

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO: 3135/2015

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

And

DEEPAK BHARDWAJ

RESPONDENT

JUDGMENT

Date of Judgment delivered: 11 September 2015

I L TOPPING, AJ:

[1] In this application, the Applicant seeks an order declaring the Respondent to be in contempt of an order granted by this court on the 26th of February 2015, in what I shall hereinafter refer to as the main application. It was submitted by both parties that it would be appropriate for me to have reference to the main application in my consideration of this application.

[2] The main application was instituted, as one of urgency, by the Applicant on the 18th of February 2015. In that application, the Applicant sought a *rule nisi* to issue, in essence, calling upon the Respondent to show cause why an order should not be granted interdicting and restraining him from undertaking any building construction work upon an immovable property owned by him, which is situated at [2.....] [W.....] [C.....] Road, [A.....], KwaZulu-Natal (“the property”). Interim relief was also sought interdicting the Respondent from continuing with such construction pending the final determination of the main application.

[3] The relief sought in the main application is premised on the Respondent's alleged non-compliance with the provisions of section 4 of the National Building Regulations and Building Standards Act, No. 103 of 1997 and contravention of the South Town Planning Scheme of the Applicant. It is alleged by the Applicant that the Respondent had, pursuant to the provisions of section 4 of the Act, made application, and had obtained its approval, for the proposed construction of a dwelling upon the property. The Applicant however contended that, upon inspection of the construction actually taking place, such was not in accordance with the building plan that had been submitted by the Respondent at the time of obtaining its approval as aforesaid.

[4] The order forming the subject of this application was granted by consent of both parties on the 26th of February 2015. The relevant portion of that order, insofar as it relates to this application, reads as follows:

“1.

A *rule nisi* do hereby issue calling upon the Respondent to show cause if any to this Honourable Court on the 24th day of March 2015 at 09h30 or so soon thereafter as the matter may be heard why an order in the following terms should not be granted:

1.1 the Respondent is interdicted and restrained either directly or indirectly, itself or through any other means or through any third party or parties from undertaking any building construction work upon the immovable property owned by the Respondent being:

Portion [1.....] of Erf [.....], [A.....]
Located at [2.....] [W.....] [C.....] Road, [A.....]
("the property")

save for such building construction work as is foreshadowed by the plan ("the approved building plan") being approved plan number [SR1.....] bearing the date May 2013 which was approved by the Applicant as evidenced by the endorsement dated 15th October 2013 appearing thereon, a copy whereof is annexed to the Applicant's founding affidavit to the application marked "A";

.....

1.4 the Respondent is interdicted and restrained from engaging in and/or undertaking any trade and/or any commercial activities of whatsoever nature upon the property unless and until the Respondent secures express written approval and authority in accordance with the applicable legislation sanctioning such trade and/or commercial activities;.....

2.

That paragraphs 1.1 and 1.4 hereof shall operate as an interim order with immediate effect pending the return date of the *rule nisi*.”

That *rule nisi* was extended on the 24th of March 2015 until it is either confirmed or discharged.

[5] It is not contended by the Applicant in these proceedings that the Respondent has engaged in any trade or commercial activities on the property subsequent to the grant of the order. It is however contended that the Respondent has continued with the construction of a building which is contrary to the plan which was approved by it and that such construction has taken place subsequent to the grant of the order on the 26th of February 2015. It is also contended that, in so doing, the Respondent has also acted in flagrant disregard of the provisions of the National Building Regulations and Building Standards Act, the South Town Planning Scheme of the Applicant and the provisions of the KwaZulu-Natal Planning and Development Act, No. 6 of 2008.

[6] In support of this contention, the Applicant has put up a copy of the relevant building plan submitted by the Respondent in its application for the Applicant’s approval pursuant to the provisions of section 4 of the National Building Regulations and Building Standards Act.¹ It is common cause that this is the approved plan. If one has reference to the plan, it is evident that the proposed building to be constructed is a dwelling which runs diagonally across the property parallel to the south-westerly boundary, which borders on [W.....] [C.....] Road. The proposed building itself consists of an entrance hall, lounge, dining area, kitchen and two bedrooms. Adjacent to the building, bordering on the northern boundary, is a double garage and an entertainment/games area. Also

¹ Annexure "B" to the founding affidavit.

depicted on the plan is a 2m height boundary wall running along the south-west boundary adjoining [W.....] [C.....] Road. Of relevance to this application, is that the area between the proposed dwelling and the south-west boundary wall consists of an open area of paved driveway, which also runs parallel to the wall and the dwelling itself. No structure is envisaged in this area.

[7] It is common cause that according to the Applicant's South Town Planning Scheme, "all erven", except where otherwise stated, are subject to a 7,5m building line. It is also common cause in these proceedings that the Respondent has failed to obtain the Applicant's "special consent", pursuant to the provisions of section 67*bis* of the Town Planning Ordinance, No. 27 of 1949, read with Schedule 2 of the KwaZulu-Natal Planning and Development Act, No. 6 of 2008, for a relaxation of the building line. The effect of such failure in the present instance is that no building may be constructed within a 7,5m distance of the Respondent's south-western boundary. I shall refer to this area as the "prohibited area".

[8] If one has reference to the papers filed in the main application, it was contended that it had come to the Applicant's attention that the Respondent had constructed vertical columns within the prohibited area.² In support of its case, the Applicant put up a schedule of photographs, alleged to have been taken on the 1st and 6th of February 2015, which depict the state of construction on the Respondent's property as at that stage.³ It is evident that the photographs were taken from the exterior of the south-western boundary of the property, looking towards the property and across the prohibited area, and depict a boundary wall in the course of construction, consisting of reinforced concrete columns and plaster bricks, a completed retaining wall, which had been constructed some distance into the property on the far side of the prohibited area, and a line of reinforced concrete columns constructed between these two walls, in essence running along the centreline of the prohibited area parallel to the retaining and boundary walls. An affidavit of a professional land surveyor was also put up by the

² Paragraph 58 of the founding affidavit.

³ Paragraph 75 of the founding affidavit and annexures "W" and "X".

Applicant in support of its case in the main application. That affidavit contained a schedule of photographs taken by the said surveyor upon his inspection of the property on the 16th of February 2015. This schedule depicts the boundary wall as having been constructed, although not plastered, and clearly depicts the line of columns that had been constructed within the prohibited area. Of relevance is that they clearly depict the state of the building works that had taken place on the Respondent's property as at the 16th of February 2015 as consisting of a retaining wall, an incomplete boundary wall and a series of concrete columns. It was on this evidence that the Respondent consented to the order being granted on the 26th of February 2015.

[9] It is now contended by the Applicant that the Respondent has acted in contempt of that order and has continued with building works within the prohibited area.

[10] This application is opposed by the Respondent. The Respondent has raised an initial point *in limine*, challenging the authority of the deponent to the founding affidavit filed in these proceedings. As to the merits of the application, the Respondent admits the grant of the order forming the subject hereof, that such order was granted by consent and that he is, and was at all material times, aware of the provisions thereof. The Respondent however contends that the Respondent has not established, on the papers before me, that any building work has taken place after the grant of the order on the 26th of February 2015 and, in any event, any non-compliance by him with the provisions of the order was not wilful and *mala fide*.

[11] Insofar as the Respondent's point *in limine* is concerned, it is stated in his answering affidavit that he disputes that the deponent to the founding affidavit is duly authorised to depose thereto, he disputes that the Applicant has authorised this application to be made without the input of all its relevant departments, he disputes that the Applicant has approved of the deponent initiating this litigation on its behalf and in its name and he accordingly denies that the deponent was authorised by the Applicant to institute this application. In support of the foregoing contentions the Respondent goes no further than to state that the Applicant is a "local government" as contemplated in the Constitution of the Republic of South Africa, 1996, that he is "led to believe" that

the deponent is not the Head of Department of the Applicant's Southern Region and that the deponent is accordingly subordinate to that Head of Department. In response to the deponent's allegation in the founding affidavit that he is the Principal Building Inspector of the Applicant's Southern Region, the Respondent merely states that he is aware of the identity of the deponent, but does "not know for a fact that he is the 'principal building inspector'". He then goes further to submit that if the Applicant sought to institute these proceedings, the Head of Department of the Southern Region would have deposed to the founding affidavit. In response to these allegations, the Applicant has filed an affidavit by the Regional Co-ordinator: Building Inspectorate Branch of its Southern Region, who has confirmed that the deponent to the founding affidavit was in fact authorised by the Applicant to depose thereto and to any further affidavits put up by him in this application.

[12] It has been held by the Supreme Court of Appeal in the case of *Gains and Another v Telkom Namibia Ltd*⁴ that the deponent to an affidavit of motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. The deponent to the affidavit is merely a witness in the proceedings. It is the attorney of the litigant who, by signing the notice of motion and issuing the application papers, who signifies that he or she has been authorised to institute the application on behalf of the litigant. The provisions of Rule 7 (1) of the Uniform Rules of Court provide a procedure in instances where the authority of the person instituting the proceedings is being challenged. The issue has been fully canvassed in the case of *ANC Umvoti Council Caucus and Others v Umvoti Municipality*⁵ where Gorven J concluded that:⁶

"The position is now that, absent a specific challenge by way of rule 7 (1), the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the Applicant' is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an Applicant which is an artificial person has authorised the institution of the application proceedings. Rule 7 (1) must be used."

⁴ 2004 (3) SA 615 (SCA) at paragraph 19.

⁵ 2010 (3) SA 31 (KZN) at paragraphs 8 - 28

⁶ At paragraph 28

It is common cause that the Respondent has not made any challenge to the authority of the Applicant's attorney of record in terms of the provisions of Rule 7 (1) of the Uniform Rules of Court. I am therefore of the view that the Respondent's challenge to the authority of the deponent to the founding affidavit in these proceedings is without merit.

[13] Turning now to the merits of the application itself. The position, insofar as contempt of court proceedings are concerned, has been summarised in the case of *Fakie NO v CCII Systems (Pty) Ltd*⁷ as follows:

- “(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
- (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.
- (d) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”

Once the Applicant has proved the grant of the order, the service thereof on the Respondent or that it has come to the Respondents notice, the Respondent's non-compliance with the provisions of that order and wilfulness and *mala fides* on the Respondent's part, an evidentiary burden then rests upon the Respondent to advance evidence that establishes a reasonable doubt as to whether non-compliance with the

⁷ 2006 (4) SA 326 (SCA) at paragraph 42.

order was wilful and *mala fides*. Should the Respondent fail to advance such evidence, contempt will have been established beyond reasonable doubt.

[14] The grant of the order on the 26th of February 2015 and that he had notice thereof is admitted by the Respondent. What needs to be analysed therefore is whether the Applicant has proved, on the papers before me, that the Respondent has not complied with the order by continuing with building works subsequent to the grant thereof and that he acted wilfully and *mala fide* in doing so.

[15] If one has reference to the terms of the order itself,⁸ the Respondent is interdicted and restrained from undertaking any building construction work upon the property “save for such building construction work as is foreshadowed by the plan” that was submitted and approved by the Applicant in the application made pursuant to the provisions of section 4 of the National Building Regulations and Building Standards Act.⁹ As far as the determination of this application is concerned therefore, one has to have reference to what is in fact depicted on the plan in order to determine what could be construed as “approved building construction work” and to compare such with what has been established by the Applicant as having actually been built. The fact that construction may have taken place over the 7.5 m building line, and in contravention of the Applicant’s South Town Planning Scheme, is irrelevant for the present purposes. The Respondent has been prohibited from undertaking any construction work which is contrary to the approved plan. No prohibition is imposed in the order regarding any construction work taking place over the building line.

[16] Should such comparison reveal that the Applicant has established on the papers that construction work has been undertaken on the property that was not “foreshadowed by the plan”, one then has to take the enquiry further and determine whether the Applicant has established that such construction work took place after the grant of the order on the 26th of February 2015.

⁸ Paragraph 1.1 of the order.

⁹ Namely the plan forming annexure "A" to the founding affidavit.

[17] Insofar as the actual construction work that has taken place is concerned, the Applicant has put up a series of photographs in support of its case. The first of which is a schedule of two photographs that were taken by its enforcement officer on the 5th of March 2015.¹⁰ The Respondent does not dispute that such photographs were taken, but merely contends that he was not aware of the enforcement officer attending upon the property on the date in question. If one has reference to the photo schedule it depicts the prohibited area, taken from an advantage point upon the property, looking out across the south-western boundary onto [W.....] [C.....] Road. What is evident from the photographs is that construction is taking place within the prohibited area and construction workers appear to be in the process of plastering the inner surface of the boundary wall. The second schedule of photographs,¹¹ were allegedly taken by the Applicant's officials on the 16th of March 2015. The Respondent admits the photographs, but disputes what transpired whilst they were being taken. It is evident from the said photographs that a roof structure was now being constructed over the prohibited area between the boundary wall and the retaining wall. It is also evident that the roof structure was being supported by the reinforced concrete columns that had been constructed along the centreline of the prohibited area. A further schedule of photographs,¹² taken on the 17th of March 2015, depict the interior of the structure that had been constructed over the prohibited area. One can clearly see that a corrugated metal roof has been constructed over the prohibited area, which is supported on either side by the retaining wall and the boundary wall, respectively, and in the centre by the reinforced concrete columns. It is also evident that a concrete floor has been laid over the entire prohibited area. Again the Respondent does not dispute these photographs. He merely notes that they have been taken and contends that he can explain why he proceeded with the building work. The Applicant put up a final schedule of photographs,¹³ albeit in its replying affidavit, allegedly taken on the 6th of May 2015, which depict the building constructed over the prohibited area in its final form. The

¹⁰ Annexure "D" to the founding affidavit.

¹¹ Annexures "H" and "I" to the founding affidavit.

¹² Annexure "K" to the founding affidavit.

¹³ Annexure "L" to the replying affidavit.

building appears to be some form of commercial building, in the form of a warehouse, which spans the entire prohibited area.

[18] Ignoring the final photographs that were taken on the 6th of May 2015, one is able to determine from the photographs put up in the founding affidavit that a building consisting of a large open interior area has been constructed over the prohibited area. This building is rectangular in shape, appears to be one and a half to two stories high and has two entrances, in the form of double garage doors, allowing access from [W.....] [C.....] Road. Although the construction of a 2m high boundary wall as reflected on the approved plan, the wall constructed along the boundary, as depicted in the photographs referred to above, is not a boundary wall but is the front wall of the building which supports the roof structure and appears to be well in excess of 2m high. The building constructed on the prohibited area accordingly bears no resemblance whatsoever to the proposed dwelling depicted on the approved plan. If one however has reference to the main application, a report compiled by the architect engaged by the Respondent in support of his special consent application pursuant the provisions of section 67*bis* of the Town Planning Ordinance is put up as an annexure thereto.¹⁴ It is evident from a perusal thereof that the structure constructed upon the prohibited area conforms with the plan accompanying that report. The structure on that plan is described as a proposed private boat and vehicle garage, private workshop and private games room/recreational area. I am accordingly satisfied that the Applicant has established, by way of the undisputed pictorial evidence put up in its founding affidavit, that a structure has been constructed on the property which does not conform in any respects with the approved plan referred to in the order granted on the 26th of February 2015. I am satisfied therefore that the building work undertaken in constructing the structure that is presently situated on the property is not “foreshadowed by the plan” referred to in the order.

[19] This being the case, I need now to consider whether the Applicant has established that such building work has been undertaken by the Respondent

¹⁴ Annexure "CC" to the replying affidavit in the main application.

subsequent to the grant of the order on the 26th of February 2015. In its founding affidavit, the Applicant contends that, at the time of the grant of the order, the Respondent had proceeded with construction to a point where foundations have been laid, certain vertical pillars were constructed and certain walls were constructed between such pillars. The Respondent admits such allegation, but contends that the Applicant is not clear about what precisely had been built on the property and submits that most of the construction work had been completed.¹⁵ As already referred to herein, the Respondent does not dispute the photographs that were taken on the 5th of March 2015,¹⁶ which depict the state of the building works that had been completed at that date as being confined to the construction of the retaining wall and the boundary wall, with the latter still being plastered. No roof structure is evident. The Applicant goes further in its founding affidavit to contend that the building work, as depicted in the aforesaid photographs, confirmed that the Respondent was in contempt of the order and was engaging in building work within the prohibited area. In answer to this allegation the Respondent admits that he carried on the building work, but denies that he acted in contempt of the order.¹⁷ As already referred to, the Respondent admits the photograph that was taken on the 16th of March 2015.¹⁸ This photograph clearly depicts that the building works had progressed to a stage where a roof was now being erected upon the structure. In support of the photographs taken on the 17th of March 2015,¹⁹ the Applicant contended that the state of construction had reached a stage where the floor had been completed, the plastering of the interior walls had been completed and that a roof had been constructed over the structure. In response to these allegations, the Respondent merely notes them and states that he has explained why he proceeded with the building work. There is no denial that such building work had taken place during the period contended for by the Applicant.

[20] Again on the pictorial evidence put up by the Applicant in its founding affidavit, and the admissions made by the Respondent in response thereto, it is clearly evident

¹⁵ Paragraph 20 of the founding affidavit read with paragraph 26 of the answering affidavit.

¹⁶ Annexure "D" to the founding affidavit.

¹⁷ Paragraph 34 of the founding affidavit read with paragraph 35 of the answering affidavit.

¹⁸ Annexure "I" to the founding affidavit.

¹⁹ Annexure "K" to the founding affidavit.

that the Respondent has proceeded with the construction of a building on the prohibited area from a state where it consisted of the outer boundary wall, still in a state of construction as at the 5th of March 2015, to a state where a structure, inclusive of a roof, a concrete floor and doors, had been completed by the 17th of March 2015. I am therefore satisfied that the structure that presently stands on the prohibited area, save for the rear retaining wall, the concrete pillars running along its centreline and a portion of the outer boundary wall, were constructed after the grant of the order on the 26th of February 2015. I am therefore satisfied that the Applicant has proved that such structure was constructed by the Respondent in contravention of the provisions of that order.

[21] With regard to whether the Respondent acted wilfully or *mala fide* in continuing with the construction as aforesaid, it is alleged by the Applicant that the Respondent had been served with various notices alluding to the fact that construction had commenced on the property unlawfully and that such construction was unlawfully continuing up to the build-up of this application. In this regard I was referred to various annexures forming part of the main application. It is admitted by the Respondent in the main application that a notice was personally served upon him by an official of the Applicant on the 6th of November 2013 in which he was advised, inter-alia, of the provisions of Regulation A25 (5) of the Regulations promulgated pursuant to the National Building Regulations and Building Standards Act and was further advised that *“any person who, having obtained approval in terms of the Act for the erection of any building, deviates to any material degree from any plan, drawing or particulars approved by the local authority shall, except where such deviation has been approved, be guilty of an offence”*.²⁰ It is also alleged by the Applicant in those proceedings that a further notice was served on the Respondent on the 29th of April 2014 wherein he was advised of the provisions of section 4 (1) of the National Building Regulations and Building Standards Act, and was, in particular, advised that *“no person shall without the prior approval in writing of the local authority in question, erect any building in respect of*

²⁰ Annexure "F" to the main application, read with paragraphs 19-20 of the founding affidavit and paragraph 68 of the answering affidavit.

which plans and specifications are to be drawn and submitted in terms of this Act".²¹ The Respondent does not deny such allegation, but merely notes same. The Respondent admits service of a similar notice upon him on the 2nd of February 2015.²² Again the provisions of section 4 (1) of the National Building Regulations and Building Standards Act were brought to his attention and he was also directed therein to "cease *all work forthwith*". It is also admitted by the Respondent that a written notice, in terms of section 56 of the Criminal Procedure Act, No. 51 of 1977, was served on him on the 3rd of February 2015 where he was charged with unlawfully contravening section 4 (1), read with section 4 (4), of the National Building Regulations and Building Standards Act with regard to the construction that was taking place on the property.²³ It is also admitted by the Respondent that he addressed an email to the Applicant on the 4th of February 2015 wherein he acknowledged receipt of the summons as aforesaid, contended that he had an approved plan, with reference to the plan forming the subject of this application, admitted that he had deviated therefrom, contended that he had submitted a "*deviation plan*" to the Applicant, but that such "*did not pass*".²⁴

[22] If one has reference to the application papers in this application, it is contended by the Respondent in his answering affidavit that he believed he was entitled to continue with the construction of the building presently situated on the prohibited area as he had launched a fresh application for special consent pursuant the provisions of section 67*bis* of the Town Planning Ordinance. He goes further to state that he was informed that the risk of economic loss in the event of the special consent application failing would be his and that he was prepared to take such risk. He further states that he was mistaken about the implication of the order and that he believed that the order was not effective until the Applicant had succeeded in securing confirmation thereof. This is despite acknowledgement of receipt of the Applicant's attorney of record's letter

²¹ Annexure "I" to the main application, read with paragraph 23 of the founding affidavit and paragraph 71 of the answering affidavit.

²² Annexure "T" in the main application, read with paragraph 67 of the founding affidavit and paragraph 99 of the answering affidavit.

²³ Annexure "U" to the main application, read with paragraph 70 of the founding affidavit and paragraph 102 of the answering affidavit.

²⁴ Annexure "V" to the main application, read with paragraph 72 of the founding affidavit and paragraph 105 of the answering affidavit.

addressed on the 5th of March 2015, at the stage when the pictorial evidence demonstrated that the building works had only progressed to the stage where the inner surface of the boundary wall was being plastered, wherein he was advised that he was acting contrary to the provisions of the order in continuing with the building works and that “*should building activity continue on the 6th of March 2015, we shall immediately approach the court for a contempt of court order*”.²⁵

[23] I accept that the Respondent’s version must be carefully scrutinised and I am also mindful that “*a respondent’s version can be rejected in motion proceedings only if it is “fictitious” or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence*”.²⁶ If one has reference to the admitted or undisputed facts before me, the Respondent was aware, as at the 5th of March 2015, of the provisions of section 4 (1) and (4) of the National Building Regulations and Building Standards Act, as well as the provisions of regulation A25 (5) of the Regulations promulgated pursuant thereto and must accordingly have been aware that he was not entitled to erect a structure without an approved plan in respect thereof. He was also aware of the provisions of the order granted on the 26th of February 2015 and had received notice that should he continue with his building operations on the prohibited area after the 6th of March 2015, an application would be instituted by the Applicant seeking to declare him in contempt of such order. It must also not be forgotten that the Respondent was represented by his attorney of record during all relevant times to these proceedings. I am therefore of the view that his assertion that he was labouring under a misapprehension that he was entitled to proceed with the building works after the 5th of March 2015 is “*clearly unworthy of credence*” and ought to be rejected.

[24] Apart from the aforesaid assertion, the Respondent has laid no further facts before me that would give me further insight into his state of mind during the time the construction was taking place between the 5th of March 2015 and the institution of these

²⁵ Annexure "E", read with paragraph 31 of the founding affidavit and paragraph 31 of the answering affidavit.

²⁶ Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 362 (SCA) at paragraph 56.

proceedings on the 20th of March 2015. The Respondent has accordingly failed to advance any evidence that would establish a reasonable doubt as to whether his non-compliance with the order dated the 26th of February 2015 was wilful and *mala fides*. The only conclusion I can draw is that the Respondent continued with the construction of the structure presently standing on the prohibited area with full knowledge that he was doing so in contravention of the provisions of the National Building Regulations and Building Standards Act and in direct contravention of the provisions of the order granted by this court on the 26th of February 2015 directing him not to do so pending the return date of the *rule nisi* issued on that date. I am therefore satisfied that the Respondent is in contempt of such order.

[25] In argument before me, the Applicant's counsel advised me that the Applicant would seek an order in terms of the alternative relief sought in the notice of motion. The alternative relief sought is that the Respondent be found in contempt of the order granted on the 26th of February 2015, that he be committed to prison for a period of 30 days, or such alternative period as I may deem appropriate, and that such committal be suspended for a period of two years on condition that the Respondent complies with the provisions of the order and further demolishes all building construction work undertaken by him contrary to the terms of the order within 14 days of the grant thereof. The Applicant further seeks leave to approach this court, on these papers supplemented insofar as may be necessary, for an order committing the Respondent to prison in the event of him failing to comply with the provisions as aforesaid.

[26] It is well accepted that the object of contempt proceedings is not only to obtain the imposition of a penalty in order to vindicate the court's honour consequent upon the disregard of its order but also to compel performance in accordance therewith. When the object is primarily to compel performance of a court's order, the period of imprisonment imposed as a punishment is often suspended pending fulfilment by the defaulter of his or her obligations.²⁷ I am mindful of what was stated with regard to a city council's obligations to enforce the law in the face of ongoing illegality being

perpetrated by an individual in the case of United Technical Equipment Company (Pty) Ltd v Johannesburg City Council, where it was stated that: ²⁸

“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 legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict.”

A situation akin to the foregoing is present in this instance. The Applicant was duty-bound to approach this court in the main application to seek an interdict to prevent the Respondent from continuing with the illegal construction of the structure on the prohibited area of the property. The unauthorised and illegal conduct of the Respondent cannot be condoned by this court. I am of the view that a lenient approach in the present instance would also lead to an open invitation to members of the public to follow the course adopted by the Respondent and to continue with the construction of buildings and structures in circumstances where the authority therefor has not been obtained from the relevant municipality pursuant to the provisions of section 4 of the National Building Regulations and Building Standards Act.

[27] The approach adopted by the Applicant, in seeking the alternative relief, would not only serve the purpose of vindicating this court’s honour consequent upon the disregard of the order granted on the 26th of February 2015, but will also serve the purpose of encouraging the Respondent to comply with the provisions thereof and provide him with an opportunity of “righting his wrongs” prior to any punishment being imposed upon him. I am therefore of the view that such relief is appropriate in the present circumstances.

²⁷ See: East London Local Transitional Council v MEC for Health, Eastern Cape 2001 (3) SA 1133 (CK) at paragraph 28; Laubscher v Laubscher 2004 (4) SA (350 (T) at paragraph 8.

²⁸ 1987 (4) SA 434 (T) at 348I-J: Which was cited with approval in Lester v Ndlambe Municipality (unreported, referred to as [2013] ZASCA 95, 22 August 2013).

[28] The only concern I have is the time afforded to the Respondent to comply with the direction to demolish the building works that were undertaken upon the property that were not foreshadowed by the approved plan. I am of the view that a period of 14 days affords the Respondent insufficient time to undertake such demolition and that a period of 30 days would be appropriate in the circumstances. I must also state that the order of demolition granted herein is confined solely to those portions of the structure that are not foreshadowed by the approved plan that were constructed after the issue of the order on the 26th of February 2015. As already stated herein, one can take as a benchmark the photo schedule taken by the Applicant on the 5th of March 2015 as being the state of construction of the structure as at that date.²⁹ The order I make hereafter only refers to those portions of the structure presently constructed on the prohibited area of the property which do not conform with the approved plan and which were constructed in addition to what is depicted in the said photo schedule.

[29] I accordingly make the following order:

- (a) the Respondent is found in contempt of the order granted by this court on the 26th of February 2015;
- (b) the Respondent is committed to prison for a period of thirty (30) days;
- (c) such committal is suspended for a period of two (2) years on condition that the Respondent:
 - (i) complies with the terms of the order granted on the 26th of February 2015;
 - (ii) demolishes all building construction work undertaken by him, or on his behalf, which is contrary to the terms of the said order within a period of thirty (30) days of the date hereof;

²⁹ Annexure "D1 and 2" to the founding affidavit.

- (d) the Applicant is given leave, in the event of the Respondent failing to comply with the provisions of subparagraph (c) hereof, and on the same papers supplemented as necessary, to apply for an order for the Respondent's committal to prison; and
- (e) the Respondent is directed to pay the costs of this application on the attorney and client scale.

I L TOPPING AJ

LAST APPEARANCE:

Counsel for the Applicant: Gajoo SC, instructed by Livingstone Leandy Incorporated, Durban.

Counsel for the Respondent: Windfred, instructed by Attorneys J Surju, Durban.

Date of Hearing: 25 June 2015.

Date of Judgment: 11 September 2015.