REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 2912/2016

Before the Hon. Mr Justice Bozalek

Hearing: 13 February 2017 and 24 May 2017
Judgment Delivered: 30 June 2017

In the matter between:

HARALD ESCHERICH	**1st Applicant**
K2015028853 SOUTH AFRICA (PTY) LTD	**2nd Applicant**

and

HJALMAR DE WAAL	**1st Respondent**
THE GEORGE LOCAL MUNICIPALITY	**2nd Respondent**
THE KNYSNA LOCAL MUNICIPALITY	**3rd Respondent**
THE SURVEYOR-GENERAL OF THE WESTERN CAPE	**4th Respondent**
THE MINISTER OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE PROVINCE	**5th Respondent**

JUDGMENT

BOZALEK J

[1] This application concerns a dispute between adjoining land owners regarding whether a road on one such property has been unlawfully diverted and, secondly, whether certain structures erected on that road without planning approval fall to be demolished.

[2] Three land owners are parties to the application, namely the first and second applicants and the first respondent. All own neighbouring farms or smallholdings in the George/Sedgefield area being portions of Hoogekraal Farm 182. The first applicant is the owner of portion 29 whilst the second applicant, which was joined as an applicant midway through the proceedings, is a company, the sole shareholder and director of which is the first applicant's son. The second applicant is also the owner of portion 28 which has been sold to a Mr Scholtz although transfer has yet to be passed. These two applicants make common cause in the relief they seek. The first respondent is the owner of portion 20 of Hoogekraal and opposes the relief sought.

[3] In addition the applicants have cited as second, third, fourth and fifth respondents respectively, the George and Knysna Local Municipalities, the Surveyor-General of the Western Cape and the Minister of Transport and Public Works in the Western Cape Province ('the Minister'). At different times the applicants' engaged with these two municipalities concerning the issues in dispute. In recent years the Knysna Municipality appears to have assumed jurisdiction in the matter notwithstanding that the properties are described in the notice of motion as falling within the Division of George.

[4] The Knysna Municipality and the Minister have delivered notices of their intention to abide the Court's decision whilst the George Municipality has taken no action in response to the application. The Surveyor-General has filed a report to which I shall return.

[5] The applicants seek orders directing the first respondent to demolish a garage/shed structure and a chicken coop erected on the road on his property, directing him to clear

the road of trees, shrubs and brush so that it might be used as a road again and directing him to remove a gate and no entry sign where the road enters onto his property.

BACKGROUND

[6] The three properties in question are part of 28 lots, in extent some 338 morgen, which are depicted on a General Plan 615 LD surveyed in 1945 and approved by the Surveyor-General. The plan depicts the Wilderness Forest Estate comprising the lots, one trading site *'and the roads'*, being portion 6 of the farm Hoogekraal situated in the Division of George.

[7] The General Plan depicts a network of roads running through, connecting and providing access to the various lots or portions. The beacons and co-ordinates for each of these roads are set out on the plan. One of them is Seaview Drive East, the road in issue in this matter, which gives access to the first applicant's property before proceeding through the first respondent's property and continuing through another property, portion 19, (now owned by one Bulbring) thereby giving access to the latter's property and then to portion 28, the second applicant's property. Importantly, as depicted on the plan, Seaview Drive East is the only road which gives access to the latter two properties.

[8] The title deeds to the first respondent's property reflects that he purchased the property in June 2005 and in describing the property refers to Diagram 10669/1947 which is annexed to the title deeds. That diagram was made available and is described as being a sub-divisional diagram pursuant to the survey conducted in 1945 by the Surveyor-General and is also described as a sub-divisional diagram in terms of the Land Survey Act, 9 of 1927. It depicts the first respondent's portion 20 and its beacons, and significantly depicts Seaview Drive East traversing the property together with all its

beacons and co-ordinates. Thus no purchaser of portion 20 could have been unaware of the existence of the road on the property.

[9] The first applicant has built two dwellings and outbuildings on his property whilst the first respondent has built a dwelling on the northern side of Seaview Drive East virtually adjacent to the road. It would appear that the first respondent commenced building his house some ten or eleven years ago but it was only in approximately 2010 that he erected a gate across Seaview Drive East on the boundary of his property and the shed and chicken coop in the middle of Seaview Drive East alongside his house thereby obstructing the road. Thereafter the first respondent, starting at the eastern boundary of his property and following the common boundary between his property and that of the first applicant, proceeded to make a new road (*'the diversion road'*) thereby giving access to portions 28 and 19. At the gate where Seaview Drive East enters his property, the first respondent has affixed a sign which reads *'Private Property. No entry without an appointment'*. The effect of all these steps is that, without the first respondent's consent, no one can use Seaview Drive East from the point where it enters his property and, even if they were to do so, they would be unable to proceed any further than his house at which point the road is blocked by the structures he has erected thereon. As a result anyone wishing to gain access to portions 19 or 28 must make use of the makeshift diversion road established by the first respondent running alongside the boundary between his and first applicant's property, albeit still within the first respondent's property.

[10] The applicants state that they are directly affected by the closure of Seaview Drive East and its replacement by the diversion road. The first applicant says that the diversion road poses security risks to his property inasmuch as his livelihood depends on a pine

plantation on the property and anyone driving along the diversion road could easily flick a lighted cigarette onto or near his property and cause a fire. His privacy is also negatively affected. Both applicants also raise the question of access to portion 28 i.e. the property owned by second applicant but which has been sold to one Scholtz who is in the process of or about to commence building thereon. At present first applicant has allowed Scholtz access to portion 28 through his property i.e. portion 29.

[11] The first respondent accepts that the owner of portion 28 is affected by the closure of Seaview Drive East but states that access can be gained thereto using the diversion road. The applicants point out that whilst the first respondent may be prepared for the time being to allow access to portion 28 and 19 along the new road, a new owner might not. The first respondent's response to this is that he is prepared to enter into servitude agreements in relation to access to the last mentioned two properties along the diversion road.

[12] Apart from the direct effect upon their rights and interests, the applicants emphasise that a further legal principle in issue is that in closing Seaview Drive East and purporting to replace it with the diversion road the first respondent has resorted to self-help which in this instance is akin to a spoliation. They observe that the law generally does not tolerate such behaviour especially since it could lead to uncertainty in that members of the public will be unable to rely on the accuracy of records held by the Surveyor-General and there might be other negative consequences. The applicants' case is further that although Seaview Drive East was not often used before, not least because the properties to the east and north-east of the first respondent's property i.e. portions 19 and 28, were not developed, the first applicant had often used it in the past for road inspections and the building and maintaining of firebreaks.

[13] The first respondent does not dispute that he erected the gate and sign and built the diversion road. Nor does he deny that he erected the structures in Seaview Drive East, namely, the shed/garage and chicken coop with the result that the road is completely obstructed at that point. He explains that he did this all in order to give himself better access, through the diversion road, for a trailer to a shed on the north-eastern side of his property. The applicants do not accept this explanation pointing out that Seaview Drive East provided better access to that shed. They contend that the first respondent is being disingenuous and that the real reason for the obstruction of Seaview Drive East and creating the diversion road is that he does not want anyone driving past the front of his home.

[14] Strictly speaking it is not necessary to resolve this difference between the parties since the reasons for the alleged obstruction of the road are not relevant to the issues which arise. In my view, however, particularly when regard is had inter alia to the various maps and photographs, the conclusion is unavoidable that the applicants' inference is correct, namely, that the first respondent decided that the position of Seaview Drive East interfered with his privacy or convenience and therefore closed it off at the entry to his property so that it now serves as no more than the driveway to his dwelling. Thereafter, to completely remove the road's function as a through-road on his property, he erected structures on it immediately adjacent to his property, in effect closing off the remainder of the road. Clearly recognising that these steps rendered portions 28 and 19 landlocked, the first respondent built the diversion road.

[15] Before turning to the legal issues something must be said regarding the responses of the two municipalities to the complaints made by the applicants in relation to the relief which they seek. In 2010 the first applicant complained to the George Municipality

regarding the first respondent's erection of a carport in the middle of Seaview Drive East thereby obstructing the road. The municipality responded that it concluded that the road across the property must remain open and unobstructed until such time as the affected parties had agreed upon an alternative access route and such route had been constructed to municipal standards. It stipulated that the first respondent therefore had to remove the gate as well as remove the unauthorised carport. It added, however, that since the road was *'not proclaimed'* it would have no further involvement in the matter. The first respondent did not remove the gate and carport but proceeded to erect a permanent and completely enclosed shed on the site and the large chicken coop behind that. Thereafter he proceeded to construct the diversion road.

[16] In 2015, the first applicant's son addressed a complaint to the Knysna Municipality in regard to the obstruction of Seaview Drive East. The municipality then investigated the matter which included a site visit. In its written response to the complaint the municipality noted in regard to the structures that although a Site Development Plan had been approved for the first respondent's property, *'building plan approval is still required for the top structures'*. It confirmed that these had been erected on a portion of the road as indicated on the General Plan. It noted, however, that the status of the road as public road *'cannot be confirmed and is therefore not deemed as such'*. The response continued that the matter of access to the property of Scholtz (the second applicant's property) *'is solely a matter that needs to be resolved between himself and (first respondent) and does not concern the municipality'*. It found that the matter was not regarded as urgent due to the fact that an *'alternative road'* existed and the first respondent had given an undertaking to resolve the matter with Scholtz and formalise the alternative road by registering it as such with the Surveyor-General *'followed by the*

submission of "as built" drawings for the top structures that required building plan approval'. There is no indication in the papers that the first respondent has approached the Surveyor-General in this regard.

[17] Finally, for the sake of completeness, the manager *'Town Planning and Building Control'* in the Knysna Municipality advised the first respondent in April 2016 that the municipality was not prosecuting him for the structures that require building plan approval since they did not pose an imminent danger to life or property and did not make the approval of the building plans a matter of urgency. The official expressed the view that it was in everyone's best interest that the present application *'first be finalised, before the building plans are attended to'*.

[18] In short then, the local municipality seized with the matter has adopted the attitude that the question of the obstruction of Seaview Drive East is not one in which it has any interest and in respect of which it intends to take no action. Similarly, as regards to the structures erected by the first respondent without building plan approval it will take no action until such time as the present application is concluded.

THE LEGAL ISSUES

[19] Most of the material facts are not in issue. First respondent does not dispute that he erected the two structures on Seaview Drive East and that he does not have building plan approval for them. He admits closing off Seaview Drive East with the gate and accompanying sign, building the diversion road on his property running parallel to the first applicant's boundary, that he has in effect closed off Seaview Drive East except for his use and that of persons permitted by him and, further, that the road is now practically impassable beyond his residence. However, the first respondent takes issue with the legal

consequences of what he has done. In the first place he disputes that Seaview Drive East is a public road or street and/or that he is not entitled to obstruct it as he has done. In the second place he disputes that the applicants have locus standi to claim the relief which they seek both in relation to the road and to the structures he has erected thereon. Finally, the first respondent argues that the applicants have impermissibly changed their case midstream.

[20] The question of the applicants' locus standi to claim relief in relation to the obstruction of Riverview Drive East depends to a large extent on its legal status. I shall therefore deal with that issue first. Similarly, the question of whether the applicants have changed their case midstream is bound up with that of the status of the road or street in dispute. Accordingly I shall not consider the locus standi point initially but deal with the issues in the following order:

1. the legal status of Seaview Drive East and, depending thereon, whether the first respondent is entitled to obstruct it by erecting a gate and structures upon it;
2. whether the applicants have impermissibly changed their case.
3. whether, in the light of these findings, the applicants have locus standi to claim the relief they seek;

THE STATUS OF SEAVIEW DRIVE EAST

[21] There are a variety of opinions expressed in the papers regarding the status of Seaview Drive East, several of them contained in correspondence or memoranda. I have already referred to correspondence from the George Municipality establishing no more than that the road is not *'proclaimed'* as well as to a letter from the municipal manager of the Knysna Municipality noting that the status of the road as a public road *'cannot be confirmed and is therefore not deemed as such'*. Neither of these municipalities took any

part in the proceedings and therefore there is no indication of the reasoning behind their conclusions nor any indication of what research, if any, was done before expressing these opinions.

[22] The other main source of information regarding the status of the land was the office of the Surveyor-General of the Western Cape. The Surveyor-General himself filed a report dated 27 July 2016 stating that he was aware of the matter and that:

> *'2. In researching the matter as to whether the roads as shown in the general plan 615LD of Wilderness Forest Estate as approved by the Surveyor-General in 1946 are public roads and fall within the definition of "Public Street" in sec 2 (lxxvi) of the "Divisional Council Ordinance No 18, 1976" I have found differing approaches by staff of this office over the years.*
>
> *3. Correspondence dd 1979.03.12 from Mr C Singels, then Surveyor-General (SG File Geor 182 page 235), gives clear indication that no planning consent was required in terms of the Cape planning legislation applicable at the time, Ordinance 33, 1994 since the property was not being subdivided for the purpose of residential development, and that the Surveyor-General approved the plan in 1946 without conditions of establishment (such as servitudes, road maintenance, the establishment of a home-owners association etc., as would be the case today). Registration of the portions duly took place vide diagrams framed from the general plan. The general plan and diagrams show the roads and are in agreement with each other. In some instances the roads transverse across the land parcels and in others, where they are along boundaries, they are left as part of the remainder of the parent property. They are fully beaconed, with data and have road names.*
>
> *4. The Surveyor-General, Mr Singels subsequently came to the conclusion that these roads all qualify as "public streets" as defined in Ordinance 18, 1976 and ownership vests , presumably in terms of Section 121 of the same Ordinance, in the Divisional Council (as it existed at the time).*

5. Vesting ownership of public streets exists in cases where a separate diagram has not yet been framed of a portion of road for formal transfer of ownership in the Deeds Registry to a local authority.

6. A subsequent letter (status) to professional Land Surveyor OJA Goosen dated 1990.08.21 confirm the dates of these roads as "public streets" ….

7. …

8. It is regretted that confusion has arisen and that the status correspondence which is not entirely consistent may have led to this confusion.

9. It is my view that the roads are public streets and ownership vests in the Local Authority.'

[23] The Surveyor-General's conclusion is congruent with the definitions and provisions of the relevant ordinance which he quotes. Section 2(lxxvi) (b)(i) and (ii) of the Divisional Councils Ordinance No 18 of 1976 ('the Ordinance') defines a 'public street' inter alia as:

'(b) any land, with or without buildings or structures thereon, which is shown as a street on –

(i) any plan of subdivision or diagram approved by a council or other competent authority and acted upon, or

(ii) any general plan as defined in sec 49 of the Land Survey Act, 1927 (Act 9 of 1927), registered or filed in a deeds registry or the Surveyor-General's office,

unless such land is on such plan or diagram described as a private street;'

[24] In the present case is it clear that Seaview Drive East is shown as a street on General Plan 615 LD which was registered or filed in the Surveyor-General's office. Nor is Seaview Drive East described on that plan as a *'private street'*. At the very least then Seaview East Drive satisfies the definition in sec 2(lxxvi)(b)(ii).

[25] Section 121 of the Ordinance provides as follows:

> *'Ownership of public places and public streets.*
>
> *(1) The ownership of all immovable property to which the inhabitants of a divisional area have or may acquire a common right and of all public places and public streets and the land comprised in such places and streets shall vest in the division; […]'*

[26] Section 127 of the Ordinance deals with encroachments and provides as follows:

> *'(1) When any immovable property owned by a division or under the control or management of a council is encroached upon, the council may and, when so directed by the Administrator, shall take such steps as may, in the opinion of the council, be necessary to remove or regularise such encroachment.'*

[27] Against the considered opinion of the Surveyor-General, the first respondent raised that of Mr GS Savage, a professional land surveyor whom he contracted to perform various services on his property. Mr Savage confirmed that in August 2011 he surveyed the first respondent's property and established that Seaview Drive East forms part of the entire area of that portion and is not an excluded figure within the erf *'as is normally shown for a road'*. He expressed, further, the view that the area labelled as the road was *'not a proclaimed road but is a private road as is (sic) all the other roads in this estate'*. Mr Savage offers no explanation for his view other than the fact that, physically, the area occupied by the road forms part of the total area described in the first respondent's title deed. This is not determinative of the issue however, since, as is set out in LAWSA on the Ownership of Land – Acquisition (Vol 14, Part 1) at para 20:

> *'Under the previous dispensation, statutory provision was made in certain cases for the direct acquisition and vesting of rights pertaining to land in the state, a public or local authority or a statutory body without any act of expropriation. This was a further example of original acquisition, since the co-operation of the previous owner was not required to effect transfer of the property to the beneficiary. The ownership vested*

directly in the acquirer by virtue of the relevant provision of the statute and no form of transfer from the previous owner was required for ownership to vest in the acquirer.'

[28] Paragraph 45 states as follows regarding the acquisition of state land by means of vesting by statute:

'It has already been mentioned that ownership of land may be acquired merely by the direct vesting of the land in a particular body or person by virtue of a statute. Some statutes provide for the vesting of land in the state for various purposes.'

[29] Acquisition of ownership in land by original methods, one of which is vesting by statute, occurs by operation of law and does not constitute a transfer of ownership. Registration in the Deeds office is therefore not required for ownership to vest. There are many instances furthermore in which the Deeds Registry records do not correctly reflect the ownership of land, one of which is where ownership is acquired by statute. *Union Government (Minister of Justice) v Bolam* 1927 AD 467 at 472.

[30] Having regard to the fact that Seaview Drive East appears on the General Plan, is defined by beacons and coordinates on the Plan, appears on a diagram which is deducted from that General Plan which is referred to in the first respondent's title deeds, the road's congruence with the relevant provisions of Ordinance 18 of 1976 and, finally, giving due weight to the Surveyor-General's opinion in the matter, I am of the view that the applicants have established on a balance of probabilities that Seaview Drive East is a public street, the ownership in which vests in the relevant local authority. In reaching this conclusion I also take into account the functionality of the road which serves as the only formal and registered means of gaining access to portions 19 and 28 of what is described on General Plan 615 LD as the *'Wilderness Forest Estate'*.

[31] It must inevitably follow that the first respondent has no right to unilaterally close or obstruct the road simply to suit his own convenience since to do so is to entirely abrogate the public character of the road. The fact that the first respondent has established a diversion road which gives access to these portions 19 and 28 and that he offers to register servitudes of way over his property in their favour does not advance his case. For one thing the existing arrangements are temporary and can be disavowed by subsequent owners of the first respondent's property. Further, as is alluded to in earlier correspondence with the Surveyor-General, there is an established procedure for changing the location of a public street. Not surprisingly it involves the advertising thereof, notification to the local authorities, the Surveyor-General, all interested parties and a fresh survey. The first respondent simply bypassed this procedure and resorted to self-help.

A CHANGE OF CASE BY THE APPLICANTS?

[32] The first respondent complains that the applicants changed their case midstream from reliance on Seaview Drive East being a *'public road'* to it being a *'public street'*. It would appear to be correct that this aspect first came to the fore after the filing of the Surveyor-General's report which was some months after the first respondent filed his opposing affidavit. Since then, however, the first respondent has filed further sets of affidavits and had an adequate opportunity to deal with the contents of the report if he so chose.

[33] It is so that in general an applicant will not be allowed to supplement his founding affidavit by adducing supporting facts in a replying affidavit. *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* and Others 1974 (4) SA 362 (T) at 368H – 369B. This is not an absolute rule however and in any event there has been no infraction of the rule

in the present case. The applicants' reliance on Seaview Drive East being a *'public street'* as opposed to a *'public road'* introduces no new facts into the matter. The underlying facts, namely, the existence and position of the road, its provenance and the effect of the diversion road upon the applicants have remained exactly the same throughout this case. All that has changed is that the applicants ascribe it to a different statutory definition i.e. a public street rather than a public road. This is no more than a question of law, one which can be addressed by the first respondent at any point without any prejudice to him. The objection based on the applicants changing the nature of their case midstream must therefore fail.

LOCUS STANDI

[34] The first respondent contends that the relief sought by the applicants in relation to Seaview Drive East is any event incompetent inasmuch as they lack the locus standi to seek such relief. He argues that in order to have locus standi as an individual, the first applicant must not show merely a direct interest in the matter but also possession of the right *'in his own right'*. He argues that the first applicant does not use Seaview Drive East, expresses no desire to use it in future and at one point contemplated the possibility of purchasing the first respondent's property and himself re-routing the road. It is not strictly necessary, in my view, to consider the merits of this argument since in his replying papers the first applicant successfully applied for the joinder of the second applicant, a company of which his son is the sole owner and director and which owns portion 28. Having regard to the papers as a whole it is clear that the second applicant has a direct interest in the matter and also possesses the right to use the road '*in its own right'*. In a letter to the Knysna Municipal manager on 29 August 2015 the second applicant's director complained of the road closure stating that it directly affected

portions 28 and 19 *'as there is no more physical access to these plots'*. His complained further that the diversion road *'diverts all the traffic past our property and selfishly gives him (first respondent) full privacy. He also didn't follow the appropriate channels to divert this road and didn't receive any permissions from the affected parties. We the affected parties told him not to do this'*.

[35] In any event the first applicant also complains that his privacy has been affected by the fact that the diversion road runs alongside his property and this has also compromised his security inasmuch as the fire risk to his pine plantation, which now borders the diversion road, is increased. Between them the applicants also point out that the diversion road is inferior in quality to Seaview Drive East which takes a winding path through the first respondent's property in order to remain level and thus renders it as efficient as possible for its purpose.

[36] As has been mentioned previously sec 127 (1) of the Ordinance (pursuant to which ownership of the public street in question is vested in the local authority) provides that when there has been any encroachment upon such a street, as in this case, the local authority may take such steps as it considers necessary to remove or regularise such encroachment. This provision is analogous to sec 21 of the National Building Regulations and Building Standards Act, 103 of 1977 ('the NBSA') which provides as follows:

> *'21 Order in respect of erection and demolition of buildings*
>
> *Notwithstanding anything to the contrary contained in any law relating to magistrates' courts, a magistrate shall have jurisdiction, on the application of any local authority or the Minister, to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorizing such local authority to demolish such building if such magistrate is satisfied that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorization granted thereunder.'*

[37] It was argued on behalf of the first respondent that only the local authority could act against the first respondent in relation to the unlawful structures and that by analogy sec 127 of the Ordinance in effect reserved to the local authority alone the power to take action against the first respondent for encroaching on the road.

[38] The general argument in relation to unauthorised structures was addressed in *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (CPD) where one of the disputes was whether the applicant, the owner of a site adjoining the second respondent's site where structures had been erected pursuant to building plans in contravention of restrictions in the title deeds, had locus standi to approach the court for enforcement of the town planning scheme. The Court held that in view of the purpose to be pursued in the preparation of a town planning scheme, a person who lives in a particular area for which the scheme provides certain amenities which he would like to see maintained may, particularly if he/she is an immediate neighbour, take appropriate steps to ensure that nobody diminishes those amenities unlawfully and that, accordingly he/she had locus standi to enforce compliance with the scheme. Grosskopf J (as he then was) stated as follows at page 401 B - F:

> *'The purposes to be pursued in the preparation of a scheme suggest to me that a scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision. And by "affected" I do not mean damnified in a financial sense. "Health, safety, order, amenity, convenience and general welfare" are not usually measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighbouring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area. […] In my view a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider*

that he may take appropriate legal steps to ensure that nobody diminishes these amenities unlawfully.'

[39] The question was further addressed in *BSB International Link CC v Readam South Africa (Pty) Ltd and another* 2016 (4) SA 83 (SCA), a matter concerning a dispute between neighbours and in particular certain building works which did not comply with the town planning scheme and encroached on the adjoining owners' rights. The Court a quo ordered demolition to the extent necessary for compliance with the relevant town planning scheme but did not explain the legal basis for such order. On appeal the Supreme Court of Appeal confirmed the order and held that the power to order demolition was sourced from a broad general discretion vesting in courts, after due consideration of all relevant circumstances, to order demolition at the instance of a party which had suffered an encroachment upon its rights. The Court did hold that only a local authority or the Minister had locus standi to bring an application in terms of sec 21 of the NBSA and that an individual would not have locus standi to pursue the remedies provided for in sec 21.

'[23] […] Such an individual would be restricted to seeking a mandamus in appropriate circumstances to compel the municipality or the Minister to act in terms of s 21 of the NBSA, should the municipality or Minister have failed so to act.'

[40] But the court went on to state as follows:

'[24] That, however, could hardly mean that Readam was without a remedy. For, it is "of the essence of a town-planning scheme that it is conceived in the general interests of the community . . ." […] And, as the High Court observed, "the contravention of the Scheme by BSB, at least in relation to parking in the vicinity, has a direct adverse (and harmful) impact on the applicant". At common law the power to order the demolition of a building ordinarily finds application in the case of an encroachment by a building onto a neighbour's property. […]

[25] Importantly, here we are not concerned with an encroachment on Readam's land. In De Villiers v Kalson 1928 EDL 217 Graham JP embarked upon a detailed discussion of the prior authorities on this point. He said (at 229 – 230):

"It will be observed that in none of the South African cases were the facts quite similar to the facts disclosed in this case, for in the present case there has been no encroachment upon the ground of another, but an encroachment upon . . . his rights . . . . I am inclined to think that this difference makes little or no change in the plaintiff's rights for many of the same arguments used in favour of the view that the Court has no discretion but must grant an order for the removal, apply equally well to encroachment on land and encroachment on rights, such as exist in this case." […]

[26] The High Court appeared not to appreciate that it was possessed of the kind of discretion alluded to by Graham JP. What tips the scales against BSB is that it was warned that it was acting illegally and, in spite of such warning, it deliberately persisted. If anything, it engaged in obfuscatory behaviour to delay finalisation of this litigation while pressing ahead with its illegal conduct. Such conduct can hardly be countenanced by a court. To do so will make a mockery of ordered town planning and by extension the law. The order granted by the court a quo, which directed that the property be demolished to the extent necessary to ensure compliance with the scheme, can accordingly not be faulted.'

[41] In my view the principles established in the above cases apply squarely to the present matter both in relation to the first respondent's unauthorised structures and his encroachment upon and/or obstruction of the road. Not only do the applicants have a general interest in ensuring the system of public streets operating in the estate are maintained and are not be unilaterally changed (except by lawful procedures), they also have a direct interest in the encroachment inasmuch as its consequences impact upon them directly. Nor can I see any reason in law why the applicants should be restricted to a *mandamus* against the Knysna Municipality to take action against the first respondent in respect of his unauthorised structures or his encroachment upon/obstruction of the road. It

has been amply demonstrated that the Knysna Municipality has no interest in taking action against the first respondent.

[42] In the result I find that the applicants have locus standi to seek the relief sought against the first respondent both in relation to the obstruction of and/or closure of Seaview Drive East and in respect of the structures built on Seaview Drive East without building plan approval.

[43] Be that as it may, having found that the first respondent unlawfully obstructed Seaview Drive East by erecting a shed and chicken coop on it, the question of his lack of building plan approval becomes moot. Inasmuch as he will be ordered to restore the street those structures will have to be demolished, whether they have building plan approval or not. In the result, I find that the applicants have made out their case against the first respondent.

ORDER AND COSTS

[44] Part of the relief claimed by the applicants was an order directing the first respondent to clear Seaview Drive East as it runs through his property but a dispute arose between the parties as to whose responsibility this was. This does not need to be determined, however, since the applicants are content with an order directing the first respondent to clear Seaview Drive East or allow them to clear it.

[45] The applicants having been successful they are entitled to their costs. A question arose over the costs of the hearing on 16 February 2017 where the main application could not be heard since questions of joinder and the first respondent's right to reply to certain material in the first applicant's replying affidavit had first to be determined. Those costs were reserved. It is correct that the first respondent adopted a somewhat obstructive

attitude by not putting up a substantive reply to the applicants' replying affidavit in anticipation that its late filing would be condoned. Strictly speaking he was, however, entitled to take that attitude and the matter was in my view not wholly ripe for hearing. In the circumstances I consider that the appropriate order as far as the hearing of 16 February 2017 is concerned would be that each party bear their own costs.

[46] For these reasons the following order is made:

1. *The first respondent is directed to demolish the garage/shed structure and chicken coop erected on the road named Seaview Drive East running through portion 20 (a portion of Portion 6) of the Farm Hoogekraal Number 182, situate in the Division of George, Western Cape ('Portion 20');*

2. *The first respondent is directed to clear Seaview Drive East or to allow it to be cleared by the applicants as it runs through Portion 20 along the route depicted by the beacons represented by the figure "G a b c d e f g C h j k l m n o p q r" on the plan deducted from Plan 615LD, and signed by the Surveyor-General in January 1948 (attached to the applicants founding affidavit as 'HE 3") of trees, shrubs and brush so that it might be used as a road again;*

3. *The first respondent is directed to remove the gate and 'No Entry' sign erected on or near beacons 'G r' on the plan referred to above;*

4. *The first respondent is directed to pay the applicants' costs of suit save for the wasted costs arising out of the hearing on 16 February 2017 in respect of which each party will bear their own costs.*

BOZALEK J

For the Applicant	*:*	*Mr D Baguley*
As Instructed by	*:*	*Haycock Attorneys* *c/o Dunster & Associates*
For the 1st Respondent	*:*	*Mr CW Kruger*
As Instructed by	*:*	*VanDerSpuy Cape Town*