IN THE KWAZULU-NATAL CONSUMER TRIBUNAL
HELD IN DURBAN

CASE NUMBER: KZNCT08/2022

In the matter between

KWAZULU-NATAL CONSUMER PROTECTOR	**FIRST PLAINTIFF**
BULELWA MAGUDU	**SECOND PLAINTIFF**
and	
ZENTEC 99 CC	**FIRST DEFENDANT**
LUVUNHO PROJECTS (PTY) LTD	**SECOND DEFENDANT**
MENZI MAKHAZA	**THIRD DEFENDANT**
ERICA MAKHAZA	**FOURTH DEFENDANT**

Coram:

Prof B Dumisa	-	Chairperson and Presiding Member
Adv N Nursoo	-	Member
Adv R M Hand	-	Member

Date of hearing	-	12 and 13 October 2022
Date of judgment	-	31 January 2023

JUDGEMENT AND REASONS

PLAINTIFFS
FIRST PLAINTIFF

1. The first plaintiff in this matter is the OFFICE OF THE KWAZULU-NATAL CONSUMER PROTECTOR, established in terms of section 5 of the KwaZulu-Natal Consumer Protection Act (the "Act") (hereinafter referred to as "the First

Plaintiff"), with head Offices at Pietermaritzburg, in the Province of KwaZulu-Natal.

2. The Office of the KwaZulu-Natal Consumer Protector falls under the Department of Economic Development, Tourism and Environmental Affairs (EDTEA) in the Province of KwaZulu-Natal.

3. At the hearing, the First Plaintiff was represented by Mr Ryan Moodley, a Deputy Director in the Office of the KwaZulu-Natal Consumer Protector, in the employ of the First Plaintiff.

4. The First Plaintiffs Investigation Report was deposed by Ms Vanessa Shabangu, an Investigator appointed within Consumer Protection Services, in the employ of the First Plaintiff.

SECOND PLAINTIFF

5. The Consumer, who is the Second Plaintiff in this matter is **Ms BULELWA MAGUDU,** a major female who resides in Manor Gardens, Durban, in the Province of KwaZulu-Natal (hereinafter referred to as "the Second Plaintiff" or "the Consumer").

6. The Second Plaintiff lodged her complaint against the Defendants on the 7th of February 2022.

7. On both hearing dates, the Second Plaintiff was represented by Advocate T Khazi, instructed by Madikizela Kundishora Attorneys.

DEFENDANTS

8. The First Defendant in this matter is **ZENTEC TRADING 99 CC,** a closed corporation duly registered and incorporated in terms of the Close Corporation

Act, 84 of 1984 of the Republic of South Africa with Registration Number 2011/016149/23, with its principal place of business situated at B1200 Skhindi Road, KwaMashu, Durban, in the Province of KwaZulu-Natal (the "First Defendant" or "Zentec 99 CC").

9. The Second Defendant in this matter is **LUVUNHO PROJECTS (PTY) LTD,** a company that is duly incorporated and registered in terms of the company laws of the Republic of South Africa, with company registration number 2019/183881/07 with its principal place of business located at 5637 Inyathi Place, Lamontville, Durban, in the Province of KwaZulu-Natal (hereinafter referred to as "the Second Defendant").

10. The Third Defendant and the Fourth Defendant in this matter are Mr **MENZI MAKHAZA,** a major male, and Mrs **ERICA MAKHAZA,** a major female, respectively, who jointly own the First Defendant and Second Defendant businesses (hereinafter all collectively referred to as "the Defendants").

11. At the initial hearing of the matter, on 27 July 2022, the Defendants were represented by Mr L Mnguni of MLS Attorneys. After a very brief exchange on 12 October 2022 Mr Mnguni stated he had no submissions to make and he excused himself.

BACKGROUND

12. The Consumer entered into a contract with the Defendants for :

    12.1 Architectural work involving drawing of house plans;

    12.2 Construction of a double garage;

    12.3 Construction of an outbuilding; and

    12.4 Construction of retaining walls.

13. The Consumer complains that:

13.1 the Defendants commenced with the construction despite not receiving the necessary municipal approval for the plans;

13.2 the Defendants produced poor workmanship; and

13.3 the Defendants used building materials of poor quality.

APPLICATION TYPE AND ORDER SOUGHT

14. The KZN Consumer Tribunal (hereinafter referred to "the Tribunal") derives the jurisdiction for hearing this matter under Section 21 of the KwaZulu-Natal Consumer Protection Act, 4 of 2013 (the KZNCPA).

15. This matter will be heard in terms of Section 19(2)(a)(i) and Section 47(3) and Section 54 of the Consumer Protection Act, No 68 of 2008 (the "CPA").

16. The Consumer's prayers were for:

16.1 Confirmation of the termination of the Agreement;

16.2 Declaration of the First and Second Defendants conduct as prohibited conduct, and in contravention of Section 19(2)(a)(i), Section 47(3), and Section 54 of the CPA;

16.3 Refund to the Second Plaintiff of the full amount of R314 450.00 (three hundred and fourteen thousand four hundred and fifty Rand) being the amounts paid for the architectural plans and building construction work;

16.4 Refund to the Second Plaintiff the amount of R7 475.00 (seven thousand four hundred and seventy five Rand) being the total amount paid for the services of the Structural Engineer;

16.5 Directing the First Defendant to completely demolish the partially built building works at the Consumer's residence at 51 Archer Place, Manor Gardens at his own cost within 30 days from the granting of the tribunal order;

16.6 Directing the First Defendant to remove all building material and rubble left at the Second Plaintiff's property restoring the yard to the condition it was found in before the work began;

16.7 Interest on the amount referred to in (16.3) above at the mora rate in terms of the Prescribed Rate of Interest Act 53 of 1975;

16.8 The legal costs of the Second Plaintiff; and

16.9 Further and /or alternative relief.

THE FIRST PLAINTIFF'S EFFORTS TO RESOLVE THIS COMPLAINT

17. The First Plaintiff tried to mediate this matter between the parties:

17.1 The Defendants initially seemed to co-operate with the Office of the Consumer Protector, and even met with the Second Plaintiff at the Office of the Consumer Tribunal, where some resolutions were made. The Defendants did not honor those undertakings they made;

17.2 It was on the above grounds, the First Plaintiff concluded "*The complaint lodged by Ms B Magudu cannot be resolved through mediation. The defendant is clearly untrustworthy and conducts business in an unacceptable manner that the Consumer Protection Act was designed to protect consumers from. It is best this complaint be referred to the Consumer Tribunal for hearing*".

SUMMONS SERVED ON THE DEFENDANTS

18. On the 30th of June 2022, the Summons was served on the Defendants, indicating the KZN Consumer Tribunal set down date of 27 July 2022.

19. The Defendants did not respond to the papers served on them; there was no answering affidavit.

THE HEARING ON 27 JULY 2022

20. The matter was set down for hearing, on merits, on a default basis on 27 July 2022 because the Respondent had failed to file an answering affidavit.

21. At the hearing, the Defendant's legal representative, Mr Lwazi Mnguni, attended, saying he had just been approached by the Defendants to represent them on this matter, and that he had been briefed to apply for a postponement.

22. The Second Plaintiff's legal representative, Adv Thabiso Khazi, strongly objected to the attendance of the Defendant's legal representative at the hearing, and also to the proposed application for postponement.

23. The Tribunal felt that the issue of a postponement was not just there for the asking and required Mr. Mnguni to explain why it was that there had been no opposition up until the day of the hearing. It was clear that Mr. Mnguni had no instructions in this regard, and accordingly he was compelled to take instructions from the 3rd defendant whilst the Tribunal waited. It appeared that the defendants had simply not acted and had briefed Mr. Mnguni at the very last minute.

24. The Defendants' legal representative made an offer that they would be open to any direct negotiations with the First Plaintiff and the Second Plaintiff in order to arrive at an amicable resolution of this postponement matter.

AGREEMENT BETWEEN THE PARTIES ON 27 AUGUST 2022

25. The parties ultimately agreed on the following:

25.1 The proceedings be adjourned to the 12th of October 2022 for a three-day Tribunal Hearing, on 12, 13, and 14 October;

25.2 The parties to be directed to attend to an inspection in loco at the premises of the Second Plaintiff, at 51 Archer Road, Manor Gardens, by no later than 11 August 2022;

25.3 The Defendants be directed to procure of a structural engineer and deliver his/her report with recommendations not later than the 19th of August 2022;

25.4 The Second Plaintiff's structural engineer, Melvin Joseph and the Defendants' appointed structural engineer are directed to file their minute by no later than the 26th of August of August 2022;

25.5 The Defendants were directed to pay the reservation costs of the Second Plaintiff's experts, together with witness fees, payable and the costs of the legal representation of the Second Plaintiff on the scale of party and party;

25.6 The costs of the legal representatives of the Second Plaintiff were to include costs of preparations and appearance, as per Regulation 17(3)(c);

25.7 The defendants are directed to deliver their answering papers by no later than the 9th of September 2022; and

25.8 The Second Plaintiff will deliver her replying papers, if any, by no later than the 16th of September 2022.

POSTPONEMENT & INTERIM COSTS ORDER

26. The Agreement of the Parties, as per Paragraph 26, was made an Order of the Tribunal.

27. The Defendants were liable for the Second Plaintiff's full wasted costs, for preparations and appearance of one Counsel and attorney on the 27th of July 2022.

28. The Defendants were ordered to settle the Second Plaintiff's full wasted costs, as per Paragraph 26, not later than the 30th of September 2022.

THE HEARING ON 12 OCTOBER 2022

29. When the matter commenced, counsel for the second plaintiff complained that the defendants' answering affidavit had been served very late and that it had not dealt with the Consumer Protector's report which contained strong statements of fact. The late filing of the answering affidavit prevented the second plaintiff replying.

30. Counsel contended that the receipt of an application for condonation (of the late filing of the answering affidavit) on the evening of 10 October 2022 amounted to "litigation by ambush" which gave no opportunity to either consider or take instructions. It was "an arrogant attempt to explain non-compliance".

31. In addition, Counsel pointed out that although the Bill of costs was served on the defendants on 29 August 2022, there had been no payment to date. Counsel submitted that all attempts at corresponding with the Defendants, in relation to the order that they pay the costs, had met with no response.

32. It was also apparent that there was non-compliance with the portion of the order requiring the filing of a joint minute by both structural engineers, again because of a lack of engagement by the defendants according to Counsel for the second plaintiff.

33. Counsel for the second plaintiff reminded the Tribunal that it had, on 27 July 2022, cautioned the defendants regarding non-compliance with timelines and, in particular, that it could proceed in terms of Regulation 17(1)(a) in the event that it concluded that the defense was deliberately non-compliant.

34. Given this background Mr. Mnguni was asked to address the Tribunal as to the reasons why the defendants should be allowed to take a further step in the proceedings. This was in particular because the original postponement was secured in no small measure by the undertaking to pay all costs before the resumption of the matter. This was included in the order taken by consent. Notwithstanding both the undertaking and the order the defendants were not forthcoming with payment even when this issue was pursued on the morning of the hearing i.e. 12 October 2022.

35. Somewhat surprisingly Mr Mnguni stated he had no submissions to make and he excused himself after stating that his clients would not seek to appoint other representation but would merely observe the proceedings. The fact that Mr. Mnguni declined the opportunity to engage with the Tribunal resulted in it being deemed that the application for condonation was not to be pursued and was in fact withdrawn. Absent any cogent explanation or condonation the answering affidavit was filed hopelessly out of time and was not to be considered. Mr Mnguni left and the matter accordingly proceeded on a default basis by order of the Tribunal Chairman.

40. She received an invoice from the second defendant requiring payment for design and drawing.[2] She paid what was required. In January 2021 Mr Makhaza sent her a list of documents, including the drawings which were to be submitted in support of an application for a bank loan. The application was initially refused, and Mr Makhaza told her he would assist her to get a loan. She decided to separate the proposed alterations into 2 phases and signed the contract presented to her by Mr Makhaza[3].

41. This was the first time she learnt of Mr Makhaza's connection with the first defendant, and he signed the document in front of her. She was quoted R89 500.00 for phase 1 but that was only for labour. She was advised that materials would be quoted for separately. The process that followed consisted of her receiving WhatsApp requests for payment for materials etc and she would then make payments into a bank account supplied by Mr Makhaza. The last of these requests, on 19 April 2021, was for R24 000.00 for doors and windows. Some 2 hours after she made payment to Mr Makhaza she heard from Mr Nair for the first time. Pursuant to that conversation she got hold of Mr Makhaza and he furnished a plan number to be given to Nair.

42. Ms Magudu confirmed that Nair reported there was no plan and that he issued a stop work notice on 20 April 2021. From that point she engaged telephonically with the fourth defendant, Erica Makhaza, many times in fruitless attempts to secure invoices for all the building materials allegedly purchased by the defendants with money she had paid them.

43. In another vain attempt to encourage progress she prevailed upon work colleagues to enquire whether her architect, Mr Makhaza, could meet with the person assigned to consider the plans. She was told who this was and conveyed the information to Mr Makhaza. He appears to have reneged on several undertakings to go and meet with that person. His apparent lack of

---

[2] BMW 3, p95 of indexed bundle
[3] BMW 1, p83 of indexed bundle

respect and numerous lies resulted in Ms Magudu sending a complaint to the Architects' Council. She received a response to the effect that Mr Makhaza was not an architect and as a result she laid a charge with the South African Police Services.

44. On 11 February 2022, and in writing, Ms Magudu cancelled the contract between herself and the first defendant. She has not received any response to that letter. Thereafter she reported the matter to the Consumer Tribunal and confirms that the first plaintiff arranged a mediation between the parties on 5 May 2022.

45. During the mediation process the defendants made a number of admissions which included, *inter alia*:

45.1 The third defendant was not the architect but rather it was one Maphumulo;

45.2 The contract had been cancelled in writing; and

45.3 The defendants ought to have only commenced construction works after approval by the municipality of the plans but they failed to do so.

46. This was the first time that Ms Magudu was made aware that Mr Makhaza was not the architect he held himself out to be. She did however note that on the plans the name of the submitter is recorded as "M M" and the contact number is that of the second defendant.

47. Ms Magudu saw fit to appoint her own structural engineer. Mervyn Joseph("Mr Joseph") requested the geotechnical/structural report so that he might assess its contents. She had to secure the report[4] from Mr Makhaza and gave it to Mr Joseph who later determined that the report was falsified and had not been completed by its purported author, one R Dilraj.

---

[4] P56-58 of indexed bundle

RUDIPERSADH DILRAJ

48. The Consumer Protector called Mr Dilraj as a witness. He confirmed that he is a civil engineering technologist at RPD Consultants CC and that he was shown the report in question by Mr Joseph. He emphatically denied authoring the report and said that although his name and registration number were at the foot of the document they appeared to have been 'cut and pasted' from another unknown document. Neither he nor his firm had anything to do with the report and, in any event, Durban does not require a full geotechnical report for a single and/or double story dwelling.

MERVYN JOSEPH

49. Mr Joseph inspected the visible portions of the site and compiled a report[5]. In short it is his opinion that the structure is not habitable. His reasons relate to various aspects and we deal with them separately at first.

The roof

50. The roof construction is not stable for several reasons:

50.1 The 'top chord' (the top member of a roof truss) cannot be nailed as it appears to be in the photograph[6]. That is against the building code. In addition there is no cross bracing of the roof trusses and there is nothing securing the top chord to the trusses. In the result the trusses are not level and a number of them have twisted/warped thereby impacting on the structural integrity of the roof. Already a number of the tiles have cracked as a result;

50.2 The fact that brickwork has been done on top of roof tiles compromises both the brickwork and the roof which effectively forms the foundation of that particular brickwork;

---

[5] P 47- 53

[6] 4th photo on p51 0f indexed bundle

50.3 There are no hoop iron ties to hold down the trusses and secure them to the walls. Neither the top chord nor the bottom chord is attached to the brickwork as required.

50.4 The fabrication of the roof trusses does not comply with the requirements of the timber codes in that the gang nails are incorrectly sized, positioned and fixed.

50.5 There is no certificate of stability, given by an engineer and it impossible to secure one now because:

50.5.1 One cannot brace the trusses retrospectively;

50.5.2 Hoop irons cannot be fitted retrospectively

50.5.3 There would be no wall plate fitted as the rafters/trusses are already in place.

50.6 In the circumstances the roof has to come off.

The lintels

51. A lintel is a structural beam used above windows and doors. When more than 50% of the lintels in use have cracked, as discovered by Mr Joseph, then one should suspect that the rest may fail. The lintels installed on site appear to be of a very poor quality. Mr Joseph expressed surprise at this because all lintels are supposed to be S.A.B.S. approved but these are not. He said the Tribunal should remember that "the lintel supports the brickwork and the brickwork supports the roof" so they are very important.

The plaster/mortar thickness and quality

52. Mr Joseph opined that more than 50mm of mortar around roof trusses was more like packing and not plaster. He said this was another reason why everything above lintel height should be removed and reconstructed. The thickness was not only against the building code but also made it weak. This was exacerbated by clear indications of an incorrect ratio of cement to sand and water in the mixture resulting in excess evaporation causing shrinkage of the plaster and therefore cracking. He said that this was capable of remediation.

53. Mr Joseph did not support the idea of total demolition of the impugned structure. He stated that one would have to investigate the state of the foundations before one could offer meaningful comment on anything below lintel height. He was concerned at the lack of a "rational assessment", apparently required by the municipality when one is contemplating building onto an existing structure. In this case, he explained, the new structure was being built onto an existing retaining wall and the neighbour's garage. An engineer is required to submit such an assessment. Another potential issue with the foundations is that, considering the soil type, all foundations not only required reinforcement but also had to be designed by an engineer. Absent the drawings and the appointment of an engineer he was unable to confirm compliance with these requirements.

APPLICABLE SECTIONS OF THE CPA

54. Section 19 Consumer's rights with respect to delivery of goods or supply of service

"(1)....

(2) unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that-

(a) the supplier is responsible to deliver the goods or perform the services-

(i) on the agreed date and at the agreed time, if any, or otherwise, within a reasonable time of the concluding the transaction or agreement;

(ii) ....."

55. Section 47(3) Over-selling and over-booking

"(3) if a supplier makes a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and, on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity fails to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must-

(a) Refund to the customer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and

(b) In addition, compensate the consumer for costs directly incidental to the suppliers breach of the contract, except to the extent that subsection (5) provides otherwise."

56. Section 54 Consumers rights to demand quality service.

(1) When a supplier and it takes to perform any services for or on behalf of a consumer, the consumer has a right to-

(a) the timely performance and completion of those services., and timely notice of any unavoidable delay in the performance of the services;

(b) the performance of the service is in a manner and quality that persons are generally entitled to expect;

(c) use, delivery, installation of goods that are free of defects and are of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and

(d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purposes. Of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services."

EVALUATION OF THE EVIDENCE AND THE RELIEF SOUGHT

57. It is apparent from perusal of clauses 3.1.2 and 3.2 of the contract that there was no date recorded either as an anticipation date of occupation of the site by the contractor or as an anticipation date of the completion of the works. In the circumstances, the second plaintiff must rely on the notion that the services ought to have been concluded within a reasonable time. The contract was signed on 31 January 2021 and it was cancelled in writing on 11 February 2022

because of *inter alia* non- performance and shoddy workmanship. This 12 month period would seem excessive and not reasonable.

58. Having regard to section 47, whilst it is true that the defendants made a commitment to supply goods and services, it cannot be found that there was a failure to supply because of insufficient stock or capacity to supply those goods and/or services (our emphasis). The mischief complained of relates rather to defective goods and defective workmanship which is hardly "Over-selling and over-booking". In the circumstances we do not consider there to be prohibited conduct as contemplated in section 47.

59. In considering a contravention of section 54, we find that the defendants have not performed either timeously or to the standard and quality that might reasonably be expected by the 2nd plaintiff. Having found that there is this failure there are two options available to the consumer. It is abundantly clear that the second plaintiff does not favour the first option provided for in subsection 2(a), which is that the supplier should remedy the defect. This option was explored during the mediation process but was rejected by the consumer.

60. This leaves only the option in subsection 2(b), which is that the consumer should be refunded a reasonable portion of the price paid for the services performed having regard to the extent of the failure. This creates some difficulty. Because of the nature of the evidence and in particular that of the structural engineer, Mr Joseph stated it is impossible, without further evidence, to make any kind of determination as to what portion of the price could be separated out and therefore be capable of being refunded. The reason for this is that Mr Joseph indicates that it may only be necessary to demolish everything above lintel height. He does not exclude the possibility that everything below lintel height is capable of remediation. What this means is that there may be value in the ground, if the foundations prove to be sound however one cannot speculate as this is a determination yet to be made.

61. The consumer/second plaintiff may reject the defendants' offer to remedy but this does not mean that another contractor could not both remediate and

continue with the construction. It would seem that Ms Magudu is intent on trying to wipe the slate clean in that she wants a full refund, total demolition and removal of all rubble and detritus to restore a pristine site. That is not a course of action supported by her engineer and it would also ignore the fact that there may well be value in the ground in the form of foundations and brickwork at least up to lintel height.

62. Ms Magudu has signalled her intention to pursue a delictual claim against the defendants. She would obviously also have a claim in contract but it would have to be properly quantified in order to proceed. It is of course possible that the foundations might be condemned. One might then expect that everything above the foundations would have to come down and that the foundations themselves would need to be ripped up. That may result in a near total loss but we cannot speculate on that issue. Absent any evidence regarding the quantification it is not possible to separate out any portion for refund.

63. We considered Ms Magudu's evidence that , on 19 April 2021, she was asked for, and in fact paid, R24 000.00 for doors and windows. This was two hours before Mr Nair, the building inspector contacted her for the first time. That payment was apparently denied during the attempted mediation. Reference to the second plaintiff's bank statement[7] shows a payment, to the second defendant, in the amount of R19 000.00. The difference between the sum mentioned in testimony and that appearing in the bank statement was never explained and we cannot speculate what that payment was actually for. Given that construction was closed down the next day we had contemplated refunding at least the amount allegedly paid for doors and windows but absent proof of payment that is not possible.

64. Part (iv) of the orders sought seeks a refund of R7 475.00 being the total amount paid for the services of a structural engineer. When Ms Magudu testified she said she was asked for R15 000.00 for this purpose and that she in fact paid the amount asked for and not any lesser amount, her main concern

---

[7] P97 of the indexed bundle

seeming to be that the report was falsified. In the premises it is not possible to refund a sum of money that has not been proved.

65. Counsel for the second plaintiff was directed to deal with the issue of demolition in his written argument. Section 21 of the National Building Regulations and Building Standards Act is discussed as it empowers a magistrate having jurisdiction to make an order authorising a local authority to demolish a building on an application by such local authority or the Minister. In order to make such an order, the magistrate must be satisfied that the erection is contrary to or does not comply with the provisions of the Act or any approval or authorisation granted thereunder. It is correctly stated that the Ethekwini municipality has not invoked the provisions of section 21 even though it has been aware of the unlawful structure erected on the second plaintiff's property since 20 April 2021.

66. It is important to keep in mind that the evidence of the building inspector was that prosecution has been held in abeyance because there are plans pending or lodged for approval. This tends to suggest that the municipality itself does not discount the fact that the construction may subsequently be authorised through approval of the plans currently under submission.

67. Counsel also develops his argument through the cases of *Lester v Ndambe Municipality and another*[8] and *BSB International Link CC v Readam South Africa (Pty) Ltd*[9] and submits that any trier of fact is empowered to order either the partial or total demolition of a structure. The issue has however enjoyed further attention by the Supreme Court of Appeal in the matter of *Serengeti Rise Industries (Pty) Ltd and another v Tayob Nazeer Aboobaker NO and others*[10]. In this matter, the appeal lay against the validity of a demolition order granted by the local division of the High Court, Durban, which order was granted because the learned Judge found that she was bound to order the demolition of the illegal structure based on *Lester v Ndlambe Municipality* . In upholding the appeal the court found:

---

[8] 2015(6) SA 283 (SCA)
[9] 2016 (4) SA 83 (SCA)
[10] 2017 (6) SA 581 (SCA)

"On a plain reading of the order only the portion of the building that 'exceeds GR1 zoning' will have to be demolished. There is no description of that portion. This is not surprising, as no evidence, expert or otherwise, was led in the High Court in this regard. There is also no evidence on whether the structural integrity of the building could survive the execution of the partial demolition order..... It would appear that the only way it could be executed would be the demolition of the entire building. And, the court below did not give any consideration to the constitutional proportionality of that remedy."[11]

68. In *Lester* the demolition order application was made in terms of section 21 by the local authority and was granted on the basis that there was no way that the construction could ever be authorised or approved. We are unable to find that that is the case in the matter before us and section 21 does not find application here.

69. In *BSB International v Readam,* the court discusses the statutory right provided for in section 21 and states:

"....is clearly intended to enable local authorities and the Minister, to ensure compliance with the provisions of the NBSA in relation to town planning schemes. Consequently, an individual with standing to bring an application to review and set aside the unlawful approval of building plans by a local authority would not have locus standi to pursue the remedies provided for in section 21. 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 section 21 of the NBSA, should the municipality or minister have failed so to act." and

"At common law the power to order the demolition of a building ordinarily finds application in the case of an encroachment by the building onto a neighbour's property.[12]

---

[11] Paragraph 13
[12] Paragraphs 23 & 24

70. In terms of s 21 of the NBSA a court has the power 'to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorising such local authority to demolish such building'. Generally this would be to protect the essence of the town planning scheme and would involve addressing a direct adverse (and harmful) impact on the applicant. This might result from the unauthorised actions of a neighbour for example but it is difficult to conceive of a situation where the applicant would be the owner of the premises. The common law approach does not seem to provide a solution. In the current matter construction has stopped and plans are pending approval. This distinguishes it from the facts in *BSB v Readam* where despite being warned of the illegality BSB deliberately persisted with construction whilst engaging in obfuscatory behaviour to delay finalisation of the litigation aimed at stopping the very construction.

71. In the circumstances we are not swayed that the Tribunal has the authority to grant a demolition order, whether it be total or partial. Even if the Tribunal did that authority, it would be impossible, for the reasons discussed above, to make a determination that would adequately address the issues of safety, structural integrity and proportionality without further expert evidence.

ORDER

72. The defendants' conduct is declared prohibited conduct in contravention of Section 19(2)(a)(i) and Section 54 of the Consumer Protection Act No.68 of 2008

73. The agreement is confirmed to have been terminated on 11 February 2022

74. The defendants are ordered, jointly and severally, the one paying the others to be absolved, to pay:

74.1 The reservation costs incurred by the First and Second Plaintiff's experts on 12 and 13 October 2022 together with witness fees payable on the scale as between party and party; and

74.2 The costs of the application on the scale as between attorney and client, such costs to include those consequent upon the employment of counsel, and in respect of the preparation for and appearance on the hearing dates of 12 and 13 October 2022.

75. All amounts are payable within 60 (sixty) days of the date of this judgment.

DATED ON THIS 31st DAY OF JANUARY 2023

ADV R HAND
MEMBER & JUDGMENT WRITER

Prof B Dumisa (Presiding Member & Chairperson) and Adv N Nursoo (Member) concurring