



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to magistrates:	NO

Case number: 2200/2022

In the matter between:

CHOP CHOP CONNECTIONS (PTY) LTD

Applicant

And

**MICHAEL DUDLEY WALKER
THE TRUSTEES FOR TIME BEING
OF THE BODY CORPORATE:
HILLVERSUM SECTIONAL SS33/2001**

**First Respondent
Second Respondent**

MANGAUNG METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT BY: LEKHOABA, AJ

HEARD ON: 19 OCTOBER 2023

DELIVERED ON: 01 FEBRUARY 2024

- [1] The Applicant applies for a demolition order regarding its neighbour's garage which encroaches onto its property and for the 1st Respondent ('the respondent') to remove heaps of building material and rubble on the Applicant's area. The Respondent opposes the application. The Second and the Third Respondents did not oppose the application. The Responded had raised an issue of joinder but has since abandoned same.
- [2] The Applicant is the registered owner of two Sections 1 and 2, as shown and more fully described on Sectional Plan no. SS33/2001 in the Sectional Title Scheme known as "Hillversum" in respect of the land and building (s) situated on Portion 4 (of 2) of the Farm Klipdrift 10, Bloemfontein, Free State.
- [3] The Applicant furthermore purchased the rights to an exclusive use area, which is approximately 15 hectares in size in Hillversum. The Applicant submits that she was supposed to receive the full use and enjoyment of the exclusive use area without any interference from the other owners, such as the Respondent.
- [4] The Respondent is the registered owner of Section 7 as shown and more fully described on Sectional Plan no. SS33/2001 in Hillversum in respect of the land building(s) situation at portion 4(of 2) of the farm Klipdrift No. 10, District Bloemfontein, Province Free State.
- [5] It is alleged that the First Respondent had however, after the registration of the scheme constructed a garage and fenced in an area with electric fencing which encroaches his section's boundaries into the exclusive use area, regardless of the rights of the Applicant and regardless of the limited rights the Respondent had in respect of the use of the exclusive use area.
- [6] A copy of the tittle deed of the First Respondent's property, confirms ownership of the property, but furthermore confirms this property may not be used to construct building and, or structures which encroaches its boundaries.

I now turn to the submissions by the parties:

APPLICANT'S CASE

- [7] Rule 74 of the Management Rules of Hillversum provides that exclusive use area is reserved for the exclusive use of the owner of sections 1 and 2, being the applicant. The Applicant alleges that the Respondent also owns a sectional title scheme which directly borders the exclusive area reserved for use by the Applicant.
- [8] The Applicant's Counsel submitted that after moving onto his property on or about 28 September 2021, the Applicant realized that the roof structure of the buildings on the Respondent's property encroached onto the exclusive use area and that the first Respondent fenced off an area in the exclusive use area with an electric fence. The Applicant further alleges that there were further heaps of building material and rubble on the area.
- [9] The Applicants' Counsel submitted that the Respondent refused to remove the encroachments despite demand. The Applicant further submitted that she thus attempted to resolve the dispute amicably and, or through a reasonable request for corporation, but no action had been forthcoming from either of the Respondents. As a result, the Applicant continues to suffer harm, and is prejudiced in the use of the exclusive area since it cannot enjoy the use of same specifically reserved for her use and enjoyment. The Applicant contends that the Respondent has no right to encroach onto the exclusive use area of the applicant with its buildings, roofs, fences and or with building material being stored / retained on its exclusive use area.

RESPONDENT'S CASE

- [10] The First Respondent denies all allegations by the Applicant and submitted that the Applicant called her and requested that they remove the encroachments from its exclusive use area. The Respondent contended that

the Applicant lacks *locus standi* to bring this application. The respondent contend further that should the Court find that there is encroachment on the exclusive use area of the Applicant then in that case, an order for transfer of a section into the name of Respondent should be made against compensation to be paid to the Body Corporate. This according to the Applicant would an appropriate order.

- [11] The Respondent submitted that the Court has to balance its rights with the rights of the Applicant to determine what order to make, being one of the demolition or transfer of the encroached-upon area. The Respondent further submitted that taking into consideration the size of the encroached property, it cannot be in the interests of justice to order demolish of the structure. They further contended that the Court should adjudicate on the notion of equity and fairness in terms of the principles of neighbour law, so as to order payment instead of demolition.

ISSUES

1. To determine if the Applicant has *locus standi*.
2. Whether the First Respondent's roof structure of the garage and fencing encroached onto the exclusive use area.
3. Whether the First Respondent is liable to remove building material being stored/ retained on the exclusive use area.
4. Whether compensation should be paid to the Applicant or the Body Corporate

On *Locus Standi*

- [12] Sectional Title Schemes Act 20 of 2011 ("the Act") provides as follows:

“9. (1) An owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section-

(a) When such owner is of the opinion that he or she and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in Sec 2(7), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or

(b) when the body corporate does not take steps against an owner who does not comply with the rules.

(2) (a) Any such owner must serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period referred to in paragraph (a), the owner may make application to the Court for order appointing *curator ad litem* for the body corporate for purpose of instituting and conducting proceedings on behalf of the body corporate.

(3) The Court on such application, if it is satisfied-

(a) that the body corporate has not instituted such proceedings;

(b) that there are prima facie grounds for the institution of proceedings; and

(c) that an investigation into such grounds and the desirability of the institution of such proceedings is satisfied appoint a provisional curator ad litem and direct him or her to conduct an investigation into the matter and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of curator ad litem for the body corporate, and issue such directions as it may consider necessary to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem*”.

[13] What is noticeable from the language of these provisions is primarily that it empowers individuals’ owners of units in a sectional title scheme to institute proceedings not in their own interest but for and on behalf of the body corporate. That much is clear from the text read with the heading which states; “*Proceedings on behalf of Bodies Corporate*”. Seen in this context the conditions imposed on an owner who seeks to institute proceedings on behalf of the body corporate are understandable. The institution of the proceedings

has a risk of a costs order which may be issued against the body corporate, in the event of losing a case.

- [14] It is clear that before an owner may be permitted to act on behalf of the body corporate, he/she must show that the body corporate has failed to institute proceedings in a case where it suffered damages or a loss has been deprived of a benefit. Even then, the authority to initiate proceedings is not available to all owners but is restricted to only those who can show that they suffered a damage or a loss or has been deprived of a benefit.
- [15] But before such owner may institute the proceedings, he/she must give written notice to the body corporate, calling upon it to institute proceedings within a month. If the body corporate does initiate proceedings, the owner's entitlement to do so falls away. He/she cannot pursue the appointment of a *curator ad litem*. On the contrary if the body corporate fails to commence proceedings within a month, the owner concerned may seek the appointment of a *curator ad litem*.

The Court on such application, if it is satisfied-

- (a) that the body corporate has not instituted such proceedings;
 - (b) that there are prima facie grounds for the institution of proceedings; and
 - (c) that an investigation into such grounds and the desirability of the institution of such proceedings if satisfied will appoint provisional *curator ad litem* and direct him or her to conduct an investigation into the matter and to report to the Court on the return day of the provisional order.
- [16] In applying the above legal prescript to the present case, this court is not in the possession of a written notice that was given to the body corporate. Section 9 (2) (b) provides that if the body corporate fails to institute the proceedings within the period referred to in paragraph (a), the owner may make application to the Court for order appointing curator ad litem for the purpose of instituting and conducting proceedings on behalf of the body corporate. In my view, the Applicant failed to comply with the provisions of Section 9 of the Act. *The is no evidence that the Applicant approached the*

body corporate to institute the proceedings as prescribed. Non-compliance with section 9 is fatal to the Applicant's case as the said provision is peremptory.

[17] I agree with the Respondent that the Applicant lacks *locus standi* and there is no need for me to traverse the other issues as my finding is dispositive of this application.

[18] In the result, the following order is granted:

ORDER

1. The application is dismissed with costs.

LEKHOABA, AJ

APPEARANCES:

On behalf of the Applicant:

Adv. LBJ Moeng.
BLAIR ATTORNEYS
BLOEMFONTEIN

On behalf of the Respondent:

MADELEINE KOLLER
DU PLOOY ATTORNEYS
BLOEMFONTEIN