



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 22 November 2024

Status: Immediate

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

Today the Supreme Court of Appeal (SCA) handed down a judgment in which it set aside an order of the full court of the Eastern Cape Division of the High Court, Mthatha.

On 20 August 2018, Luxolo Fono (Mr Fono) commenced with the construction of a tourist facility on land belonging to the Caguba Community, situated within the jurisdiction of the Port St Johns Municipality (the municipality), without submitting building plans for municipal approval. This led the municipality to issue a cease-and-desist order, with which Mr Fono did not comply. As a result, on 28 August 2024, the municipality made an urgent application to the high court for an order declaring the construction on the land without the required approval by the municipality to be unlawful; interdicting Mr Fono from carrying on with the construction until he has complied with the applicable municipal by-laws and regulations; compelling Mr Fono to demolish the building, failing which the municipality would be authorised to demolish it.

Before the court of first instance, Mr Fono raised the following, *inter alia*, points *in limine*. He contended that the National Building Regulations and Standards Act 103 of 1977 (the Building Standards Act) did not apply in the former Transkei, as it was not included in the Justice Laws Rationalisation Act of Act 18 of 1996 (the Rationalisation Act). He contended that the municipality failed to specify how he violated s 33(1) of the Spatial Planning and Land Use Management Act 16 of 2013 (the SPLUMA) and did not detail the municipal by-laws that he allegedly contravened. Additionally, he contended that his lease agreement with the tribal authority for the land gave him the right to build without municipal interference, as the property falls under traditional jurisdiction. Mr Fono further contended that demolition would cause him significant financial loss, and he should be allowed to have the construction inspected and submit the required building plans for approval. The court of first instance dismissed the application and found that the Building Standards Act was not applicable in the former Transkei territory. It further found that the municipality could not prove that Mr Fono violated any of its by-laws or the SPLUMA.

The full court upheld the municipality's appeal, finding that the court of first instance had made two fundamental errors. First, it disagreed with the conclusion of the court of first instance that the Building Standards Act did not apply in the former Transkei, reasoning that this finding was inconsistent with constitutional principles promoting equal protection under the law. The full court found that excluding the former Transkei from the application of the Building Standards Act would perpetuate unconstitutional discrimination, as seen in past cases addressing inequalities faced by those in the former homelands. Second, the full court found that Mr Fono had indeed violated

the SPLUMA by failing to apply for the necessary building permissions. As a result, the full court set aside the order of the court of first instance and upheld the municipality's application.

The issues for determination before the SCA were whether condonation should be granted for the late prosecution of the appeal; whether the Building Standards Act applies to the property in question; whether the municipality was entitled to rely on s 33(1) of the SPLUMA; and whether full court erred in exercising its discretion to grant a demolition order.

The SCA granted condonation for the late prosecution of the appeal, accepting that Mr Fono had reasonable prospects of success and that the delay was due to transcription issues and the late discovery of missing pages of the record. Regarding the applicability of the Building Standards Act, the SCA found that the full court erred in concluding that the Building Standards Act applied to the former Transkei, as the omission of the statute from the relevant schedule may have been a deliberate legislative decision. The SCA confirmed that the municipality was entitled to rely on section 33(1) of the SPLUMA, as the building project fell within the municipality's Spatial Development Framework Policy, which has been approved in terms of the SPLUMA, and Mr Fono had not obtained the necessary approval. Regarding the demolition order, the SCA found that the full court's approach was too rigid, given the broader discretion provided under the SPLUMA, which permits for other appropriate remedies in terms of s 32. The SCA highlighted that the municipality had mishandled the situation by relying on non-existent by-laws and by being vague and ambivalent regarding which legislative provisions it relied on. The SCA noted that Mr Fono had already halted construction and offered to engage experts to rectify the situation. As a result, the SCA made an order setting aside the order of the full court, substituting it with an order to the effect that Mr Fono should be given an opportunity to remedy the breach, before demolition is considered; and that each party is to pay their own costs of the appeal.

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