IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 1444/2024

In the matter between:

RAY NKONYENI MUNICPALITY **APPLICANT**

and

JPA RAS EIENDOMME (PTY) LTD **RESPONDENT**

ORDER

The following order is granted:

The respondent is ordered to pay the costs of the application on a party and party scale on scale B.

REASONS

Delivered on: ______________

Matlamela AJ

[1] The applicant is a local municipality, duly established in terms of the Local Government: Municipal Structures Act 117 of 1998, read with s 155(1) of the Constitution.

[2] The applicant is a competent authority, as defined in s 1 of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), which is empowered to grant or approve the right to use land for any purposes specified in the Ray Nkonyeni Special Development Framework.

[3] In this application, the applicant seeks to assert its constitutional authority to enforce building regulations in its area of jurisdiction, consequent upon the unlawful construction and use of a shop/restaurant upon the immovable property described as Portion 1 of the Farm Lucas, No 2626, Hibberdene (the property).

[4] The parties subsequently concluded a settlement agreement, and the relevant paragraphs are as follows:

'F: Subsequent to the institution of the application, and during August 2025, the Respondent undertook for settlement purposes and to avoid further cost on both sides the partial demolition of the unlawful structures erected on the property, leaving certain remnants thereon, including a concrete slab.

G: In light of the Respondent's demonstrated compliance, the parties have agreed to settle the matter and wish to record the terms of their agreement.

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. SETTLEMENT TERMS

1.1 The Respondent undertakes to complete, at its own cost, demolition and removal of any remaining and without any admission of the unlawfulness or otherwise of the erection thereof, the structures, remnants and concrete slabs erected on the property on or before the 30th November or such further date agreed upon in writing, thereby rectifying the contraventions identified under the NBSA and the Municipal Scheme.

1.2 *The issue of costs shall be placed before the Honourable Court for determination*.'

[5] This judgment will deal with the issue of costs. There is no dispute that the respondent erected a structure, which was a park home container on the property without the applicant's approval.

[6] On 27 September 2021, a notice of contravention was issued to the JWA Trust, the previous owner of the property, to alert it that the structure was erected without the applicant's consent, in contravention of ss 4(1) and (4) of the National Building Regulations and Building Standards Act 103 of 1977 (NBRBSA). The notice was delivered to Mr Daniel Prinsloo.

[7] Section 4 of the NBRBSA outlines the application process of erecting a building, stating that written approval from a local authority is required before construction begins:

(a) In terms of s 4(1) of the NBRBSA, '[n]o person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act'.

(b) Most importantly is that, in terms of s 4(4), 'Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building'.

[8] Municipalities are competent authorities, as defined in s 1 of SPLUMA and as such are empowered to grant or approve the right to use land for any purpose specified in their special development framework. This means

municipalities are responsible for ensuring that their development and town planning schemes are complied with.

[9] In order for a person to erect any structure on their property, they would first need to obtain written approval from their local authority for their building plans.

[10] Reverting back to the facts of the matter, on 30 September 2021, the applicant received an application for a business licence for the operation of a takeaway drive-through on the property. The address of this entity is situated at the Remainder of Erf 7[...], H[...] and not on the property. This application was brought by Mr Daniel Prinsloo, on behalf of Carousel Holiday Resort. The applicant has not issued a business licence for Carousel Holiday Resort on the property.

[11] On 28 October 2021, the applicant issued a notice to the JWA Trust, notifying it that it was in contravention of clause 2.2.1 of the Ray Nkonyeni Municipal Scheme (the Scheme) and bylaw 87(1)*(b)* of the Ray Nkonyeni Municipal Planning and Land Use Management Bylaw, 2019 (the Bylaw):

(a) The contravention notice read as follows:

'JWA TRUST are contravening the said clause by using or permitting the use of Portion 21 of the Farm Lucas No 2626 as a shop and/or Restaurant, which is/are a consent use in terms of the Scheme provided that there are a minimum of 50 dwelling units on the property, as there are no dwelling units on the property, the use of a Shop and/or Restaurant is/are prohibited in terms of the said Scheme.'

(b) The contravention notice read further as follows:

'In consequences of a contravention of the provisions of the aforesaid Scheme you are acting illegally in that you are contravening Sec 87 (1) (b) of the Ray Nkonyeni Municipal Planning and Land Use Management Bylaw 2019 by using or permitting the use of Potion 21 of the Farm Lucas No 2626 as a Shop and/or Restaurant…

The said activities as described above is/are prohibited, the Ray Nkonyeni Municipality in the capacity as the enforcement authority in terms of the Bylaws hereby notifies you, JWA Trust, that you are guilty of an offence in terms of Sec 87 (1) (b) and (2) of the Bylaw.'

[12] It was further indicated in the contravention notice that in consequence of the previous owner's contravention of the provisions of the Scheme, the previous owner was acting illegally in that it contravened bylaw 87(1)*(b)* of the Bylaw by using or permitting the use of the property as a shop and/or restaurant.

[13] The contravention notice further read as follows:

'AND WHEREAS YOU, J W A TRUST, are contravening the Clauses 2.2.1 of the Ray Nkonyeni Municipal Scheme by using or permitting the use of Portion 21 of the Farm Lucas No 2626 as a Shop and/or Restaurant, which is/are a consent use in terms of the Scheme provided that there are a minimum of 50 dwelling units on the property, as there are no dwelling units on the property, the use of a Shop and/or Restaurant is/are prohibited in terms of the said Scheme.'

[14] On 3 November 2021, the previous owner's legal representatives (Dykes Van Heerden Inc), wrote a letter to the applicant. The letter indicated that JWA TRUST is the seller of the property and the property was in the process of being sold:

(a) They indicated further that the purchaser had taken occupation of the property and they had written to the purchaser and notified them to immediately cease operations on the property.

(b) The attorneys further indicated that they would obtain a written undertaking from the purchaser that they would not continue to operate the business in contravention of the bylaw.

[15] The applicant received another letter dated 28 July 2021 from HNK Geometrics (who are land surveyors), appointed by Mr Prinsloo (the owner of

Carousel Holiday Resort) to undertake an application to subdivide the portion of the property that is adjacent to the main road, R61, and to rezone the said portion to ‘Low impact Mixed used 1’. This zone will permit the building of a restaurant, which is to be the primary intended use of this parcel of land.

[16] The respondent is a private company duly incorporated in terms of the company laws, with its registered address situated at 7[...] S[...] Road, Hibberdene and is the owner of the property. The previous owner was the JWA Trust, until it was transferred to the respondent on 3 January 2022.

[17] The respondent was also served with the abovementioned contravention notices on 27 September 2022.

[18] The applicant’s attorneys issued a further contravention notice letter dated 21 February 2023. The respondent acknowledged receipt of the letter on 8 March 2023.

[19] The application was instituted on 1 February 2024 and served on the respondent on 9 March 2024.

[20] The notice of set down on the unopposed motion roll on 20 March 2024 was issued on 22 February 2024. On 15 March 2024, the respondent filed a notice to oppose the application. On 19 March 2024, a notice of removal of the matter from the roll was filed.

[21] The second notice of set down was issued on 26 July 2024, which placed the matter on the court roll on 26 September 2024. Again, a notice of removal from the unopposed roll was issued on 21 August 2024. On the same date, the matter was reinstatement for hearing on 22 October 2024. On this date, the

matter was adjourned to 18 November 2024 and the respondent was directed to pay the costs.

[22] The answering affidavit was issued and served on 14 November 2024.

[23] The respondent disputed the right of the applicant to issue the contravention notice. Instead, the respondent, as its defence, relied on ss 13(1) and 14 of the KwaZulu-Natal Provincial Roads Act 4 of 2001, which read as follows:

'**13 Structures adjacent to and on provincial roads**

(1) A person may not, without the prior written permission of the Minister, which permission may be conditional or unconditional, erect, lay, establish or alter any structure or permit the erection, laying, establishment or alteration of any structure-

(a) on, over or below the surface of a provincial road so as to encroach on a provincial road; or

(b) in a building restriction area within fifteen metres of the boundary of a main road or district road…

14 Fencing on provincial roads

(1) The Minister may, based on objective criteria established in regulations, authorise the erection of fencing adjacent to a provincial road and the fencing must thereafter be maintained by the owner of the property adjacent to the provincial road.

(2) An owner of land adjacent to a provincial road is responsible for all maintenance of any fence adjacent to his or her property and constructed by the Department.

(3) The Minister may, notwithstanding the Fencing Act, 1963 (Act 31 of 1963), in his or her discretion, authorise a contribution for the maintenance of any fence adjacent to a provincial road, but this provision does not remove or diminish the responsibility of the owner of land adjacent to a provincial road for maintaining any fence adjacent to his or her property.

(4) Sections 22 to 27, inclusive, of the Fencing Act, 1963 (Act 31 of 1963), apply *mutatis mutandis* to this section.'

[24] Before the institution of this application, the respondent had not raised this technical defence in the letters that the parties were exchanging. It was only raised for the first time in the answering affidavit.

[25] The issue of raising technical points has been dealt with in many cases. The broad and general principles in dealing with procedural technical points are as follows:[1]

'(a) The court does not generally encourage a formalistic approach in the application of the rules as the rules should not be regarded as an end in themselves.[2]

(b) Technical objection based on procedural defects should not be permitted unless the other party would suffer prejudice as a result.[3]

(c) The superior court may in the exercise of their inherent power adjust the rules depending on the circumstances of a given case.[4]

(d) The rules of court are designed to achieve justice and thus courts will in the exercise of their inherent power, relax the application of the rules where strict application thereof may result in substantial injustice.[5]'

[26] The aforesaid principles must be balanced against the foundational purpose of the rules, as well as the time periods prescribed therein, of which the purpose is to assert the control of the court over its processes and the speedy resolution of disputes.[6]

[27] *River Gate Properties (Pty) Ltd and Another v Asmal NO and Others*[7] dealt with the legal principles applicable when dealing with illegal structures. The following paragraphs are relevant:

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[1] *Msibi v Road Accident Fund* [2025] ZAGPJHC 1084 para 36.
[2] *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A).
[3] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A).
[4] *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others* 1982 (3) SA 353 (W).
[5] *Hart and Another v Nelson* 2000 (4) SA 368 (E).
[6] *De Bruyn v Mile Inv 307 (Pty) Ltd and Others* [2017] ZAGPPHC 286 para 19.
[7] *River Gate Properties (Pty) Ltd and Another v Asmal NO and Others* [2018] ZAGPJHC 89 (*River Gate Properties)*.

‘[49] The issue of illegal structures erected on land is governed by section 4 (1) read with s 4 (4) of the NBSA which provides that:

> "No person shall, without prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act….Any person … in contravention of the provisions …shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building”

[50] The objective of the NBSA as stated in *Lester v Dlambe Municipality* and Another, by Madjiet JA, is:

> “To provide uniformity in the law relating to the erection of buildings in the area of jurisdiction of local authorities and to prescribe buildings standards.”

[51] In terms of 4 (4) of the NBSA, it is a criminal offence to erect a building without the approval of the municipality as required in terms of the provisions of s 4 (1) of the NBSA.

[52] The remedy of demolition of a building that has been constructed in breach of s 4 (1) of the NBSA can either be under the provisions of s 21 of the NBSA or under private (neighbour) law in terms of s 7 (1) (b) (ii) (bb) of the NBSA.

[53] Section 21, provides *locus standi* to approach the magistrate court for the demolition of a building erected without compliance with the requisites of the NBSA by either the municipality or the Minister. In other words individuals affected by non-compliance with the statutory requirements do not have *locus standi* to approach the magistrate court for an order of demolition. An individual may in certain circumstances seek a *mandamus* to compel either the Minister or the municipality to act.

[54] It is clear from the reading of s 21 of the NBSA that the remedy for breach of s 4(1) gives rise to the remedy in public law. In this respect the magistrate on application by the local authority or the Minister has authority to prohibit any person from commencing or proceeding with an erection of a building or demolition of a building that does not comply with the law.

[55] In *Lester,* the High Court asked the question why statutory breach which gives rise to the same claim under the private or public law can afford the court discretion under private law and not under public law. In answering that question on appeal, the SCA said:

> "The answer is simply that the law cannot and does not countenance on-going illegality which is also a criminal offence. To do so, would be to subvert the doctrine of legality and to undermine the rule of law.”

[56] The complaint of the applicants in the present matter was triggered by the disqualifying factors envisaged in s 7 (1)(b)(ii) of the NBSA. The case of the applicants is that the units were erected or being erected in a manner that is objectionable and also that they derogate from the value of the neighbouring properties. The complaint in that regard relates to the erection of buildings done without compliance with the provisions of the NBSA. In dealing with the conduct similar to the present the court in *Standard Bank of SA Ltd v Swartland Municipality and Others*, said:

> "The unauthorised and illegal conduct of the third respondent [in unlawfully erecting a structure without approved plans] is *contra boni mores* and contrary to public policy, and cannot be condoned by the court. It militates against the doctrine of legality, which forms an important part of our legal system, and more especially since the Constitution became the supreme law of the country".

[57] The remedy of an individual whose rights in terms of s 7(1) (b) (ii) of the NBSA have been breached may approach the court on the basis of common law private (neighbour) law.

[58] It is undisputed in the present matter that the buildings in question were erected by the respondents with no approved building plans by the municipality. Although the Trust contended that the plans were submitted to the Municipality on 2 November 2016, there is no proof of such. The municipality insisted that the buildings were erected without approved building plans and thus, as stated somewhere else in this judgment, the structures on the property are unlawful.'

[28] I agree with what was held in *River Gate Properties*. It applies to the case at hand.

[29] Eventually, the parties entered into a settlement agreement, which provides that the respondent undertakes to complete, at its own costs, the demolition and removal of any remaining structures, remnants and concrete slabs erected on the property on or before 30 November 2025, to rectify the contravention identified under the NBRBSA and the Scheme. Such an undertaking was made without any admission of the unlawfulness or otherwise of the erection of the structures.

[30] As I have indicated above, the issue of costs was placed before the court for determination.

[31] The award of costs is a matter wholly within the discretion of the court, which discretion must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at.[8]

[32] It is a fundamental principle that the party who succeeds should be awarded costs, and this route should not be departed from except on good grounds. The court still retains a judicial discretion in awarding costs.

[33] In this application, the respondent has been guilty of contravening municipal laws or national laws. It was served with letters which provided it an opportunity to settle this matter before the application was instituted. It chose to file an answering affidavit wherein it raised technical points, which were never raised prior to litigation, at which stage the applicant would have considered its position.

[34] The fact that it is the applicant who instituted the application instead of the Minister does not mean that the respondent is not guilty of the contravention of the legislation concerned.

[35] The High Court of Southern Rhodesia had adopted the view that when a statutory body is engaged in litigation, the general rule that costs follow the event should apply, but that the court will be justified in departing from the

[8] A C Cilliers, C Loots and H C Nel *Herbstein and Van Winsen Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 955.

general rule when the body concerned has acted impartially and not unreasonably in exercising its statutory duties.[9]

[36] The delay in settling the matter cannot be ignored and the erection of the structure dates to 2021. Between 2021 and 2024, the parties were communicating by exchange of letters. In all these years, the respondent never raised any technical points. The respondent only raised such a point in the answering papers as a defence on 14 November 2024, when the matter was already in court.

[37] Even if I were to accept the respondent's technical points, the respondent remains in contravention of the NBRBSA. The respondent cannot just erect a structure without approval from the Minister or the municipality concerned.

[38] The settlement agreement is in line with the relief contained in the notice of motion. This indicates that the applicant has been successful in this matter and costs shall follow the event.

[39] The fact that the Minster is not a party to this litigation does not change the fact that the respondent contravened the NBRBSA. The applicant acted in good faith to protect the area in question.

[40] There are no reasonable grounds for me to depart from the general principle applicable to the award of costs.

[41] I accordingly make the following order:

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[9] *L & B Holdings (Pvt) Ltd v Mashonaland Rent Appeal Board and Others* 1959 (3) SA 466 (SR) at 470D-G.

The respondent is ordered to pay the costs of the application on a party and party scale on scale B.

MATLAMELA AJ

Appearances:

Counsel for the applicant:	K Mshengu
Instructed by:	Sandile Dlomo Inc
Counsel for the respondent:	C Rodel
Instructed by:	Van Heerden Attorneys
Heard on:	22 October 2025
Delivered on:	27 February 2026.