THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 514/12

In the matter between Reportable

MATTHEW ROBERT MICHAEL LESTER **APPELLANT**

and

NDLAMBE MUNICIPALITY **FIRST RESPONDENT**

HIGH DUNE HOUSE (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Lester v Ndlambe Municipality* (514/12) [2013] ZASCA 95 (22 August 2013)

Coram: MTHIYANE DP, CACHALIA, THERON and MAJIEDT JJA, ZONDI AJA

Heard: 15 MAY2013

Delivered: 22 AUGUST 2013

Summary: Local Government – demolition of a building erected without approved building plans – court not vested with any discretion where demolition applied for in terms of s 21 of the National Building Regulations and Building Standards Act 103 of 1977 – doctrine of legality requires courts to enforce statutory prohibitions the contravention of which constitutes a criminal offence

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ORDER

On appeal from: Eastern Cape High Court, Grahamstown(Alkema J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

MAJIEDT JA (MTHIYANE DP, CACHALIA and THERON JJA and ZONDI AJA concurring):

Introduction:

[1] This appeal concerns the demolition of a luxury home in Kenton-on-Sea (Kenton) on the Eastern Cape coast. The home belongs to the appellant, Professor Matthew Robert Michael Lester. The first respondent, the Ndlambe Municipality, under whose jurisdiction Kenton falls, applied for and was granted a demolition order in respect of the appellant's home by Alkema J in the Eastern Cape High Court, Grahamstown. The learned judge also dismissed the appellant's counter-application to allow him to alter the house and made costs orders in accordance with these outcomes. This appeal is with his leave.

[2] The second respondent, High Dune House (Pty) Ltd, is a private company, whose shareholders and directors are Mr and Mrs Haslam. Their holiday home is registered in the company's name and is adjacent to the appellant's residence. Mr Haslam has deposed to all the affidavits on the

company's behalf. For the sake of convenience I shall refer to the various parties as 'Ndlambe', 'Lester' and 'Haslam'. Ndlambe's seat as local authority is in the nearby town of Port Alfred.

The factual matrix:

[3] This case has a long, sorry history, which includes seven high court applications, including the one presently on appeal, extending over a period of more than a decade. All these applications culminated in orders against Lester, either by consent or by the court finding against him. As these applications form an integral part of the factual backdrop to this matter, I consider it necessary to recount them in some detail. The facts are largely undisputed. Most importantly, it is common cause that Lester's dwelling, which is the subject of this dispute, has been erected unlawfully, without any approved building plans as required by s 4(1) of the National Building Regulations and Building Standards Act 103 of 1977. I shall revert to this and other relevant provisions of the Act presently.

[4] Kenton is a quaint seaside village, on the coastal road between Port Elizabeth and East London, the R72. It is flanked by this road, two rivers and the Indian Ocean. Its inhabitants consist mostly of retirees, holidaymakers and a few permanent residents. Lester, a professor in tax law at Rhodes University in Grahamstown, (some 60 kilometres from Kenton by road), falls into the lastmentioned category. It is undisputed that the property is his primary residence. As stated, the Haslams' neighbouring property is their holiday home. It is located (as the company's name suggests) on the flat top of a dune, with Lester's property to the south, lower down the sloping dune. Lester acquired his property in 1997 from his mother and aunt, to whom it had been bequeathed by Lester's grandfather. The property initially provided basic holiday accommodation but, upon joining Rhodes University in 1998, Lester decided in 2001 to make Kenton his permanent home. This necessitated the construction of a bigger house higher up the slope of the dune. This is when the trouble started.

[5] Before the construction began, the Haslams had sweeping, panoramic views over the ocean from their dwelling, spanning from the west to the east. This changed when Lester began building. Lester first engaged the architectural services of Ms Pollos Purden to design a dwelling higher up from the existing rudimentary dwelling. She designed a single storey pitched roof house. Her building plans were approved by Ndlambe on 3 May 2002 (the Purden plans). The design envisaged a split level home. It has erroneously been described by some of the parties as a 'double-storeyed' home, though nothing turns on this issue. Lester commenced building operations on the Purden plans. Haslam obtained copies of the Purden plans from Ndlambe's officials, after he saw foundations being cast for the new dwelling. He made it plain to the officials at that early stage that he had an interest in the matter and that he required to be notified of Lester's building plans, prior to their approval. Haslam raised an objection to the construction of a second, separate dwelling higher up on the dune because it contravened Lester's title deed restriction which prohibited more than one dwelling on the same property. Lester was notified of this objection, but chose to continue building, pending a council decision.

[6] These events led to the first high court application in which Haslam applied for an interdict restraining Lester from continuing building operations, pending the outcome of review proceedings. The application was successful before Pickering J who interdicted Lester from building further pending approval of amended plans. Of significance is that Lester, in his answering affidavit, acknowledged that in the event of a successful review he would be obliged to demolish the existing structure for lack of approved plans. On Lester's instructions, Ms Purden amended the plans to convert the old building to a boathouse and outbuildings, thus overcoming the prohibition against the construction of more than one dwelling on the property. The amended Purden plans were approved on 8 November 2002. It is common cause that these plans remain unchallenged and valid. One would have

thought that Lester, in view of what had happened, would have contented himself with this situation and to have proceeded with the building on these plans. This was not to be. Due to a change in his personal circumstances, which entailed Lester having to create additional space for his frail mother in his new house, he discarded the Purden plans altogether, and appointed another architect, Mr Sam Pelissier, with a mandate to design a double-storey building, using the Purden plans' footprint.

[7] Pelissier fulfilled his mandate by designing a dome-shaped roof in place of the envisaged pitched roof of the Purden plans to cater for the wind, height and shade factors (the Pelissier plans). It is important to note that these plans varied significantly from the Purden plans in respect of the general architectural design. In particular it had a bigger roof which considerably increased the height of the building. The Pelissier plans were taken to the relevant Ndlambe officials in Port Alfred for approval by Lester himself on 17 July 2003. In Lester's own words, he "walked the officials of the various [Ndlambe] departments through the plans", resulting in them being approved on the same day. Neither Ndlambe nor Lester gave notice to Haslam of the new Pelissier plans despite being undeniably aware of Haslam's interest in the matter. So, when construction of the new dwelling commenced, Haslam, completely unaware of the changed circumstances, assumed that building was still proceeding under the unchallenged Purden plans of November 2002. When he realised that this was not so during October 2003 he launched the second application to have the Pelissier plans reviewed and set aside.

[8] Several grounds for review were advanced by Haslam in the second application amongst others the fact that Ndlambe had failed to appoint a building control officer whose tasks in terms of the Act included the furnishing of a report on Lester's building operation. Ndlambe conceded this omission and consented to an order before Jennett J on 25 June 2004, setting aside the approval of the Pelissier plans and referring them to Ndlambe for

reconsideration, following the appointment of a building control officer and upon notice to Haslam. Lester also consented to the order.

[9] Ndlambe approved the Pelissier plans again during November, subject to certain conditions, which included the change in the conditions in the title deed. This prompted Haslam to launch the third application on 24 February 2005, for the review and setting aside of the conditional approval of the plans. Several grounds were relied upon for the review, of which the principal ground was that Ndlambe had no authority to approve plans 'conditionally', and that its purported 'conditional approval' was *ultra vires* s 7 of the Act. Goliath AJ made an order by consent on 22 September 2005, setting aside the Pelissier plans yet again and referring them back to Ndlambe for fresh consideration.

[10] The Pelissier plans were approved by Ndlambe for the third time on 14 February 2006, after it had received submissions from all interested parties and after it held a hearing on 25 November 2005. And so the fourth application was made for a review of this latest approval on substantially the same grounds as in the previous application. Jones J made an order by consent between the parties on 29 June 2007, setting aside this approval.This time, Jones J did not remit the matter to Ndlambe, but issued a declarator to the effect that the Pelissier plans (of July 2003) 'be not approved'. Lester's counter-application was dismissed. In effect Jones J's order required the submission of new building plans, a fact which Ndlambe acknowledged by passing an important resolution on 31 March 2008. The relevant part reads:

'That it be noted that the building on Erf 20 [Lester's dwelling] exists without plans, no plans have subsequent to Jones J's by the owner of Erf 20 for approval.'

The fifth application, in which Haslam sought a mandamus to compel Ndlambe to make a decision following the judgment of Jones J, was withdrawn when Haslam became aware of the resolution. But he was not satisfied with the terms of the resolution and brought the sixth application for the reviewing and setting aside of the resolution and substituting it with an order directing Lester to submit, within one month, building plans that comply

with all the applicable statutory and zoning prescripts failing which Ndlambe would apply in terms of s 21 of the Act for the dwelling to be demolished.

[11] On 22 April 2010 Plasket J made an order by agreement between the parties. The order granted Haslam the relief set out in the preceding paragraph. The significance of this order was twofold:

(a) Lester was placed on terms to submit plans within one month that complied with all statutory and zoning requirements; and that,

(b) the spectre of a demolition order being sought in the event of non-compliance, loomed large.

It bears emphasis that Lester had consented to Plasket J's order. The whole sorry saga surrounding Lester's dwelling raised the ire of several members of the community, forcing Lester to decamp to Cape Town for a brief sojourn. It is not in issue however, that the dwelling in Kenton remained his primary residence.

[12] Lester sought to comply with the Plasket J order by submitting various sets of amended and revised plans to Ndlambe, none of which met with the latter's approval. The final revised plans envisaging the removal of the top floor and the domed roof to be replaced with a flat roof in order to achieve a reductionin overall height and size, were submitted on 15 September 2010. On 5 December 2010 Ndlambe adopted the recommendations of the building control officer and resolved in terms of s 7(1)(*b*) of the Act not to approve the final plans since they did not comply with the Plasket J order. Lester was notified of this outcome on 13 January 2011 and the demolition application followed on 21 January 2011. As I have mentioned, Lester instituted a counter-application to permit him to alter the dwelling so as to avoid the demolition order.

The judgment of the court below

[13] The central disputes between the parties in the court below concerned the questions:

(a) whether the existence of the requisite jurisdictional facts *ipso facto* warrants a demolition order under the Act;

(b) whether a court has any discretion at all in deciding whether or not to order demolition where there has been non-compliance with the relevant statutory provisions;

(c) if such a discretion exists, whether it is a wide or narrow discretion; and

(d) lastly, whether an alteration of the dwelling, as sought by Lester, should be ordered instead.

[14] Alkema J made the following principal findings:

(a) Lester was no innocent victim of Ndlambe's incompetence;

(b) Absent any internal appeals under s 9 of the Act or challenges by way of reviews under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) these decisions remain valid and legally binding until set aside on appeal or review;

(c) Lester's property is, both judicially and administratively, an unlawful structure in terms of the Act, thus entitling Ndlambe to seek an order authorising it to have the dwelling demolished in terms of s 21 of the Act;

(d) Whereas Ndlambe's case against Lester turns on s 4(1) read with s 21 of the Act, Haslam relies on both the common law principles of neighbour law and the statutory contraventions;

(e) In all cases where a demolition order is sought, the court retains a discretion which has to be exercised judicially, ie in accordance with the disproportionality of prejudice test, bearing in mind the dictates of legal and public policy;

(f) In applying the disproportionality of prejudice test, Lester's own conduct and the absence of any evidence that he would not be able to afford other housing, does not constitute sufficient prejudice, nor can he avail himself of the rights enshrined in s 26(3) of the Constitution;

(g) Legal and public policy required the court to enforce the principle of legality and to uphold the rule of law by granting the demolition order.

[15] I do not propose dealing with all these findings. For the reasons that follow, I agree that the demolition order was warranted, but I am of the view that Alkema J chose an incorrect path in reaching his conclusion. He found firstly that neighbour law principles are applicable in this case and secondly that a court has a discretion in all demolitions sought under the Act. In this court Lester, understandably so, supported the finding that a court has a discretion, but contended that such discretion should have been exercised in his favour, by granting the counter-application for alteration of the dwelling. Lester's counsel relied for these submissions on s 26(3) of the Constitution and the common law's neighbour law principles for the existence of such a discretion. This discretion, contended counsel, was either a wide discretion, particularly if s 26(3) of the Constitution applies, or what he termed a 'residual discretion' which he contended emanates from the Act itself. I shall deal with these submissions separately by first examining the constitutional basis and then by considering whether neighbour law applies at all. Closely associated with the latter aspect is the question whether the statutory provisions themselves permit such a discretion, bearing in mind the principle of legality.

Does s 26(3) of the Constitution afford a court a discretion in demolition cases?

[16] Section 26 of the Constitution reads as follows:

'Housing

26 (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

It was submitted on behalf of Lester that the magistrate's authority (or in this instance that of the high court) to order a demolition under s 21 of the Act had to be read with s 26(3) of the Constitution, which requires 'all relevant circumstances' to be taken into account before making the order. This confers, so it was contended, a wide discretion on a magistrate when faced with such an application to consider all the relevant circumstances in this case before ordering the demolition of Lester's dwelling. For the reasons that follow, I consider this submission to be misplaced.

[17] Section 26(3) must not only be read in its historical context, ie as a bulwark against the forced removals, summary evictions and arbitrary demolitions of the shameful past dispensation, but also together with s 26(1) and (2), since s 26 must be read as a whole. Mokgoro J, writing for a unanimous court in *Jaftha v Schoeman; Van Rooyen v Stoltz*[1] emphasized that:

'(s)ection 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy.'[2]

The protection afforded in s 26(3) must therefore always, without exception, be read against the backdrop of the right to have access to adequate housing, enshrined in s 26(1). Thus where a person, facing a demolition order, does not adduce any evidence that he or she would not, in the event of his or her dwelling being demolished by order of a court, be able to afford alternative housing, s 26(1) is of no avail to him or her. Lester, as the court below correctly found in my view, is in precisely this position. Apart from alluding to the 'calamitous financial implications' which demolition of his dwelling (which he estimates to be worth around R8 million) would entail, he does not state anywhere in his papers that he would be rendered homeless and destitute by

[1] *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 28.
[2] Ibid, para 29.

the demolition.[3] This court pointed out in *Standard Bank of South Africa Ltd v Saunderson*[4] that what constitutes 'adequate housing' is always a factual enquiry and that executing a writ of execution in respect of a luxury home, which Lester's dwelling undeniably is, has no bearing on the right of access to adequate housing. And the fact that the dwelling sought to be demolished is the person's primary residence, as is the case here, does not detract from this principle. The cardinal question is whether demolition of Lester's property would infringe upon his right to access to adequate housing. The answer, on the papers before us, must be an emphatic 'no'. Lester's counsel contended that such an interpretation of s 26(3) would render the words '. . . an order of court made after considering all the relevant circumstances' nugatory. I disagree. Even taking into account 'relevant circumstances' (which the court below in any event did), the primary consideration is whether the right of access to adequate housing would be compromised by the demolition. That is the import and effect of the judgment in *Jaftha* and the plain, unambiguous meaning of s 26. I turn to consider the second submission, namely that the source of the discretion not to order a demolition is to be found in the statute and in the common law principles of neighbour law, which are based on principles of fairness and equity.

The statutory provisions and neighbour law as possible sources of a court's discretion

[18] Alkema J relied heavily on the case of *Benson v S A Mutual Life Assurance Society* [5] as authority for his finding that he does have a discretion whether to order demolition or not. Lester's counsel has correctly conceded that *Benson* does not lend such support, since it concerned the discretionary remedy of specific performance in breach of contract instances. The passage relied upon (783C-E) in particular, is clearly about this aspect and not about a discretion concerning demolition orders. The judge below appears to have given recognition to this in his judgment granting leave to appeal to this court,

[3]Lester's counsel was driven to an oblique concession in this regard in the course of his argument.
[4]*Standard Bank of South Africa Ltd v Saunderson* 2006(2) SA 264 (SA) para 17.
[5]*Benson v S A Mutual life Assurance Society* 1986 (1) SA 776 (A) at 783C-E.

acknowledging that '[*Benson*] dealt with a discretion in cases of specific performance and not in demolition orders' and later on, that he had exercised his discretion 'on an extremely narrow, and perhaps novel basis'.

[19] A useful starting point, to my mind, in ascertaining whether there are other sources for such a discretion in demolition cases, is the statute itself. The Act's objective is to provide uniformity in the law relating to the erection of buildings in the area of jurisdiction of local authorities and to prescribe building standards. Section 4(1) reads as follows:

'(1) 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.'

Section 4(4) renders the contravention of s 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) building. Section 9 makes provision for an appeal against decisions of local authorities. For present purposes the refusal to grant approval of building plans is appealable – such appeal is to a review board. Section 21 reads 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.'

[20] It is plain that s 21 must be read with ss 4(1) and 4(4) of the Act. As stated, it was common cause before Alkema J that Lester's property is an illegal structure having been erected without approved building plans. It was therefore at risk of demolition by order of court at the instance of Ndlambe. Both Nlambe and Haslam (in particular) adopted the stance in the court below and again before us that a court has no discretion in the circumstances and

must order demolition under s 21 once illegality is established. Lester's counsel valiantly sought to persuade us that such a discretion is to be found in the section itself and if not, that the neighbour law principles should be 'imported' into the section. He contended that s 21 implicitly permits partial demolition in the present case, as sought by Lester in his counter-application. These submissions are devoid of merit. First and foremost a mere reading of the provision makes it plain that there is no warrant for reading such implicit discretion into it. What is more, s 4(4) read with s 4(1), creates a criminal offence with a penal sanction in the event of a building being erected without approved building plans, an aspect which militates strongly against such discretion. I shall revert to the provisions of s 4 under the next rubric in which I will discuss the applicability of neighbour law and the doctrine of legality. Counsel was unable to expound on the legal basis for and the modalities of the importation of neighbour law principles into the provisions contained in s 21. It comes as no surprise that there is a complete dearth of authority for this novel proposition. Counsel was unable to point us to such authority and I am not aware of any. The conclusion that the statutory provision itself does not lend itself to such a discretion is unassailable. The language of the provision gives a magistrate no latitude not to order the demolition once the jurisdictional fact, namely that the building was erected contrary to the Act, is established. During argument Lester's counsel contended that the provision must at a minimum be read to give a residual discretion to the magistrate. But he was unable to advance authority for this proposition and it too is devoid of merit. I turn to a consideration of neighbour law principles and the doctrine of legality.

The relevance of neighbour law and the role of the doctrine of legality

[21] Alkema J commenced his judgment by stating that this case 'involve issues of neighbour law, public law and administrative law'. Lester's counsel vigorously endorsed the view that neighbour law principles apply here, understandably so. But this is not a neighbour law case at all. The misconception in this regard stems from the Haslams' involvement in the case. To illustrate why this was misconceived, a brief history of how they

joined the fray is required. Haslam (and I am still referring to him here representing the second respondent company) was initially cited in Ndlambe's demolition application as one of several respondents with an interest in the matter. Haslam, however, successfully and without any opposition thereto, applied for joinder as second applicant with Ndlambe in the main application. He did so because he supported fully the relief sought by Ndlambe. More importantly, in so doing, Haslam did not rely on any neighbour law principles, nor did he seek any additional remedies based on neighbour law. Haslam made common cause with Ndlambe in seeking public law remedies, ie demolition in terms of s 21 of the Act and ancillary relief. In the supporting affidavit in the joinder application, Haslam pertinently states that 'High Dune (ie second respondent) has a legal interest in ensuring that Ndlambe takes all appropriate steps to remedy any failure by Lester to comply with all statutory zoning and other requirements'. Alkema J wrongly found that 'the issues raised by the joinder (of Haslam), on the other hand, are essentially matters of neighbour law, which is a branch of the law of obligations, and which call into play certain legal principles which do not arise as between Ndlambe and Lester, but became relevant between Haslam and Ndlambe.' As a consequence of this misconception, a significant part of the judgment of the court below deals with neighbour law principles and cases. I intend restricting myself to a few of them only, to illustrate why this is not a neighbour law case and to contrast it with the doctrine of legality.

[22] It is plain that Ndlambe approached the court below for a public law remedy, namely a s 21 demolition. It simply sought enforcement of a statutory right flowing from a statutory contravention, which also amounts to a criminal offence. And Haslam supported the relief sought by the council. Lester's counsel's submission appears to be that there is no reason not to apply the common law principles of neighbour law, which give courts a wide and equitable discretion to avoid granting a demolition order in respect of encroaching structures in the context of a public law remedy. Neighbour law has long recognized that in matters such as encroachment, courts have a discretion to award damages instead of ordering the removal of the offending

building or structure, the deciding factor being the disproportionality between removal of the encroachment measured against the damage or inconvenience suffered by a plaintiff. There is an interesting academic discourse on whether the English law influence of equity finds application in this discretionary power, but it need not be discussed at all in this instance[6]. In *Rand Waterraad v Bothma*[7]*,* Hattingh J undertook a detailed analysis of this discretion in encroachment cases. Numerous cases and the Roman and Roman Dutch authorities are collated in the judgment. *Brevitatis causa*, it will suffice to summarize the conclusions reached by Hattingh J at the end of his detailed discussion[8] (loosely translated and condensed):

(a) the *sui generis* nature of neighbourly relationships resulted in the development of legal rules based on equity in our common law;

(b) the emphasis in neighbour law is always on the protection of the neighbourly relationship as such, rather than the individual interests of every neighbour separately;

(c) neighbour law principles and precepts are aimed at attaining a just and equitable result and the correct application thereof ought always to lead to a result which satisfies one's sense of justice.

The law reports are replete with instances where the courts have held that such a discretion exists in neighbour law cases.[9] It is easy to understand why neighbour law, which is premised on considerations of fairness, equity and justice, would afford courts a discretion on whether to order removal of the offending structure or whether to award damages. But it seems to me that a public law remedy such as a demolition order in terms of s 21, is a different matter altogether. Here it is common cause that the dwelling is an illegal structure and not a mere encroachment on a neighbour's property. Moreover, as stated, it constitutes a criminal offence under s4(4) of the Act.

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[6]See, inter alia, J B Cilliers and C G van der Merwe 'The ''year and a day rule'' in Sourth African Law: do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?' (1994) *THRHR* 587 at 592.

[7]*Rand Waterraad v Bothma* 1997(3) SA 120 (O) at 130F-138G.

[8] Ibid, at 138D-G.

[9]See inter alia: *Hornby v Municipality of Roodepoort - Maraisburg and Arthur* 1918 AD 278 at 296 – 298 (in this dictum Solomon JA recognizes the existence of a discretion on principles of equity in English law, but appears to leave open the question whether those principles apply in our law as well); *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd* 1971 (2) SA 397 (W) at 405-407.

[23] Section 21 authorizes a magistrate, on the application of a local authority or the Minister, to order demolition of a building erected without any approval under the Act. This is undoubtedly a public law remedy. Alkema J questioned how a statutory breach which gives rise to the same claim under private law or public law can afford a court a discretion under private (neighbour) law, but not under public law. The answer is simply that the law cannot and does not countenance an ongoing illegality which is also a criminal offence. To do so, would be to subvert the doctrine of legality and to undermine the rule of law. In *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council*[10] the Full Court was seized with an appeal against the granting of an interdict in the Local Division in terms whereof the appellant company (qua respondent a quo) was restrained from using property which was zoned residential in terms of the Town Planning Scheme, for business purposes (offices). It was common cause that by using the property as offices, the appellant was committing an offence. The appellant's case was that the court should have suspended the interdict pending the final dismissal of his application to the Administrator for rezoning of the property. Harms J, writing for the Full Court, considered whether a court has a general discretion to grant or refuse an interdict. The learned judge pointed out that in the leading case on interdicts, *Setlogelo v Setlogelo*[11], this court granted a final interdict, having been satisfied that all the requisites for the granting of a final interdict had been met, without considering at all whether it should, in the exercise of a discretion, refuse the interdict. Harms J also referred to *Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd*[12], where the court refused to suspend an interdict under similar circumstances because, as Clayden J put it: 'where the breach of law interdicted is a breach of a statute a stricter approach is adopted.'[13] As Harms J correctly explains, what Clayden J meant to convey was not that there is a rule that a statutory right is stronger than a common law right, but simply that the statutory breach referred to is a breach

[10] *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987(4) SA 343 (T).
[11] *Setlogelo v Setlogelo* 1914 AD 221.
[12] *Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd* 1965 (1) SA 683 (T).
[13] Ibid, at 685A.

which is visited by criminal sanctions (as is the case here). The following dictum of Harms J is apposite: 'It follows from an analysis of these cases that discretion can, if at all, only arise under exceptional circumstances. Furthermore, I am not aware of any authority which would entitle the court to suspend the operation of an interdict where the wrong complained of amounts to a crime'[14].

[24] Courts have a duty to ensure that the doctrine of legality is upheld and to grant recourse at the instance of public bodies charged with the duty of upholding the law. In *Standard Bank of South Africa Ltd v Swartland Municipality*[15] Moosa J had to deal with an application that a demolition order, issued in the Malmesbury Magistrates' Court, be set aside and for Standard Bank, as mortgagee, to be joined. In stressing the courts' duty in enforcing demolition orders, the learned judge stated that:

'The unauthorised and illegal conduct of the third respondent (in unlawfully erecting a structure without approved plans) is contra boni mores and contrary to public policy, and cannot be condoned by the court. It militates against the doctrine of legality, which forms an important part of our legal system, and more especially since the Constitution became the supreme law of the country'[16].

Moosa J referred to the oft quoted dictum of Chaskalson CJ in *Pharmaceutical Manufacturers of SA: In re Ex parte President of the Republic of South Africa and others*[17], which bears repetition:

'The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law'.

The doctrine of legality as part of the rule of law

[14] *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council,* supra, at 347F-H.
[15] *Standard Bank of South Africa Ltd v Swartland Municipality* 2010(5) SA 479 (WCC); see also *Standard Bank of South Africa Limited v Swartland Municipality* 2011 (5) SA 257 (SCA).
[16] Ibid, para 22.
[17] *Pharmaceutical Manufacturers of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 20. See also: *Minister of Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) para 27 and cases cited there.

[25] Wade and Forsyth correctly point out that in administrative law, the rule of law encapsulates, inter alia, the notion that 'government should be conducted within a framework of recognized rules and principles which restrict discretionary power'[18] It is self-evident that this principle encompasses all three arms of government, ie the executive, the legislature and the judiciary. Equally obvious is that it applies to the three spheres of government, ie national, provincial and local government. Yvonne Burns explains that this doctrine ensures in the sphere of public law that '(a) the exercise of public power by the administration conforms to constitutional principles; (b) public authorities comply with specific duties and obligations in the exercise of their discretionary powers and (c) the state and its officials obey the law to ensure good and fair administration'.[19]

[26] Local government, like all other organs of state, has to exercise its powers within the bounds determined by the law and such powers are subject to constitutional scrutiny, including a review for legality. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) [20] the court expounded on the doctrine of legality as an essential component of the rule of law as follows:

'These provisions [ie ss 174(3) and 175(4) of the Constitution] imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.'[21] (footnote omitted).

The power to approach a court for a demolition order in s 21 is unquestionably a public power bestowed upon local authorities. As such, its exercise must conform to the doctrine of legality. Put differently, a failure to exercise that

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[18]Wade and Forsyth Administrative Law 7ed (1994) 24.
[19]Y Burns 'A rights-based philosophy of administrative law and a culture of justification (2002) 17 SAPL: 279 at 285.
[20] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 40.
[21]Ibid para 56; see also para 58.

power where the exigencies of a particular case require it, would amount to undermining the legality principle which, as stated, is inextricably linked to the rule of law. See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* where the court held as follows:

'(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law'[22].

In *National Director of Public Prosecutions v Zuma*[23] Harms DP emphasized that the courts are similarly constrained by the doctrine of legality, ie to exercise only those powers bestowed upon them by the law.[24] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the court below was constrained by that doctrine to enforce the law by issuing a demolition order once the jurisdictional facts for such an order were found to exist.

[27] I conclude by reverting to what Harms J said in *United Technical Equipment,* supra, with regard to the City Council's obligations to enforce the law in the face of an ongoing illegality being perpetrated by the appellant company in that case:

'The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with a hope that the use will be legalise in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict.'[25]

Ndlambe is in exactly the same position as the respondent in the aforementioned case – it was statutorily and morally duty bound to approach the court below for a demolition order in order to uphold the law. The court a quo, in turn, had a concomitant duty to uphold the doctrine of legality, by

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[22] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC).
[23] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 SCA 28.
[24] Ibid para 15.
[25] *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council,* supra, at 348I-J.

refusing to countenance an ongoing statutory contravention and criminal offence.

Conclusion:

[28] As stated, Lester has erected an unlawful structure on his property – this fact is unchallenged and common cause. The jurisdictional basis for a demolition order in terms of s 21 has therefore been established. All administrative actions, such as the unanimous resolution of Ndlambe's full council on 5 December 2010 not to approve the final revised plans, remain valid and legally binding until set aside on review or appeal. Absent any challenge on appeal, internally in terms of s 9 of the Act to a review board, or on review in terms of PAJA to a competent court, that resolution had legal consequences. In *Camps Bay Ratepayers' Association and another v Harrison and the Municipality of Cape Town,* the Constitutional Court,[26] in referring with approval to *Oudekraal Estates (Pty) Ltd v City of Cape Town*[27] said that:

'[A]dministrative decisions are often built on the supposition that previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence. Applied to the present facts it meant that the approval of the February 2005 plans must be accepted as a fact. If the footprint issue was part of that approval, that decision must likewise be accepted as a fact unless and until it is validly challenged and set aside'.

See also: *Member of the Executive Council for Health, Eastern Cape v Kirland Investments*[28]*.* I have already found that the court below erred in finding that it had a discretion whether or not to issue a demolition order. Absent such discretion, the court below simply had to uphold the rule of law, refuse to countenance an ongoing statutory contravention and enforce the provisions of the Act.

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[26]*Camps Bay Ratepayers and Residents' Association v Harrison* 2011 (4) SA 42 (CC) para 62.
[27]*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 31.
[28]*Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* (473/12) [2013] ZASCA 58] (16 May 2013) para 20.

[29] I turn to the counter-application. It was conceded on Lester's behalf that in the event of this court finding that the court below was correct in ordering demolition as sought by Ndlambe, supported by Haslam, the counter-application would inevitably be doomed to failure. In the counter-application Lester sought an order that the dwelling be demolished partly only to the extent that its design would then accord with the plans submitted by him to Ndlambe on 18 May 2010, alternatively 13 December 2010. But Ndlambe's council has already considered these final revised plans and the accompanying representations and has rejected them. As stated, that resolution remained extant and legally binding as a valid administrative act, unless and until set aside by a competent court. Moreover, it is undisputed that the final 2010 plans still offend the existing building regulations because of the height of the roof. As pointed out above, an order for partial demolition as sought by Lester, would amount to the sanctioning of an ongoing illegality and criminal offence, in the face an existing valid administrative decision. This can never be countenanced by a court. The counter-application was therefore correctly dismissed by the court a quo.

[30] Alkema J made certain adverse findings against Lester, inter alia, as stated above, that he was not the mere innocent victim of Nlambe's incompetence, as contended by counsel, and further that the learned judge had 'a sense, nothing more, that Lester may have orchestrated the situation in which he now finds himself'. In my view it is not necessary to come to any conclusion on these aspects. The common cause material facts suffice, namely that the structure was illegal and that Lester had, in the face of six preceding court orders against him, elected to continue building operations without approved plans. As stated (see para 6 above), Lester already acknowledged as early as 2002 during the first high court application before Pickering J, in his answering affidavit that, in the event of a successful review before the high court, he would be obliged to demolish the existing structure for lack of approved plans. And, as stated, the spectre of demolition loomed large in the order of Plasket J (see para 11 above).

[31] One is acutely aware of the financial calamity, inconvenience and disruption which the demolition of what is plainly and expansive, luxurious dwelling, and a primary residence to boot, would cause Lester. But the upholding of the doctrine of legality, a fundamental component of the rule of law, must inevitably trump such personal considerations. The appeal must therefore be dismissed with costs, including the costs of two counsel where so employed.

[32] In the result I make the following order:

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

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