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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 3581/2021

In the matter between:

MONDOCLOX (PTY) LTD

Applicant

And

JANET CUMMING BRANCH

First Respondent

NDLAMBE MUNICIPALITY

Second Respondent

JUDGMENT

Bloem J

1. The applicant seeks an order declaring the erection of a structure unlawful and a directive that it be demolished. In the alternative, the applicant seeks an order compelling the second respondent to take the steps which it is lawfully obliged to take to ensure the demolition of the structure.

2. The applicant is a company. It is the owner of an immovable property known as erf [...], Kenton-on-Sea (the applicant's property) since 2014/2015. The first respondent is an adult female. She is the owner of the neighbouring immovable property known as erf 1561, Kenton-on-Sea (the first respondent's property) since 1995. The applicant's property abuts the first respondent's property on the eastern

edge. The applicant's and first respondent's properties are situated within the area of jurisdiction of the second respondent, the Ndlambe Local Municipality (the municipality).

3. When the applicant purchased its property, it was undeveloped and remains so. It claimed that during 2015 it drew plans for the erection of a residential dwelling in the centre of the property. It subsequently amended those building plans which envisage the proposed dwelling closer to the boundary which it shares with the first respondent. The amended building plans have been approved by the municipality.

4. The applicant alleged that, after the approval of the amended building plans, a survey was carried out of its property. The survey revealed that a structure on the first respondent's property substantially encroaches over the building line close to the boundary between the two properties. The applicant fears that the required excavations would seriously undermine the foundations of the encroaching structure, which in turn would lead to instability and cause foundation subsidence and damage to the encroaching structure. The encroaching structure accordingly has complications for the erection of the envisaged residential dwelling on the applicant's property.

5. The applicant's legal representatives met with the municipality's Director of Infrastructure Developments on 19 March 2019 to discuss the applicant's concerns. Several further visits by the applicant's legal representatives to the municipality followed. During a meeting on 25 March 2019 the municipality provided the applicant's legal representatives with copies of the 2007 and 2015 building plans relating to the first respondent's property. During that meeting a certain Ms Ngxashula, of the municipality's town planning department, informed the applicant's legal representatives firstly, that there was no application for the first respondent to erect the structure over the building line on the first respondent's property; and secondly, that there was no application for consent to land use change in respects of the first respondent's property.

6. The applicant alleged that the first respondent falsely represented to the municipality that the encroaching structure was an artist's studio, when it was in fact

a flatlet or cottage which is rented out. A separate flatlet on an immovable property constitutes a second dwelling, which, without specific permission, is not permitted within the prevailing land use scheme which governs the use of both the applicant's and the first respondent's properties.

7. It is common cause that during 1997 the first respondent's husband submitted building plans to the municipality for the erection of the structure in question (the outbuilding). The municipality approved those building plans on 19 February 1997. On 4 October 2007 the first respondent submitted further building plans to the municipality for certain alterations and additions to the existing outbuilding. On 2 April 2008 the municipality approved those plans. On 23 April 2008 the municipality's building control officer inspected the first respondent's property during the construction of the envisaged alterations and additions. From the building control inspector's control sheet, it appears that the builder on site identified the boundary pegs. According to the building plans which were approved on 2 April 2008, the building line was 1570mm from the boundary with the applicant's property and the floor plan indicated that the structure would consist of an art studio, pottery studio and a bathroom.

8. During 2015 the first respondent submitted further building plans to the municipality in respect of her property for yet further alterations and additions to the outbuilding. The municipality approved the further amended building plans on 13 May 2015. The applicant alleged that *"it is apparent that the first respondent wished to extend the existing outbuilding structures by adding an office and two stores"*. The first respondent erected the structure as envisaged in the further amended building plans, the applicant complaining that *"the result being the unlawful structure"*. The applicant contended that the erection of the outbuilding was unlawful for two reasons. Firstly, the entire length of the structure has been erected over the building line *"with its nearest point to be within 290mm of the applicant's property and with its most distant abutting point to be 830mm"*. Secondly, the structure appears to have a kitchen and a bathroom. It is plumbed, supplied with electricity and has two geysers. It therefore constitutes a second dwelling unit, whereas the area in which the properties are situated is zoned "single residential". The applicant alleged that the

first respondent did not apply for nor obtain permission to erect the structure in that manner.

9. The applicant based its application on the provisions of the National Building Regulations and Building Standards Act¹ (the Building Act) and the National Building Regulations.² It furthermore based its application on the provisions of the Ndlambe Local Municipality Spatial Planning and Land Use Management By-Laws³ (the by-laws), as read with the Ndlambe Municipality Land Use Scheme⁴ (the Scheme). The by-laws and the Scheme were promulgated and adopted in terms of the Spatial Planning and Land Use Management Act.⁵

10. The applicant's case is that the building line⁶ nearest to the boundary⁷ which it shares with the first respondent is 1570mm and that the outbuilding on the first respondent's property encroaches over the building line nearest to that boundary. The applicant made that allegation because that distance is specified on the first respondent's building plans. It is pointed out that in terms of sections 24 and 26 of the Scheme, the building line is 1500mm from the boundary between the applicant's and first respondent's properties. The applicant employed a professional land surveyor who, after having surveyed the properties, alleged that at its furthest point, the outbuilding is situated 830mm from the boundary with the applicant's property and at its closest point, it is situated 290mm from that boundary. The applicant alleged that its enquiries with the municipality revealed that the first respondent has not made an application for permission to encroach the building line. It contended

¹ National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977), as amended.

² Regulations made under section 17(1) of the National Building Regulations and Building Standards Act, published under Government Notice R2378 in Government Gazette 12780 of 12 October 1990, as amended.

³ Ndlambe Local Municipality Spatial Planning and Land Use Management By-Laws, published under GN 2 in Government Gazette 39733 of 26 February 2016.

⁴ Ndlambe Municipality Land Use Scheme, as approved in terms of section 24(2) of the Ndlambe Local Municipality Spatial Planning and Land Use Management By-Laws, which came into operation on 1 June 2019.

⁵ Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013).

⁶ In terms of the National Building Regulations 'building line', in relation to a site, means a line prescribed in any town planning scheme or any other law designating the boundaries of the area of the site outside of the erection above ground of any building prohibited and in terms of the Ndlambe Municipality Land Use Scheme "building line" means the distance from the cadastral line within which no building or structure, excluding a boundary wall, pergola or fence, may be erected.

⁷ In terms of the Ndlambe Municipality Land Use Scheme "cadastral line" means a line representing the official boundary of a land unit as recorded on a diagram or general plan approved by the Surveyor General and registered in the Deeds Office.

that the encroachment is unlawful and negatively impacts on its enjoyment of its property because it limits the extent to which it can develop its property.

11. The applicant alleged that, when it purchased its property, the first respondent's property was zoned as residential zone 1. In terms of the Scheme, a distinction is made between residential zones 1, 2, 3 and 4. Zone 1 makes provision for single residential purposes, zone 2 makes provision for medium density residential purposes, zone 3 makes provision for high density residential purposes and zone 4 makes provision for incremental housing. According to the Scheme, a dwelling unit on a residential zone 1 property "*means a self-contained inter-leading group of rooms with not more than one kitchen used for human habitation and includes such outbuildings as are ordinarily used therewith and permit a home occupation for a single household*". Multiple use of the building on a residential zone 1 property has to be limited to minimise any adverse impact on the residential environment. The first respondent's property could accordingly be used for single residential purposes only. Consent had to be acquired from the municipality to erect an additional dwelling, crèche or guest house on the property. The applicant alleged that the first respondent did not make an application to the municipality for the amendment of the land use by having it rezoned to residential zone 2, 3 or 4 or to a business zone. In this regard, the applicant alleged that the first respondent's property is used as a guesthouse. In support of that allegation, the applicant referred to an advertisement by an estate agent wherein a 5-bedroom house, with pictures of the outbuilding, is offered to be leased.

12. By letter dated 5 November 2019 to the municipality the applicant, through its attorney, objected to the encroachment over the building line and the use of the first respondent's property other than for single residential purposes. It requested the municipality to investigate the two complaints and take the appropriate steps. In a further letter also dated 5 December 2019 the applicant's attorney informed the municipality that any subsequent or *post facto* application for approval by the municipality or for the rezoning of the property will be met with an objection from the applicant, as such approval will have the effect of significantly diminishing the value of the applicant's property.

13. By email dated 15 January 2020, the municipality's Assistant Town Planner informed the applicant's attorney that a site inspection was conducted on 14 January 2020 and that he had spoken to the first respondent who informed him that the outbuilding was used as an art studio and denied that it was used as a guesthouse. He also informed the applicant's attorney that the municipality had approved the outbuilding within the prescribed building lines, but because there was no physical boundary fence between the two properties, *"one cannot be able to determine for sure whether such structure is encroaching on your client's property [and that it] will therefore be advisable that your client appoints a land surveyor to determine the boundary pegs of their property in order to determine if indeed the structure is encroaching on their property"*. He concluded that, from a Town Planner's point of view, the contraventions, as alleged in his letters dated 5 November 2019, were neither established nor witnessed and that the matter was closed. He nevertheless stated that he copied in the municipality's Building Control Section to investigate whether there was any contravention of the National Building Regulations.

14. In a letter dated 17 March 2020 the applicant's attorney confirmed that on 16 March 2020 he met with the municipality's legal and other representatives. In that letter he stated that consensus had been reached that the structure was unlawful as it encroached over the building line; that the applicant had employed a land surveyor who verified the beacons of the boundary between the two properties; that the survey confirmed the encroachment; that the construction of the applicant's envisaged dwelling was likely to cause a collapse of the earth on the first respondent's property; and that the municipality had undertaken to urgently engage with the first respondent. The applicant's attorney addressed letters dated 31 March and 8 May 2020 to the municipality, but received no response.

15. In summary, the applicant's case is that although the municipality had approved the first respondent's original and amended building plans, such approval related to the erection of the outbuilding within the building lines of the first respondent's property and that the outbuilding could be used for an art studio only.

16. The municipality did not oppose the application. The first respondent raised three points *in limine* in her answering affidavit. The first was that the deviation from

the building lines was consented to by the previous owner of the applicant's property, that the municipality approved the building plans and that there is accordingly no illegality. The second is that the applicant relied on the report dated 16 March 2015 with drawings thereto from the land surveyor that it employed. The second respondent contended that the applicant's claim to set aside the plans and obtain a demolition order became due on 16 March 2015 when the applicant became aware of the alleged encroachment. The first respondent accordingly contended that, because the applicant served the notice of motion and supporting affidavits on her on or about 22 November 2021, more than six and a half years, its claim has become prescribed in terms of section 11 of the Prescription Act.⁸ The third point raised by the first respondent was that the applicant relied on legislation that was promulgated during or after 2016 whereas the outbuilding was erected during 1997, it being contended that the legislation cannot operate retrospectively, making the legislation irrelevant to the application. Mr Beyleveld, counsel for the first respondent, did not deal with the third point in his written heads of argument- or at the hearing. In any event, reference will be made hereunder to only the Building Act and the National Building Regulations.

17. The first respondent also applied to strike out paragraph 1 of the applicant's replying affidavit as well a resolution as proof of the deponent's disputed authority to institute the application against the respondents. The first respondent complained that the applicant did not appropriately deal with the deponent's authority to bring the application in the founding affidavit and that it sought to supplement its case in the replying affidavit. In the founding affidavit the deponent described himself as a director in the employ of the applicant. He also alleged that he was duly authorised by the applicant to depose to the founding affidavit and institute the application on its behalf. Attached to his founding affidavit was a resolution of the applicant's directors reflecting his authority to institute the application. That document reflected that the applicant resolved on 2 November 2021, the same date when the founding affidavit was commissioned, that the applicant intended to institute the application against the respondents and resolved that the deponent, in his capacity as the applicant's director, was authorised to act on behalf of the applicant and sign any documents,

⁸ Prescription Act, 1969 (Act 68 of 1969).

inclusive of affidavits, relating to the application. The first respondent admitted that the deponent was a director of the applicant and many other companies, but denied that the resolution constituted sufficient authority to bring the application.

18. In this heads of argument Mr Beyleveld submitted that the resolution did not in express terms authorise the deponent to bring the application. I disagree. I am satisfied that the deponent has made sufficient averments and placed enough before the court to warrant the conclusion that he was duly authorised to institute the application against the respondents on behalf of the applicant. It was accordingly unnecessary for the applicant to attach a further resolution to the deponent's replying affidavit wherein his authority to institute the application on behalf of the applicant was reiterated.

19. In any event, the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of an applicant, is provided for in rule 7(1) of the Uniform Rules of Court.⁹ Rule 7(1) should accordingly be applied when the authority of anyone acting on behalf of a party is challenged.¹⁰ The first respondent did not use Rule 7(1) to challenge the deponent's authority to institute the application on behalf of the applicant. The application to strike out paragraph 1 of the replying affidavit and accompanying annexure must, in the circumstances, be dismissed.

20. The first respondent made an application to deliver a rejoinder affidavit in response to the applicant's replying affidavit. That affidavit sought to address two issues, namely annexures to the answering affidavit which were not initialled by the deponent and commissioner of oaths and the allegation that the affidavit of the first respondent's daughter was initially not attached to the first respondent's affidavit. Both issues have been satisfactorily explained and at the hearing Mr Brown, counsel

⁹ Rule 7(1) provides that "Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

¹⁰ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 206F-G.

for the applicant, did not offer serious opposition to the admission of those documents. The court has had regard to them in preparation of this judgment.

21. Section 10(1) of the Prescription Act provides that, subject to the provisions of Chapters III and IV thereof, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. The periods of prescription of debts are set out in section 11 of the Prescription Act. They are 30, 15 and 6 years in terms of section 11(a), (b) and (c) respectively. Section 11(d) provides that, save where an Act of Parliament provides otherwise, the period of prescription shall be three years in respect of any other debt. The first respondent relied on section 11(d).

22. Mr Beyleveld submitted that the concept of 'debt' is now settled law and, for purposes of the Prescription Act, means "*Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.*" That is the meaning ascribed to the word 'debt' in the *Shorter Oxford English Dictionary*,¹¹ which was referred to in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*¹² wherein it was held that a debt is an obligation to pay money, deliver goods or render services. Counsel furthermore submitted that the word 'debt' refers more generally to the claim or right of action and is wider than the technical term 'cause of action'. In *Desai NO v Desai and Others*¹³ the then Appellate Division gave a wide and general meaning to the term 'debt', which includes an obligation to do or refrain from doing something that entails a right on one side and a corresponding obligation on the other.

23. In *Makate v Vodacom Ltd*¹⁴ the Constitutional Court found that the meaning given to the term 'debt' in *Desai* was erroneous to the extent that it went beyond what was said in *Electricity Supply Commission*. It held that, because section 10(1), as read with sections 11 and 12 of the Prescription Act, limits the rights guaranteed

¹¹ The New Shorter Oxford English Dictionary Third Edition (1993) volume 1 at 604.

¹² *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344E-G.

¹³ *Desai NO v Desai and others* 1996 (1) SA 141 (A).

¹⁴ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at par 90.

by section 34¹⁵ of the Constitution, the provisions of section 39(2)¹⁶ of the Constitution have to be followed in construing those provisions. The court found that an interpretation of 'debt' which must be preferred is the one that is least intrusive on the right of access to courts. Jafta JA, writing the majority judgment, found that there was nothing in *Electricity Supply Commission* that "*remotely suggests that 'debt' includes every obligation to do something or refrain from doing something, apart from payment or delivery*".¹⁷ *Makate* was followed in *Off-Beat Holiday Club and another v Sanbonani Holiday Spa Shareblock Ltd and others*¹⁸ wherein Mhlantla J, writing the majority judgment, said that she was satisfied that in interpreting the meaning of 'debt', *Makate* functionally overturned the broad test adopted in *Desai* to the extent that it went beyond the narrow test in *Electricity Supply Commission*.

24. In the present matter the applicant did not claim the payment of money, the delivery of goods or the rendering of a service. The applicant claimed an order declaring the outbuilding to have been erected in contravention of certain legislative provisions and that the first respondent be directed to demolish the outbuilding, alternatively that the second take appropriate steps in terms of certain legislative provisions to demolish the outbuilding and to enforce compliance with those legislative provisions. In my view, an order directing the demolition of a structure cannot be equated with an order that a service be rendered. Section 10 of the Prescription Act accordingly does not apply to the applicant's claim. The submission that the applicant's right to pursue its application has become prescribed can accordingly not be sustained. Its claim has not become prescribed.

25. It is undisputed that the first respondent's husband purchased their property on 31 July 1995. One of the conditions contained in the Deed of Transfer was that no building or structure or any portion thereof, except boundary walls and fences, shall, except with the consent of the Administrator, be erected nearer than 1500mm of the

¹⁵ Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

¹⁶ Section 39(2) of the Constitution provides that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

¹⁷ *Makate* above n 14 at par 93.

¹⁸ *Off-Beat Holiday Club and another v Sanbonani Holiday Spa Shareblock Ltd and others* 2017 (5) SA 9 (CC) at par 48.

lateral boundary common to any adjoining erf, provided that, with the consent of the municipality, an outbuilding used solely for the housing of motor vehicles may be erected within such side space.

26. The first respondent alleged that her husband sought and obtained the written consent of Malcolm Baines, the previous owner of the applicant's property, to erect the outbuilding nearer than 1500mm from the boundary between the two properties. She attached a copy of application, with the building plans of the proposed outbuilding, to her affidavit. The first respondent alleged that the written consent was given to the municipality but, given the effluxion of time, it is not in the municipality's files. She also alleged that Mr Baines orally informed her that her husband had given consent and her husband also informed her that Mr Baines had given his consent. The municipality approved the building plans on 19 February 1997. The first respondent did not dispute that the outbuilding is about 290mm at the closest point and 830mm at the furthest point from the boundary between the two properties. The first respondent's husband passed away on 28 August 2004 and on 11 January 2008 the property was transferred into her name.

27. The first respondent confirmed the approval by the municipality of the amendment of the building plans on 2 April 2008 and 13 May 2015. In 2008 the municipality approved the conversion of the garage into a pottery studio and a bathroom and the carport into an art studio. In 2015 the municipality approved the addition of an office and two store rooms to the existing outbuilding. The 2015 addition is irrelevant for present purposes because it was erected entirely on the first respondent's property. It is the side wall of the pottery studio that encroaches the building line on the first respondent property's closest to the boundary between the two properties. Although much has been made by the first respondent in her answering affidavit about the reasons for the applicant not yet having commenced the construction of its residential dwelling on its property, it is irrelevant for the determination of the real issue, namely whether the first respondent's outbuilding encroached the building line with or without Mr Baines' written consent and with the municipality's approval.

28. What has to be determined is whether or not Mr Baines consented to the first respondent erecting the outbuilding over the building line and that the municipality approved the building plans on that basis. If it is determined that such consent was granted, the application must be dismissed because the erection of the outbuilding would then have been approved by the municipality with the consent of Mr Baines.

29. For her contention that such consent was granted, the first respondent relied on two sources. The first is the application that her late husband made to the municipality on 17 February 1997, a copy which was attached to her answering affidavit. The difficulty I have with that application form is that it does not support the allegation that her husband made an application that the outbuilding be erected over the building line. Neither the application form nor the building plans contained any indication that the first respondent's husband sought or the municipality approved the erection of the outbuilding over the building line. Both the applicant and the first respondent obtained documents, some of which were attached to their respective affidavits, from the municipality. The only document which, according to the first respondent, could surprisingly not be found in the municipality's files, was the written consent allegedly given by Mr Baines. The second source upon which the first respondent relied was her daughter, who simply alleged in her confirmatory affidavit that she had read the first respondent's answering affidavit and confirmed the correctness of the allegations contained therein in so far as they related to her. Given the fact that the applicant's deponent stated in his founding affidavit that the first respondent did not obtain approval from the municipality to erect the outbuilding over the building line, one would have expected the first respondent and her daughter to have stated when, where and the circumstances under which her late husband and father allegedly informed them that he had obtained Mr Baines' written consent. Neither one did so. Furthermore, there was no explanation why Mr Baines could not depose to an affidavit to confirm having given his consent. The first respondent also did not secure an affidavit from an appropriate person employed by the municipality to either explain why the alleged missing written consent was not in the relevant file or that the municipality would not have approved the outbuilding to be erected over the building line without written consent from Mr Baines. Without such affidavit this court cannot, on the say so of the first respondent, make a finding

that the municipality would not have approved the building plans of the outbuilding without such written consent. Such a finding would be based on speculation.

30. In the circumstances, I cannot sustain Mr Beyleveld's submission that the first respondent's version does not consist of bald or uncreditworthy denials, nor are her explanations palpably implausible, far-fetched or clearly untenable that this court is justified in rejecting them on the papers. The 1997 application to the municipality and the allegations of the first respondent's daughter to her have no or very little evidential value. In my view, the first respondent's version in that regard is implausible and is rejected. It is the applicant's denial of the first respondent's allegations in that regard that is, in the circumstances, not uncreditworthy or far-fetched.

31. The result of that finding is that the approval of the building plans by the municipality and the erection of the outbuilding did not happen with Mr Baines' written consent to the first respondent's late husband for the erection of the outbuilding over the building line. The erection of the outbuilding contravened the National Building Regulations, which, in terms of the Building Act, are included in the Act.¹⁹ As pointed out above, the erection of any building above the ground outside the building line is prohibited by the definition of 'building line' in the National Building Regulations.²⁰ The erection of the outbuilding was accordingly unlawful, in so far as it was erected over the building line.

32. The applicant's complaint was not directed at the municipality for having approved the building plans of the outbuilding in 1997 or thereafter. Its complaint was directed at the first respondent or her late husband's failure to erect the outbuilding within the building lines on their property. It was submitted on behalf of the first respondent that, absent the successful review of the administrative decision to approve the building plans, the first respondent's actions consequent thereto remain valid and lawful. That submission cannot be sustained. It was premised on the misconception that the building plans were unlawfully approved by the

¹⁹ In terms of section 1 of the National Building Regulations and Building Standards Act, "this Act" includes the national building regulations made and directives issued in terms of it.

²⁰ See above n 6.

municipality. I repeat, it was not the applicant's case that the municipality approved the building plans in contravention of any legislation. There was accordingly no need for the applicant to institute an application for an order reviewing and setting aside the municipality's decision to approve the building plans, as contended by the first respondent. The applicant seeks an order declaring that the erection of the outbuilding was unlawful because it was erected over the building line. The applicant has succeeded to show, in fact it is common cause, that the outbuilding was erected over the building line. The first respondent has failed to show that the municipality approved the erection of the outbuilding based on the alleged written consent of Mr Baines. In view of the above finding, it is unnecessary to decide the whether or not the outbuilding constitutes a second dwelling in circumstances where a second dwelling is prohibited by the Deed of Transfer.

33. What needs to be considered is a just and equitable remedy given that the outbuilding encroaches the building line on the first respondent's property. It is undisputed that the applicant's property is on a slope. After it purchased the property, it had plans drafted for the erection of a residential dwelling in the centre of the property. It was subsequently decided not to erect the dwelling in the middle of the property because firstly, the construction thereof, on a slope, would require costly earth works with high costs of construction; and secondly, there are many milkwood trees on the property which, in its view, add substantially to the beauty of the property. It accordingly decided to avoid a layout which would require the removal of those trees. The amended building plans, which have been approved by the municipality, repositioned the envisaged dwelling closer to the boundary which the applicant shares with the first respondent.

34. The applicant alleged that the erection of the envisaged dwelling in accordance with the amended building plans will require large scale engineering works, inclusive of subterranean excavations for foundations. Those excavations will be undertaken immediately adjacent to the first respondent's outbuilding. The applicant alleged that those excavations would pose a serious danger to the foundations of the outbuilding. The first respondent's unhelpful attitude in this regard was that, because the applicant acknowledged that the execution of its building

plans would pose a serious danger of undermining the foundations of the outbuilding, the application should for that reason alone be dismissed with costs.

35. In the light of the applicant's undisputed evidence, will a damages claim by the applicant against the first respondent be appropriate or should this court order a demolition order? In my view, a damages claim will not undo the above dangers alluded to by the applicant. The applicant's fears of damage to the foundations of the outbuilding, with possible adverse consequences to the applicant or its envisaged dwelling are real. A remedy in damages might not be an answer to that problem. In my view and given the circumstances, the appropriate remedy is to order the demolition of the outbuilding, but only to the extent that it encroaches over the building line. However, because of the drastic nature of demolition, the first respondent should be given an opportunity to establish that the construction of the applicant's envisaged dwelling will not pose any real risk to the outbuilding or the construction of the applicant's envisaged dwelling. It is for that reason that the order has been formulated in the fashion set out below.

36. Since the applicant has been successful, it is entitled to the costs of the application. It would be appropriate for each party to pay its or her own costs relating to the first respondent's application to deliver a rejoinder affidavit in response to the applicant's replying affidavit.

37. In the result, the following order shall issue:

1. It is declared that the structure, erected pursuant to building plans approved by the second respondent on 27 February 1997 (the outbuilding), upon erf 1561, Kenton-on-Sea, in the area of jurisdiction of the Ndlambe Local Municipality, Province of the Eastern Cape, measuring 933 square metres, has been unlawfully erected since it encroaches the building line closest to the boundary with erf [...], Kenton-on-Sea, in contravention of the National Building Regulations made under the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977).

2. The first respondent be and is hereby directed to demolish the outbuilding, only to the extent that it encroaches over the building line.

3. The partial demolition of the outbuilding shall not take place unless and until a suitably qualified engineer (the engineer) has issued a certificate as to whether or not:

3.1 the construction of the applicant's envisaged residential dwelling, as envisaged in the approved building plans (Annexure FA4 of the applicant's founding affidavit), will compromise the structural integrity and safety of the first respondent's outbuilding; and

3.2 the outbuilding will compromise the construction of the applicant's envisaged residential dwelling.

4. The first respondent shall, at her expense, employ the engineer to produce the certificate, with reasons for the conclusions at which he or she has arrived.

5. The first respondent shall serve a copy of the engineer's certificate on the applicant's attorney and the second respondent on or before 28 February 2023.

6. In the event of the first respondent failing to serve the engineer's certificate on or before 28 February 2023, she shall partially demolish the outbuilding on or before 17 March 2023.

7. The first respondent shall pay the applicant's costs of the application, save that each party shall pay its or her own costs relating to the first respondent's application to deliver a rejoinder affidavit in response to the applicant's replying affidavit.

GH BLOEM

Judge of the High Court

For the applicant: Mr G Brown, instructed by de Jager & Lordan Inc,
Makhanda.

For the first respondent: Mr A Beyleveld SC, instructed by Wheeldon
Rushmere and Cole Inc, Makhanda.

Date of hearing: 18 August 2022.

Date of delivery of judgment: 15 December 2022.