THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1271/2022

In the matter between:

LUXOLO FONO **FIRST APPELLANT**

CAGUBA TRIBAL AUTHORITY **SECOND APPELLANT**

and

PORT ST JOHNS MUNICIPALITY **RESPONDENT**

Neutral Citation: *Fono and Another v Port St Johns Municipality* (1271/2022) [2024] ZASCA 161 (22 November 2024)

Coram: MOCUMIE, MABINDLA-BOQWANA and SMITH JJA and MJALI and MANTAME AJJA

Heard: 5 September 2024

Delivered: 22 November 2024

Summary: Constitutional and Administrative Law – constitutionality of legislation – the Minister responsible for the administration of the National Building Regulations and Standards Act 103 of 1977 not cited – finding of the full court regarding the constitutionality of the Justice Laws Rationalisation Act 18 of 1996 ineffectual – non-compliance with Spatial Planning and Land Use Management Act 16 of 2013 (the SPLUMA) – courts have a discretion whether to grant demolition orders – courts may issue directives for

preventative or remedial steps in terms of s 32 of the SPLUMA – the discretion must be exercised judiciously.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Pakati, Stretch JJ and Qitsi AJ, sitting as court of appeal):

1 The appeal is upheld in part.

2 The order of the full court is set aside and substituted with the following order:

'(a) The appeal is upheld with each party to pay their own costs.

(b) The order of the court of first instance under case number 4056/2018 is set aside and replaced by the following order:

''(i) The conduct of the first respondent in continuing with the construction of buildings and/or commencing with the erection of new structures on Erf 7[...], Port St Johns, without the applicant's required approval, is declared unlawful.

(ii) The first respondent is interdicted from continuing with the construction of buildings and/or commencing with the erection of new structures on the property, without complying with s 33(1) of the Spatial Planning and Land Use Management Act 16 of 2013.

(iii) The applicant is ordered to provide the first respondent with the requirements for the submission of building plans (and subsequent approval thereof), in writing, within 30 (thirty) days of this order.

(iv) The first respondent is ordered to comply with such requirements within three (3) months of the provision thereof."

3 Save as aforesaid, the appeal is dismissed.

4 Each party is ordered to pay their own costs of this appeal.

JUDGMENT

Mantame AJA (Mocumie, Mabindla-Boqwana and Smith JJA and Mjali AJA concurring):

Introduction

[1] This is an appeal against the whole judgment and order of the full court of the Eastern Cape Division of the High Court, Mthatha (the full court). The full court, sitting as a court of appeal, upheld the appeal against the whole judgment and order of the high court, per Coltman J, sitting as a court of first instance, and, *inter alia*, declared unlawful and set aside the conduct of the first appellant, Mr Luxolo Fono (Mr Fono), in constructing a building without approved building plans, and ordered him to demolish the building. The appellants appeal against that order with the special leave of this Court.

[2] The second appellant is the Caguba Tribal Authority (the tribal authority). The respondent is the Port St Johns Local Municipality (the municipality). The Caguba Community Property Association (the Caguba Community) and Minister of Cooperative Governance and Traditional Affairs, who were cited in the high court as the second and fourth respondents, respectively, did not participate in the appeal.

[3] Before getting into the merits of the appeal, I must first deal with the preliminary jurisdictional issue of the appeal having lapsed, because it was prosecuted out of time. For this reason, Mr Fono sought condonation for the late lodging of the appeal record and the reinstatement of the appeal.

Condonation

[4] It is trite that an applicant who seeks condonation for the late prosecution of his or her appeal must satisfy the court of:

(a) The nature of the relief sought – which is condonation for the late filing of the appeal record and reinstatement of the appeal;

(b) The extent and cause of the delay;

(c) The effect of the delay;

(d) The reasonableness of the explanation;

(e) The importance of the issue; and

(f) The prospects of success.

[5] It is common cause that the appeal was not lodged timeously. Mr Fono made an application for the late prosecution and re-instatement of the appeal. In their heads of argument, and before this Court, counsel for Mr Fono stated that the delay was as a result of, among others, problems with the transcription of the record, the late discovery of missing pages, and having to change counsel. He highlighted the reasonable prospects of success. These applications were not opposed by the municipality. Consequently, an order re-instating the appeal was granted. This was the case with the municipality as well, which had filed its heads of argument out of time. Mr Fono had no objection with this Court granting the municipality the condonation sought. Consequently, an order condoning the late filing of the heads of arguments was granted in their favour. The appeal proceeded on that basis.

Factual matrix

[6] Port St Johns is a small rural, tourist town nestled in the Wild Coast, Eastern Cape. The Caguba Community Property Association acquired land in this picturesque coastal strip of land, pursuant to a land claim lodged by it in accordance with the relevant provisions of the Restitution of Land Rights Act 22 of 1994. On 3 February 2008, the Regional Land Claims Commission, the

Port St Johns Municipality and the Caguba Community entered into a written settlement agreement which transferred a portion of land to various stakeholders. The Caguba Community benefitted from this award. Even though there was no formal transfer of the land from the Minister of Rural Development and Land Reform to the Caguba Community, it is not disputed that the land on which Mr Fono commenced with the construction of a tourist facility, being Erf 7[...] Port St Johns, Eastern Cape (the property), belongs to that community.

[7] It was common cause that Mr Fono commenced building operations without any approved building plans. According to a municipal official, Ms Lonwabo Zide (Ms Zide), she and other municipal functionaries visited the property on 20 August 2018 and established that a building was being erected without approved building plans. She thereafter issued Mr Fono with a letter informing him that he was in breach of municipal town planning and building by-laws, the provisions of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act) and the Spatial Planning and Land Use Management Act 16 of 2013 (the SPLUMA). She consequently demanded that he cease building operations immediately. Although Mr Fono had undertaken to comply with the demand, she subsequently discovered (on 22 August 2018) that he had nevertheless proceeded with the construction. The municipality was accordingly forced to launch an urgent application in the high court for appropriate relief.

[8] Mr Fono denied that he undertook to stop the building project, as alleged by Ms Zide. He claimed that he was not on site either on 20 or 22 August 2018 but was in Mthatha. He had no idea who Ms Zide communicated with, but was certain it could not have been with him. However, nothing really turns on this issue since Mr Fono confirmed that after the urgent application was served on

him and having obtained legal advice, he gave instructions for the construction to cease.

[9] In his answering affidavit, Mr Fono gave an undertaking to 'instruct an architect or draughtsman to draw up plans for the structures that are under construction', for submission to the relevant authorities, should that be required. He contended that he was unaware that he had to comply with municipal town planning requirements. He said that he had proceeded with the building operations on the assumption that he complied with the requirements of the traditional authority, which did not ask for building plans.

In the court of first instance

[10] On 24 August 2018, the municipality applied on an urgent basis to the Eastern Cape Division of the High Court, Mthatha for an order:

(a) declaring Mr Fono's construction of a building on Erf 7[...] Port St Johns, without the required approval by the municipality to be unlawful;

(b) interdicting Mr Fono from carrying on with the construction of the building until he has complied with the applicable municipal laws and regulations;

(c) compelling Mr Fono to demolish the building; and

(d) In the event of Mr Fono failing to demolish the building, that the municipality, be authorised to demolish it.

[11] The municipality contended that:

(a) Mr Fono constructed the building on land falling within the jurisdiction of the municipality without approved building plans by the municipality;

(b) Mr Fono's conduct was in contravention of the Building Standards Act; and

(c) Mr Fono's conduct contravened the SPLUMA and the municipality's building control and land use by-laws.

[12] In his answering affidavit, Mr Fono raised several points *in limine*. First, he contended that the Building Standards Act is not applicable in the area that used to fall within the territory of the erstwhile Republic of Transkei. Second, that despite the former Transkei's incorporation into the Republic of South Africa, pursuant to the repeal of the Transkei Act 100 of 1976,[1] the Building Standards Act was not included in the schedule of statutes that were made applicable in the territory of the former Transkei in terms of the Justice Laws Rationalisation Act 18 of 1996 (the Rationalisation Act). The Rationalisation Act was enacted to streamline, rationalise or consolidate certain statutes mentioned in Schedule I of that Act. The fact that the Building Standards Act was not included within the scope of the Schedule means that it does not apply in the territory of the former Transkei, or so the argument went.

[13] Third, the municipality's contention that he was in contravention of SPLUMA is unsustainable, since the Municipality failed to provide any detail regarding how that statute had been contravened. In this regard, Mr Fono contended that the municipality, both in its compliance notice and court papers, failed to state on which provisions of the SPLUMA it relied.

[14] Fourth, Mr Fono asserted that he had obtained the permission of the tribal authority to occupy the property and to build a guest house and tourist accommodation on it. This authority was granted by way of lease, which he had concluded with the tribal authority. The agreed rental was R500 per annum, for a period of 75 years. In view of the above, Mr Fono argued that the municipality had no right to impose and enforce the municipal laws in relation to the property in question.

[1] In terms of s 230(1) of the Interim Constitution.

[15] Fifth, the municipality alleged that Mr Fono had contravened its by-laws, without providing any detail regarding the relevant provisions that he was alleged to have contravened. He had perused numerous by-laws on the municipality's website and none related to the regulation of building plans or approval of developments. It must therefore be assumed that the municipality never promulgated such by-laws.

[16] Sixth, Mr Fono contended that, in any event, such by-laws, if any, would not apply to the property, since it did not fall within the jurisdiction of the municipality, but rather under the traditional authority. He contended that in the former Transkei, traditional legal systems have been in existence since time immemorial. The property falls directly within the jurisdiction of a tribal authority and would therefore be subject to the traditional legal system. The approval for the construction, which he obtained from the tribal authority, consequently sufficed to legitimise the construction of the buildings.

[17] Mr Fono also asserted that the balance of convenience was in his favour. He had spent R80 000 on the construction project and, should demolition be ordered, he would suffer catastrophic loss. He maintained that the structure was, in any event, sound and complied with relevant building standards, as far as they may be applicable. He was confident that this assertion would be confirmed by a building inspector or engineer, who he agreed may be dispatched to 'inspect the property and render an account on a professional level as to the standard of the building work'. The order sought by the municipality would be unfair and prejudicial to him. Instead, he should be allowed an opportunity to engage the relevant professionals and thereafter to submit the required building plans to the relevant authorities for approval.

[18] The court of first instance dismissed the application, upholding the contention that the Building Standards Act was not applicable in the territory of the former Transkei. It also found that the municipality was unable to prove that Mr Fono had contravened the provisions of either its by-laws or the SPLUMA.

In the full court

[19] In upholding the municipality's appeal, the full court concluded that the court of first instance made two fundamental errors in dismissing the municipality's application for an interdict. First, in finding that the Building Standards Act did not apply to the property and second, in finding that Mr Fono did not contravene the provisions of the SPLUMA.

[20] According to the full court, the court of first instance erred in finding that since the Building Standards Act came into effect on 1 September 1985, after the formation of the 'independent' homeland of Transkei, it did not apply to property situated in the territory of the former Transkei homeland. The full court was of the view that this finding is inconsistent with the ratio expressed by this Court in *Lester v Ndlambe Municipality* (*Lester*)[2] and in *Walele v The City of Cape Town*,[3] where the Constitutional Court emphasised that the Building Standards Act must be interpreted to promote the spirit and purport of the Bill of Rights in order to protect the property rights of landowners and occupiers of neighbouring properties.[4] The full court referred to *Herbert N.O. and Others v Senqu Municipality and Others* (*Herbert*),[5] where the Constitutional Court commented that:

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[2] *Lester v Ndlambe Municipality* and Another [2013] ZASCA 95; [2014] 1 All SA 402 (SCA); 2015 (6) SA 283 (SCA).
[3] *Walele v City of Cape Town Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) (*Walele*). See also: *Turnbull-Jackson v Hibiscus Court Municipality and Others* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) para 73.
[4] *Walele* para 55.
[5] *Herbert N.O. and Others v Senqu Municipality and Others* [2019] ZACC 31; 2019 (11) BCLR 1343 (CC); 2019 (6) SA 231 (CC).

'Evidently the partial extension of the Upgrading Act perpetuated the unequal protection and benefit of the Act on victims of discriminatory laws of the apartheid era. This unequal treatment [not only] applied between people who . . . were forced to live in the homelands . . . [b]ut all those who held rights governed [by different sections of the Upgrading Act].'[6]

[21] In essence, in upholding the appeal, the full court equated the impermissible differentiation caused by the statute under consideration in *Herbert*, namely, the Land Affairs General Amendment Act 61 of 1998, to the consequences which would result from a finding that the Building Standards Act does not apply in the territory of the former Transkei. It reasoned that 'in both instances, people who resided in the territory of the former Transkei homelands were denied the equal protection and benefit of the law for no reason other than the fact that they were living in these former homelands'. As a result, it found that '[t]he principle in *Herbert*, that this type of differentiation is irrational and unconstitutional', was equally applicable in this matter.

[22] In addition, the full court reasoned that the finding of the court of first instance 'renders the Rationalisation Act unconstitutional, in that it results in the [Building] Standards Act discriminating against persons who reside in areas such as the former Transkei, by denying them the protection and the benefits [ordinarily afforded] by the [Building] Standards Act'. It consequently found that the Building Standards Act applies to the property even though it is within the territory of the former Transkei.

[23] Finally, the full court found that there was no dispute that s 33(1) of the SPLUMA applied to Mr Fono, since he did not deny that he failed to apply for permission for the erection of structures or buildings as required in terms of s 33(1) of the SPLUMA. It therefore found that the court of first instance erred

[6] Ibid paras 28 and 30.

in finding to the contrary. The full court consequently upheld the appeal and set aside the order of the court of first instance.

Discussion

[24] In argument before us, Mr Fono abandoned most of the points *in limine* raised in his answering affidavit. His counsel correctly accepted that since the property is in the municipality's area of jurisdiction, Mr Fono was required to apply for the approval of the building plans, either in terms of the Building Standards Act (provided it is found to apply to the property), the municipality's by-laws, if any, or the SPLUMA. He, however, persisted with his arguments that the Building Standards Act does not apply in the territory that used to fall under the former Transkei and that the municipality failed to establish that it adopted the necessary by-laws to regulate the approval of building plans and related matters. The municipality conceded that it failed to promulgate the by-laws and nothing more needs to be said about it.

[25] There are fundamental problems with the manner in which the full court dealt with the issue of the applicability of the Building Standards Act in the area where the property is situated. First, the full court's reliance on *Lester* was misplaced. The property in that case was not situated in the former Ciskei homeland, as the court erroneously assumed, but in Kenton-On-Sea, a town situated in the Republic of South Africa. It was therefore common cause that the Building Standards Act applied to that property. The judgment also only concerned the issue of the peremptory wording of s 21 of the Building Standards Act in respect of demolition orders.

[26] Second, while not determining this issue, it is important to point out that there is a general presumption that the omission of a statute from a schedule of laws that were made applicable in a particular territory or jurisdiction is

deliberate and not merely as a result of a mistake on the part of the legislature. In *Kaknis v Absa Bank and Another*,[7] this Court held that '[i]t is a well-established principle of statutory interpretation that the legislature must be taken to be aware of the nature and state of the law existing at the time when legislation is passed'.[8] The effect of the full court's judgment is to declare the provisions of the Rationalisation Act unconstitutional, insofar as they fail to make the Building Standards Act applicable in the territory of the former Transkei.

[27] It is common cause that the Minister of Economic Affairs, who is the Minister responsible for the administration of the Building Standards Act, was not given notice that such relief would be sought.[9] In my view, the full court erred in deciding that issue without affording the responsible Minister the opportunity to express his or her views. For all we know, there may well be good reasons why the legislature has decided not to make the statute applicable in the area that used to fall under the Transkei homeland. The full court was therefore not entitled to pronounce on the constitutionality of the Rationalisation Act.

[28] Third, the full court erroneously assumed that the municipality had promulgated by-laws which regulate building plans and constructions. It consequently interdicted Mr Fono from proceeding with the construction of the building, until such time as he had complied with the applicable municipal by-laws and regulations. In the absence of municipal by-laws, it is obviously not possible for Mr Fono to comply with the order.

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[7] *Kaknis v Absa Bank Limited, Kaknis v Man Financial Services SA (Pty) Ltd and Another* [2016] ZASCA 206; [2017] 2 All SA 1 (SCA); 2017 (4) SA 17 (SCA).
[8] Ibid para 26.
[9] The Minister of Rural Development and Land Reform was cited as the fourth respondent.

[29] Mr Fono's counsel has correctly conceded that the municipality was entitled to rely on his non-compliance with the provisions of s 33(1) of the SPLUMA. The building is intended for tourism accommodation and, accordingly, falls within the municipality's Spatial Development Framework Policy, which has been approved in terms of the SPLUMA.

[30] His counsel, however, submitted that while the provisions of the Building Standards Act in relation to demolition orders are peremptory, the court has greater discretion in terms of the SPLUMA to consider other less drastic remedies. He argued further that a demolition order would be unduly harsh and draconian in the circumstances of this case. According to him, it would be fair to all parties – and would adequately address the municipality's concern about safety issues if Mr Fono were ordered to comply with s 33 of the SPLUMA.

[31] The issue that falls for consideration in this appeal has therefore resolved itself into the narrow and discrete question as to whether this Court should order the demolition of the building or, alternatively, allow Mr Fono an opportunity to comply with s 33 of the SPLUMA, by directing appropriate preventative or remedial measures in terms of s 32(2)*(c)*.

[32] The SPLUMA preamble recognises the fact that 'many people in South Africa continue to live and work in places defined and influenced by past spatial planning and land use laws and practices which were based on racial inequality, segregation and unsustainable settlement patterns'. Section 24(2)*(c)* of the SPLUMA provides that a land use scheme adopted in terms of subsection (1) must:

'*(c)* include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land scheme.'

[33] Mr Fono's counsel, while accepting that Mr Fono contravened the SPLUMA, submitted that the interest of justice demand that this Court should allow for the incremental introduction of land use management and regulations, and should therefore be loath to order the demolition of the property. At worst, the development should be stopped until the land development application has been submitted. In any event, Mr Fono, in his answering affidavit, undertook not to develop the property further pending the finalisation of this matter and further appealed to the Court for an opportunity to submit building plans or documents that were required in terms of any law, since he had laboured under the impression that the property is under traditional authority. In addition, s 33 of the SPLUMA does not expressly provide for a demolition order in the event of land being developed without a 'land development application'. An administrative penalty would consequently be more appropriate, so he argued.

[34] Mr Fono appeared to have been under the erroneous impression that, regard being had to the traditional legal system, he had substantially complied with applicable laws relating to the use of land, construction and management of buildings in the territory of the former Transkei. In this regard he relied on the affidavit filed by Chief Afrika Mandla Fono, confirming that Mr Fono has acted in accordance with customary law. In the circumstances, it was submitted that it would be 'unreasonable, unfair and disproportionate' to order demolition of the structures.

[35] Constitutional proportionality, according to Mr Fono, was said to be an issue that should have been considered by the full court. This approach was said to be important, more especially that there appears to be a conflict between the traditional and municipal legal systems. It was contended that the reality of land use in rural areas of the former Transkei has always been left to be administered

by the tribal authority. This Court was implored to take into consideration this constitutional imperative.

[36] As to the issue of an appropriate remedy, Mr Fono submitted that immediately after the urgent application was served on him, he stopped with the construction. The construction is currently at an advanced stage. If demolition were to be ordered, he stands to lose a considerable amount of money as the construction is currently at roof level. Mr Fono has tendered to instruct an architect or draughtsman to draw up building plans for submission to the municipality. That tender remains. In any event, the building is structurally sound and there can be little doubt that it complies with whatever building standards that may be applicable, so he said.

[37] I agree with these submissions. The municipality's reliance on several judgments of this Court regarding the extent of the court's discretion, if any, not to order the demolition of buildings in terms of s 21 of the Building Standards Act, is misplaced. The jurisprudence relied upon by the municipality was developed in the context of the peremptory wording of s 21 of that Act. Section 32(2)*(c)* of the SPLUMA, on the other hand, grants this Court a broader discretion. It allows a municipality, in the event of a contravention of its land use scheme, to apply for an interdict, a demolition order or an order, 'directing any other appropriate preventative or remedial measure'. There can accordingly be little doubt that courts have wider discretion in respect of the type of relief they may grant in the event of non-compliance with s 33 of the SPLUMA. That discretion, must of course, be exercised judiciously and will depend on the facts of each case.

[38] An important factor in considering whether a demolition order would be appropriate in this case is the fact that the municipality did not exactly cover

itself in glory in the manner in which it handled the situation. First, it purported to enforce non existing by-laws. Second, it was unacceptably vague regarding the provisions of the SPLUMA and it incorrectly cited the Building Standards Act on which it purportedly relied. And third, it failed to cite the Minister responsible for the administration of the Building Standards Act, when he or she clearly had a substantial and direct interest in the relief sought. Furthermore, as mentioned earlier, Mr Fono has offered to engage the relevant experts to enable him to prepare the necessary application and draw building plans for submission to the municipality in compliance with the provisions of the SPLUMA. Mr Fono's assertion that the building is structurally sound and does not pose any safety risks can be verified by the municipality. It is therefore only fair that Mr Fono must be afforded an opportunity to remedy the breach.

[39] In terms of s 32 of the SPLUMA, a municipality is empowered to appoint a municipal official or any other person as an inspector to investigate any non-compliance with its land use scheme. Section 32(5) vests extensive powers in the duly appointed municipal official or inspector. And in terms of s 32(11), such functionary may issue a compliance notice, in the prescribed form, to the person in charge of the property. In my view, an order in these terms must be preferable to a demolition order. It will ensure that Mr Fono will only be allowed to proceed with the construction after a duly appointed official has inspected the property, he has submitted the necessary building plans for approval and has complied with any compliance notice issued by that official. Should he fail to comply, the municipality will have the option of applying to a competent court for a demolition order, on the same papers, duly supplemented, if necessary.

[40] Regarding the issue of costs, I am of the view that it will only be fair for the parties to bear their own legal costs, both in the court of first instance and on

appeal. As I have explained above, the legal position regarding the applicable town planning and land use legislation in the area where the building was being constructed was by no means clear. And the municipality has added to that confusion by failing to promulgate the necessary by-laws and by being vague and ambivalent regarding which legislative provisions it relied on.

[41] For these reasons, I make the following order:

1 The appeal is upheld in part.

2 The order of the full court is set aside and substituted with the following order:

‘(a) The appeal is upheld with each party to pay their own costs.

(b) The order of the court of first instance under case number 4056/2018 is set aside and replaced by the following order:

‘‘(i) The conduct of the first respondent in continuing with the construction of buildings and/or commencing with the erection of new structures on Erf 7[...], Port St Johns, without the applicant’s required approval, is declared unlawful.

(ii) The first respondent is interdicted from continuing with the construction of buildings and/or commencing with the erection of new structures on the property, without complying with s 33(1) of the Spatial Planning and Land Use Management Act 16 of 2013.

(iii) The applicant is ordered to provide the first respondent with the requirements for the submission of building plans (and subsequent approval thereof), in writing, within 30 (thirty) days of this order.

(iv) The first respondent is ordered to comply with such requirements within three (3) months of the provision thereof.”

3 Save as aforesaid, the appeal is dismissed.

4 Each party is ordered to pay their own costs of this appeal.

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B P MANTAME
ACTING JUDGE OF APPEAL

Appearances

For the appellants:	A R Duminy
Instructed by:	Khaya Nondabula Attorneys, Mthatha
	Rampai Attorneys, Bloemfontein
For the respondent:	L Haskins
Instructed by:	Mvuzo Notyesi Inc, Mthatha
	N.W. Phalatsi & Partners, Bloemfontein