence (and to do so would be to subvert the doctrine of legality and to undermine the rule of law);

31.2 The unauthorised and illegal conduct of Livinafrica – in erecting structure and facilities without the requisite approval and without approved plans – is *contra boni mores* and contrary to public policy;

31.3 Skyscape is the only other member of the Body Corporate, and there are only two trustees (being the two representatives of Skyscape and Livinafrica). It was thus practically impossible to obtain trustee authority for the Body Corporate to have launched these proceedings;

31.4 The Applicant's rights are clearly being infringed by First Respondent, and thus the former has the standing necessary to seek an order protecting its rights accordingly. Furthermore, as the Respondent's neighbour, the Applicant has the necessary locus standi to apply for a court order to

enforce compliance with the relevant building laws and regulations. Reliance for this submission was placed on Van der Walt, *The Law of Neighbours,* at 341. According to the argument, the self-help demonstrated by the First Respondent can never be justified by the difficulties it faced procuring consent of the body corporate for the intended works as:

"The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. [1]"

[32] According to the Applicant, the First Respondent alleges that it failed to comply with the above provisions and attempts to avoid the apparent failure by stating that because the two trustees of the body corporate are the Applicant's sole member and the Respondent's director, it was practically impossible to obtain their authority for the body corporate to launch the present proceedings. However, so argues the Applicant, nothing turns on this submission as the Applicant did not institute these proceedings on behalf of the body corporate. It however, cannot be denied that there is disharmony and disunity in the body corporate.

[1] Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) par 61

[33] The issue of *locus standi* of owners of sectional scheme property was considered in *Cassim and Another v St Moritz Body Corporate and Others* (16788/2004, 18425/2004, 2918/2005, 11914/2005) [2010] ZAKZDHC 19 (11 June 2010). It is necessary to give a brief summary of the facts of that matter.

[34] The First and Second Plaintiffs ("the plaintiffs") had purchased three sectional title units in a block of flats known as St Moritz in 1992. During 2001, the plaintiffs became concerned over what they perceived as mismanagement of the building. This gave rise to a series of court applications which the plaintiffs instituted as trustees of the body corporate. The Second Defendant, Voyager Property Management, in its plea denied that the plaintiffs had locus standi to bring the proceedings as they could no longer rely on the locus standi they had as trustees because the entire board of trustees had been suspended. The Third and Fourth Defendants also raised a special plea stating that the plaintiff cite themselves in their personal

capacities in the numerous applications and actions. That being the case, the plaintiffs were bound to take action against the Defendants in terms of the Sectional Title Act No 95 of 1986 but failed to do so.

[35] Relying on the decision in *Letseng Diamonds Ltd v JCI Ltd* 2009 (4) SA 58 (SCA) at 59 in which it was held that an individual shareholder in the company has *locus standi* to approach the Court for a determination of issues relating to the validity of the Agreement, the plaintiff argued that as an individual member of the body Corporate, owner and trustee, she is entitled to have the validity of the Loan determined, as it affects her rights of ownership in that the creditor is entitled to recover from her, any shortfall which it could not recover from the Body Corporate.

[36] It was argued on behalf of the Second Defendant on the other hand that the Plaintiffs enjoy adequate remedies under the Sectional Titles Act in that section 41 provides a comprehensive statutory right for an owner of a sectional title unit to seek the appointment of a *curator ad litem* to bring proceedings in the name of the body corporate, where the body corporate

has not instituted proceedings for the recovery of damages or loss or where it had been deprived of any benefit in respect of a matter mentioned in section 36 (6) of the Act. Counsel for the Second Defendant relied on this contention on *Wimbledon Lodge (Pty) Ltd v Gore NO & Others* 2003 (5) SA 315 (SCA).

[37] The court found as follows:

"I am satisfied that section 41 of the Sectional Titles Act protects an aggrieved owner "and the body corporate who have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36(6) and where the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit", by providing for the appointment of a *curator-ad-litem* at the request of an aggrieved owner, provided the court is satisfied that the requirements of section 41(3) have been met."

[38] The plaintiffs appealed against the finding that they had no *locus standi* to the Supreme Court of Appeal. In *Cassim v Voyager*, *supra*, the court explained the operation of s 41 thus:

"[13] . . . it appears to me that the section finds application precisely when there is disharmony and disunity in the body corporate. The more dysfunctional the body corporate, the greater, I dare say, the need for a curator. On the view that I take of the matter, the

argument advanced by and on behalf of the appellants misconstrues the section. The section does not require an owner to cause the body corporate to act in a particular way if the latter is unwilling to do so. All that is envisaged is for an owner to effect service of a notice on the body corporate calling upon it within the stated period to institute the contemplated proceedings. Should it fail to do so the envisaged remedy available to the owner is not to compel compliance with the notice but rather to approach the court for the appointment of a *curator ad litem* for the purposes of instituting and conducting the proceedings on behalf of the body corporate."

The court further explained that it is only the body corporate and not individual members who may institute proceedings against wrongdoers and stated thus:

[15] The last string to counsel's bow on this aspect of the case was the following statement from *Wimbledon Lodge* (para 14): 'If the body corporate is seen not to do its duty, then an individual's powers may, to an extent, be restored'. Plainly what Schutz JA intended to convey was this: an individual's powers may to the extent provided for in s 41 be restored. Indeed, as Schutz JA pointed out (para 18), that accords with the general principle at common law that where a wrong is done to it, only the company (in this case the body corporate) and not the individual members may take proceedings against the wrongdoers (*Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189)). Schutz JA's statement thus affords no authority for the proposition that owners who find themselves in the position of the present appellants are exempt from the provisions of s 41. The conclusion that I therefore reach is that s 41 finds application to the appellants.

In upholding the decision of the trial judge, the court further said that:

"[19] The real difficulty for the appellants in this case, however, is that they did not impugn the constitutionality of s 41 or any other provision of the Act. Accordingly, to borrow from Mokgoro J in *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 29: 'in these circumstances, and in the circumstances of this case, the Act cannot be bypassed'. Section 41 read with s 36(6) plainly encompassed within its scope the three claims in respect of which the appellants came to be non-suited by Van den Reyden J. It follows that the conclusion of the learned judge cannot be faulted and in the result the appeal must fail."

[39] The state of the law as discernible from the above judgments therefore is that the plaintiffs ought to have pursued their application by invoking provisions of s 9 as it is not exempt from same. It follows that the applicant lacks *locus standi* in the present proceedings. In the light of the finding I have made, it is plain that the contempt of court proceedings must also fall away.

[40] In the result, the following order will issue:

1. The applicant's application for a final interdict is dismissed.
2. The application to have the First Respondent declared to be in contempt of court is also dismissed.
3. The Applicant is ordered to pay the First Respondent's costs.

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NDITA, J