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**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)**

APPEAL CASE NO: A55/2024

Case No.: MRCC 227/2023 (IN THE COURT A QUO)

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED **YES/NO**

DATE 08 May 2025

SIGNATURE

In the application between:

EUNICE ZANELE MASUKU

APPELLANT

and

THE CITY OF MBOMBELA

RESPONDENT

JUDGMENT

FOURIE AJ

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 08 May 2025 at 09H00.

INTRODUCTION:

[1] This is an appeal against the whole judgment and Order granted against the Appellant by the Learned Regional Magistrate TLL Nyambi, of Mpumalanga Regional Court, Mbombela (Court *a quo*) dated 11 July 2024.

[2] Although the Notice of Appeal indicates the appeal to be against the whole of the judgment of the Court *a quo*, it cannot seriously be contended by the Appellant that this is the case, as in the Court *a quo*, the Court made the following Order;

[2.1.] It is declared that the structure erected upon Erf 3[...], N[...] has been unlawfully erected in contravention of Section 4(1) of the National Building Regulations and Buildings Standards Act of 1977.

[2.2.] The Court authorises the Applicant to demolish the said building erected on Erf 3[...] N[...].

[2.3.] The Respondent is to pay the costs of the application on a party and party scale.

[3] In the Notice of Appeal filed by the Appellant, the Respondent in the Court *a quo*, the Appellant takes no issue with the declaration that the structure erected upon Erf 3[...], N[...] being declared unlawfully erected in contravention of Section 4(1) of the National Building Regulations and Buildings Standards Act of 1977.

[4] In what is to follow this aspect is crucially important as the Appellant only relies on two grounds of appeal, namely:

[4.1.] The Learned Magistrate erred in not determining whether it was just and equitable to order demolition given that she has the discretion to decide against or in favour of demolition, accordingly her order for demolition is not case-appropriate in light of her failure to exercise her discretion.

[4.2.] The Learned Magistrate erred in not following the SCA decision in **BSB INTERNATIONAL LINK CC V READAM SOUTH AFRICA (PTY) LTD AND ANOTHER** 2016 (4) SA 83 (SCA), where it was held that a Court has a discretion when considering Section 21 of the National Building Regulations Act, 103 of 1977.

CONTENTIONS BY THE PARTIES

[5] The crux of the contentions by the Appellant was firstly that the Court *a quo* failed to exercise any discretion in concluding that the unlawfully erected structure be demolished, alternatively and if this Court finds that a discretion was indeed applied, then it is the Appellant's contention that the discretion was incorrectly applied.

[6] The Respondent opposes the appeal and seeks that the appeal be dismissed with costs.

[7] Central to the issue this Court is asked to determine is whether the Court *a quo* indeed had any discretion to deviate from a Demolition Order, having found that the structure was erected illegally.

[8] The Appellant premised its argument almost solely on the matter of **BSB INTERNATIONAL LINK CC V READAM SOUTH AFRICA (PTY) LTD AND ANOTHER** 2016 (4) SA 83 (SCA) (herein after **BSB INTERNATIONAL LINK CC**) seeking this Court to find that the Court *a quo* indeed had a discretion, and seeking an order that the discretion was incorrectly applied.

[9] The argument by the Appellant is however fatally flawed from the start.

- [10] The separate judgment written in respect of the **BSB INTERNATIONAL LINK CC** by Majiedt JA clarifies any doubt the Appellant could have had on whether or not **BSB INTERNATIONAL LINK CC** finds any application in this matter, and further lays to rest in totality the doctrine to which the Appellant seeks an answer.
- [11] To a great degree, the same answer has also been provided by the Respondent in answer to the appeal by placing reliance in their Heads of Argument in the matter of **LESTER v NDLAMBE MUNICIPALITY AND ANOTHER** [2013] ZASCA 95; 20015 (6) SA 283 (SCA) (herein after **Lester**).
- [12] On inspection, the matter of **LESTER** was also relied upon by the Respondent in the Court *a quo*.
- [13] Although the Court *a quo* in granting judgment did not expressly refer to the matter of **LESTER**, she was no doubt made aware of its existence and the implication thereof on her discretion when providing the judgment.
- [14] It is not the intention of this Court, to make a full academic comparison between the matters of **LESTER** and **BSB INTERNATIONAL LINK CC** as same is not deserving of the case at hand, save to state that a brief explanation shall be provided to substantiate the Order of this Court.
- [15] The matter of **BSB INTERNATIONAL LINK CC** as relied upon by the Appellant consisted of an application where the Appellant derived its *locus standi* from Common Law, and in applying the principles relating to Common Law and specifically the Law of Neighbours. The Supreme Court Of Appeal (the SCA), found that, in certain appropriate matters the Court might be faced with a proposition in which it should apply a discretion on the demolition of an illegal structure.
- [16] The matter of **LESTER** however stands in direct contrast with the **BSB INTERNATIONAL LINK CC** judgment in that **LESTER** concerned a public law

statutory remedy in an instance where the unlawful erecting of the offending structure constituted a criminal offence.

[17] The current matter is on all fours with the matter of **LESTER** in that it requires that Sections 4(1) and 4(4) of the National Building Regulations and Building Standards Act, No. 103 of 1977 be read with Section 21 of the same Act.

[18] The proposition that the common Law principles as the Appellant is seeking to apply in this appeal was evaluated by the SCA in **LESTER**, and found no favour at all. At paragraph 20, the SCA said,

“It is plain that S21 must be read with S4(1) and S4(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 instance of Ndlambe. Both Ndlambe 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 S21 once illegality is established. Lester’s counsel valiantly sought to persuade as 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 S21 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, S4(4) read with S4(1), creates a criminal offence with a penal sanction in the event of a building being erected without approved building plans, an aspect that militates strongly against such discretion. I shall revert to the provisions of S4 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 S21. 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 to Order the demolition once the jurisdictional fact, namely that the building was erected contrary to the Act, is established.”

- [19] Nothing in the Court *a quo* could have given the Appellant any idea that the application was based on Common Law principles. A mere cursory reading of the application that the Court *a quo* was faced with makes it abundantly clear that the matter concerned, as in **LESTER**, the principles pertaining to Public Law.
- [20] The principles as found in **LESTER** have not been replaced or rebutted with any subsequent judgment that could be regarded as authority to lead this court not to follow **LESTER**..
- [21] Courts have a duty to uphold the doctrine of legality. They can accordingly not make any Order that would militate against the doctrine of legality.
- [22] Once an illegality has been proven to exist Courts are bound not to make any Order that gives recognition or condones such illegality.
- [23] The same rules and statutes that necessitated the Respondent to first approach the Court *a quo* to declare the Appellant's structure illegal and to seek its demolition dictate that Courts do not grant recognition to its illegality, by making any other Order than the demolition thereof.
- [24] This Court is bound by the decision of **LESTER**, and further, it is in full agreement with the applicability of Public Law and the non-applicability of the Common Law in respect of the current matter. We therefore conclusively find that the Court *a quo* had no discretion other than to order demolition of the illegal structure. The Court *a quo* correctly applied the prevailing legal principles to the facts presented to it.

[25] Even if the Appellant's argument in respect of a discretion was to find favour with this Court, the Appellant would still fall short of securing the relief it seeks under circumstances where the Appellant in the Court *a quo* failed to advance any substantiated facts that could, in any event, have moved it to come to any other conclusion than the one it reached.

CONCLUSION:

[26] For all the reasons stated herein, the Appeal stands to fail.

COSTS:

[27] The normal principles pertaining to costs follow that an unsuccessful litigant ought to pay the successful litigant's costs.

[28] I see no reason why the Court in the current matter ought to deviate from the normal principles save to state that the legal position that was advanced by the Respondent in the current matter was premised upon a legal position that clearly set out, from the start of the matter, as in the current appeal, the correct legal position which, if properly evaluated by the Appellant, would have curtailed significant unnecessary costs and time delays.

[29] The Court is satisfied that costs on a party and party Scale A is an appropriate order in respect of costs.

ORDER:

[30] In the premise, the following order is made:

1. The Appeal is dismissed.
2. The Appellant is ordered to pay the Respondent's costs on party and party, Scale A.

H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

I agree.

TV RATSHIBVUMO DJP

Counsel for the Appellant: Adv T Ngwenya

Instructed by: **PRECIOUS MAVUSO ATTORNEYS**

Counsel for the Respondent: Adv E Moukangwe

Instructed by: **XOLILE NGWENYA ATTORNEYS**

Judgment reserved on: **08 MAY 2025**

Date of delivery:
