IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARTZBURG

Case No. : AR 469/12

In the matter between:

DYECOMBER (PTY) LTD	First Appellant
COTTON KING MANUFACTURERS (PTY) LTD	Second Appellant

and

EAST COAST PAPERS CC	Respondent

J U D G M E N T

KOEN J

INTRODUCTION:

[1] This is an appeal against a judgment of Balton J which resulted in the following order:

> '1. The encroaching structure should be removed.
> 2. The applicant is granted the relief sought in paragraphs 1 to 3 of the Notice of Motion'.

[2] The First and Second Appellants were the First and Second Respondents in the court *a quo* in an application in which the Respondent, the Applicant in the court *a quo,* sought the following relief[1]:

> '1. (a) That the First Respondent be and is hereby ordered to remove that portion of

[1] As per the Notice of Motion.

the building erected on Lot 1188 Wentworth, Registration Division FT, situated in the Durban entity, Province of KwaZulu-Natal, which encroaches onto Lot 1189 Wentworth, registration division FT, situate in the Durban entity, Province of KwaZulu-Natal (Erf 1189), including that portion which encroaches upon the road servitude over Erf 1189, created by Notarial Deed of Servitude K1063/99;

(b) That in the event that the First Respondent fails to comply with the provisions of sub-paragraph (a) above within two weeks of the granting of this Order, the Sheriff being and is hereby directed to remove the said encroachment.

2. That it be and is hereby declared that the Applicant's members, employees and invitees are entitled to have access to those portions of Lot 1182 Wentworth and 1189 Wentworth, of registration division FT situate in the Durban entity, Province of KwaZulu-Natal, which are subject to the road servitude created by a Notarial Deed of Servitude K1063/99.

3. (a) That the First Respondent pay the costs of this application.

(b) Alternatively to sub-paragraph (a) above, that the First and Second Respondents jointly and severally pay the costs of this application'.

[3] The Appellants opposed the application and launched a counter application claiming the following relief:

'1. that the Third Respondent in the counter-application[2] be joined;

2. that the Third Respondent in the counter-application be authorised and directed to transfer that portion of the immovable property known as Erf 1189 Wentworth, registration division FT situate in the Durban entity, Province of KwaZulu-Natal which is covered by the building predominantly erected upon Erf 1188 Wentworth, registration division FT, situate in the Durban entity, Province of KwaZulu-Natal to the name of the Applicant[3] from the name of the First Respondent in the counter-application;[4]

3. That the First Respondent in the counter-application be ordered to pay the costs of this application'[5].

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[2] The Third Respondent in the counter application is the Registrar of Deeds, KwaZulu-Natal.

[3] The First Respondent in the application and the First Appellant in the appeal.

[4]The Applicant in the application and the Respondent in the appeal.

[5]The counter-application did not disclose a valid cause of action, nor a valid defence to the relief claimed. In *Meyer v Keiser* 1980 (3) SA 504 (D) at 507A-C Kumleben J held:

> 'When an award of damages is acknowledged as the permissible and appropriate form of relief in the case of an encroachment, an order for the transfer of that portion of the property encroached upon is incidental to, and consequent upon, such an award. The virtue of such an

[4] An order was grantedsubsequently for 'oral evidence' to be heard on the following issues:

> '(a) Whether it is fair and reasonable that the applicant's claim against the first respondent in regard to the encroachment forming the subject matter f these proceedings should be limited to one of compensation rather than the removal of the offending structures;
> (b) If so, what the amount of compensation should be'.

It was the hearing of the oral evidence on these issueswhich came before the court *a quo*.

[5] The matter proceeded on the basis that what the court *a quo* was required to do was exercise its discretion whether to direct that the encroaching structure be removed, or to direct that the Respondent be limited to a claim for compensation[6]with the encroaching structure remaining *in situ*. If compensation was ordered then the amount of the compensation also had to be determined. After hearing the evidence, the court *a quo*concluded that, in its discretion, it would be just and equitable that an order be granted directing that the encroachment be removed.

BACKGROUND:

[6] Erven 1188 and 1189are contiguous. They were previously part of a larger consolidated property[7]. After subdivisionthe Respondent bought and took transfer of erf1189 into its name on 30 November 1999[8]. Secula Investments (Pty) Ltd took transfer of erf1188 during March 1999[9]. The Second Appellant occupied erf 1188 from approximately 1998. The managing director of the Second Appellant at all

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> ancillary order is obvious but it need not necessarily be made (cf*De Villiers v Kalson*1928 EDL 217 at 233), and in certain circumstances to do so may be impracticable or not permissible in law. *The important point is that, whatever form the order takes in such a case, it is the award of damages which is the true basis for the relief granted.*[5]In my view, perhaps as a result of the form of the orders in the two decisions relied upon, this was overlooked by the pleader in the instant case which resulted in a misconception of the nature and extent of the Court's discretionary authority'.

[6]To that extent, the terms of the referral to oral evidence broadened the relief claimed by the Appellants beyond that claimed in their counter application.
[7] The owner of the consolidated property was Feltex (Pty) Ltd.
[8] It also took transfer of erven 1181, 1182, 1190 at the same time.
[9]This was also from Feltex Pty) Ltd. It also took transfer of erf 1183.

material times was a Mr Bilro. During or about 2002 he caused a second level to be added and the roof of the building on lot 1188 to be raised. It is part of these alterationswhich extends beyond the boundary of erf 1188 and encroaches on to erf1189, which the court *a quo*described as the 'encroaching structure' and which it directed should be removed. On 4 February 2008 the First Appellant, of which Mr Bilro is also the managing director, took transfer of erf 1188[10].

[7] A road servitude[11] runs along the boundary of erven 1182 and 1189 where they are adjacent to erven 1183 and 1188.The white wall which appears on photograph 20 in exhibit 'B' and a roller shutter door appearing on photographs 3 and 4 of exhibit 'B' forming part of the building on lot 1188, block thisservitude.

SECTION 4 OF THE NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT:

[8] Section4 (1) of the National Building Regulations and Building Standards Act[12] (hereinafter referred to as 'the Act') provides:

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

THE EVIDENCE OF MR WATERS:

[9] Mr Sam Waters, a fire safety officer with the eTthekwini Municipality within whose municipal area the properties are situated, testified that his duties involve scrutinising plans and inspecting building to ensure that the South African Bureau of Standards'Code 0400 is complied with. He is involved in the administrative process when plans submitted in respect of theproposed construction of and/or alterationsto existing buildings are considered to determine whether they should be approved.

[10] The First Appellant also took transfer of erf 1183 at the same time.
[11] This is the road servitude which forms the subject of the relief in paragraph 2 of the Notice of Motion.
[12] Act 103 of 1977.

[10] His uncontroverted evidence was that if plans for the building alterations in respect of the building on erf 1188, part of which constitutesthe encroachment on erf 1189, had been submitted, they would not have been approved by the municipality. Due to part of the structure also abutting the boundary wall,the owner of erf 1189 would be prohibited from building on their boundary.

[11] He testified that a building line restriction,prescribing how far buildings need to be apart,must be maintained between buildings. This distance is determined by the area of the openings,resulting from for example windows, in the boundary wall. If the total aperture area on the boundary wall of a structure is say 5 square metres, then the building line from that wall to any other building proposed to be builtand required to be kept clear, would be two metres. The maximum distance for which allowance must be made, is 9 metres if the aperture was 500 square metres. The minimum, for anything less than a 5 square metre aperture area, wouldbe1.5metres

[12] It is not disputed that no plans had been approved in respect of that part of the building which encroaches on to the respondent's property.Accordingly, the encroachment constitutes an illegal structure.[13]

[13] The significance of Mr Waters' evidence further is that if compensation is an appropriate alternative remedy, the compensation could not just simply relate to the 31.6 square metres[14]'covered by the building'as referred to in paragraph 2 of the counter-application. That isbecause the Respondent would lose not only the area covered by the building, but also the area comprised of the building line restriction on its property which the Respondent would not be able to use. At best for the Appellants this restrictive area surrounding the encroachment would be at least 1.5 metres wide, but it could be more, depending on the aperture area[15] in the wall facing the boundary.The Appellants' counsel also recognized that the compensation would have to go beyond just the area of the footprint of the encroachment, in stating in his opening address that:

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[13] Section 4(4) of the Act renders a contravention of section 4(1) a criminal offence with a penal sanction of a fine not exceeding R100 for each day on which the offender was engaged in erecting the illegal structure. See *Lester v NdlambeMunicipality* [2013] ZASCA 95 para 19.

[14] Mr Chris Hearn, a property evaluator testified that the encroachment extended over 31.6 square metres.

[15] No evidence was adduced of the extent of the aperture.

> 'The respondents' case is that in the spirit of fairness and equity, and the fact that those were pre-existing structures, they should not, that at the very least – or rather at the very most if the encroachment in any way hampers those plans for the development – the applicant's papers indicate that certain aspects of the plans, the architectural plans and the construction, would have to be modified – it would be fair and equitable at the very most that the respondents be ordered to compensate to (sic) the expenses incurred in those modifications'.

NON JOINDER:

[14] The relief claimed by the Appellants for an order directing the payment of compensation would necessarilyentail thatthe structure giving rise to the encroachment be allowed to remain intact and would, in effect, foist upon the municipality an illegal structure which would have received the imprimatur of this court by it being allowed to remain.

[15] Such an order would therefore directly affect the rights of the eThekwini municipality.[16] It has a direct and substantial interest[17] in any relief which would allow the illegal structure to remain.It should have been joined by the Appellants in pursuing the relief claimed in their counter application. It is however not a party to the present litigation.

[16] The non-joinder[18] of the eThekwini municipality in relation to the relief claimed in the counter-application, as amplified in the referral to oral evidence,is fatal.

[17] The question arising is what has to happen in the light of such non joinder. The parties seemingly desired the case to proceed in the absence of the eThekwini municipality. That would render the Appellants' counter application fatally defective and would leave only the Respondent's application for demolition. That desire cannot however relieve this court from inquiring whether the order it is asked to make may

[16]The present is not an instance such as in *Trustees,Brian Lackey Trust v Annandale*2004 (3) SA 281 (C)where the offending structure had plans approved, but it had been positioned incorrectly resulting in the encroachment.
[17]*Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O).
[18]A court, including a court of appeal, is entitled *meromotu* to raise the question of non-joinder to safeguard the interests of third parties – *Klep Valves (Pty) Ltd v Saunders Valva Co Ltd* 1987 (2) SA 1 (A) at 39I – 40B.

affect the municipality,[19] which it clearly would if the relief claimed by the Appellants was to be granted. A court of appeal may decline to hear a matter until any necessary joinder has been effected or the party sought to be joined has waived its right to be joined.[20]

[18] In the ordinary course, and if the Appellants had reasonable prospects of success in this appeal I would have given consideration to such a course of action. On the facts of this appeal, I am however not disposed to do so, as I am of the view that even if the municipality had been joined, being an illegal structure in respect of which there are no plans, there was no discretion for a court to exercise. The only legal remedy was one for the removal of the encroachment. However, even if I was wrong in that conclusion, the Appellants failed to demonstrate that the court *a quo* had not exercised its discretion, to the extent that it had a discretion, properly, and further, and in any event, insofar as the court a quo had a discretion which it could exercise in favour of compensation, the Appellants failed to discharge the onus of proving the quantum of compensation which should be paid.

THE PRINCIPLE OF LEGALITY:

[19] The part of the building for which there are no plans, encroaching on erf 1189, is an illegal structure.

[20] In *Lester v Ndlambe Municipality and Another*[21], the Supreme Court of Appeal held with reference to the provisions of s4 of the Act and in the context of whether a court has a discretion whether or not to order demolition of a building structure which has no approved plans, that '(t)he conclusion that the statutory provision itself does not lend itself to such a discretion is unassailable'.

[21] Based on that conclusion, the court *a quo*would, on the basis of the legality principle, haveno discretion to permit the encroachment to remain. As the court *a quo* would have had no discretion, the order forthe removal of the encroachment was

[19] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649.
[20] *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) para 11 – 12.
[21] (514/12) [2013] ZASCA 95 (22 August 2013 at para [20].

the only order it could validly grant. The order granted was thus correct, albeit for reasons different to those which persuaded the learned judge. An appeal lies against the result of another court's judgment, not its reasons. This appeal accordingly falls to be dismissed.

[21] Unlike the position in Lester's case however, the present application is not one as contemplated by section 21[22] of the Act,brought at the instance of a local authority[23]. It might therefore be argued that Lester's case is to that extent distinguishable, especially as the Supreme Court of Appeal held that the case before it was '…not a neighbour law case at all', whereas the Respondent *in casu* is plainly a neighbour of the Appellants and the Appellants rely on principles of neighbour law.

[22] As much as that appears to be a point of distinction, I do not consider it to affect what I consider to be the *ratio decidendi* of Lester'scase. The encroachment remains part of an illegal structure which, absent approved plans, is prohibited by law. It does not matter whether the complaint relating to such illegality is raised by the municipality or a neighbouring owner. The principle of legality entrenched in our Constitution endures for the benefit of all.

[23] Nor do the benefits extended to municipalities in terms of s21 of the Act render the *ratio* in Lester's case inapplicable to the present dispute. S21 is primarily a jurisdictional provision which permitsmunicipalities to seek demolition orders in respect of illegal structures within its area of jurisdictionin the magistrate's court, without regard to the value of the structure or such relief otherwise being beyond the jurisdiction of a magistrate's court. But the fact that s 21 extends this benefit to municipalities, and not other *personae,*cannot mean that where an illegal structure is objected to by a neighbour, a court has a discretion to permit the illegal structure to remain against the payment of compensation, whereas if the objection was taken by the municipality, the court would have no such discretion. Such an approach would produce anarbitrary result.

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[22] Section 21 provides that '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 ….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'.

[23] In the present matter, the eThekwini Municipality.

[24] However, even if I was wrong in that regard and it was to be found that a court has a discretion to order compensation and allow the illegal structure to remain, then I nevertheless am not persuaded that the court *a quo* erred in granting the order it did.

IF THE COURT A QUO HAD A DISCRETION, IT HAS NOT BEEN SHOWN THAT IT DID NOT EXERCISE THAT DISCRETION PROPERLY:

[25] The learned judge in a carefully reasoned judgment weighed up all the relevant consideration when it comes to exercising the discretion[24]a court has in matters involving encroachments in our neighbour law, specifically whether to direct the demolition of the encroachment, or to direct the payment of compensation. Where a court has such discretion, the starting point is that an owner is ordinarily entitled to claim a demolition order in respect of an encroachment unless it will give rise to an unjust result. The disproportionality of prejudice[25] should a demolition order be directed, as opposed to compensation being directed to be paid, will be a consideration in determining whether an injustice might follow. Another consideration willbe the aversion a court has to order the destruction of economically valuable building works.[26] The Appellants however placed no evidence[27] before the court as to what it would cost to have the encroachment removed. The Appellants also made no serious attempt to quantify the amount of compensation that should be paid, a point to which I shall return below. The Appellants showed no concern or appreciation[28] for the extent of the damage the encroachment constituted to the Respondent's property. Instead, the attitude of Mr Bilro, on behalf of the Appellants, has been one of arrogance and disdain for the complaints regarding the encroachment caused by his illegal building alterations, which would have been

[24] That a court has a discretion to award damages rather than demolition of the structure is now well established – see *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) and *Trustees, Brian Lackay Trust v Annandale* (supra) at fn 13 para 20 on page 289. That principle must be qualified to the extent that the structure must be a legal one with approved building plans.
[25] *Trustees Brian Lackay Trust v Annandale* (supra) at fn 13 para 35.
[26] *Trustees Brian Lackay Trust v Annandale* (supra) at fn 20 para 36.
[27] Mr Bilro testified that he did not get a quotation for the costs to remove the encroachment and that he did not bother to do so.
[28] Mr Bilro testified when it was pointed out to him that the Respondent would not be able to complete the buildings on its property that all the Respondent had to do was put a roof against his roof?

avoided, had he followed the correct steps of first having building plans approved before undertaking a construction which could encroach on the land of others. The Appellants were the authors of their own misfortune.

[26] The alternative claim for compensation should, in any event,also fail as the Appellants did not provide any or satisfactory evidence to determine the amount of compensation. Although there was some reference to the land having to be acquired at R2 800 per square metre, one simply does not know what the extent of the building line should have been both in width and in length.As much as precise arithmetical proof might not always be possible or legally required, the Appellants failed, at a very minimum, to prove what building line should have been provided with reference to the configuration of the portion of the building constituting the encroachment.

[27] The Appellants accordingly failed to discharge the onus of proving the amount of any compensation. That being so, the court *a quo* for that reason too, would have had no basis to exercise its discretion other than in favour of the Respondent.

WHAT OPPORTUNITY FOR DEMOLITION SHOULD BE ALLOWED?

[28] The court *a quo* granted an order in terms of paragraphs 1 to 3 of the Notice of Motion. Paragraph 3 falls to be rectified to refer to sub-paragraph (a) only. It also seems to me that the time period of ‘two weeks’ in paragraph 1(b) of the Notice of Motion is unreasonably short and should be substituted with ‘two months’.

COSTS:

[29] The Respondent has asked that the appeal be dismissed with costs,such costs to include those consequent upon the employment of senior counsel. Such an order appears to be appropriate and reasonable in the circumstances. The Appellants did not advance any argument to the contrary.

ORDER:

[30] The order granted is therefor as follows:

1. The appeal is dismissed with costs, such costs to include those consequent upon the employment of senior counsel.
2. The order of the court *a quo* is replaced with the following:

   An order is granted in terms of paragraphs 1, 2 and 3(a) of the Notice of Motion, save that the reference to ‘two weeks’ in paragraph 1(b) is substituted with ‘two months’.

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LOPES J

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CHILI A J

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Date of Judgment: 18 October 2013

Date of Delivery: 7 November 2013

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