



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 2023/066319

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

E LABUSCHAGNE

DATE: 21 JULY 2023

In the application between:

XSTREAM HOLDINGS (PTY) LTD

Frist Applicant

MANNINGSTRAAT EEN EEN TWEE (PTY) LTD

Second Applicant

ANTONIE JOHANNES BOTES

Third Applicant

LINDA BOTHA

Fourth Applicant

and

CHICKY INVESTMENTS (PTY) LTD

First Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Second Respondent

JUDGMENT

- [1] The applicants approach the court on the basis of urgency, seeking an order stopping construction on a communal right of way over the first and second applicants' immovable property.
- [2] The applicants and the first respondent are neighbours, owning properties contiguous to a right of way servitude. The first applicant is the owner of Portion 3 of Erf 140 Queenswood Ext. 1. The second applicant is the owner of the Remaining Extent of Erf 1040 Queenswood Ext. 1. The Boteses are the joint owners of Portion 1 of Erf 1041 Queenswood Ext. 1 and the first respondent is the owner of Portion 2 of Erf 1041 Queenswood Ext. 1.
- [3] By virtue of the provisions of the respective Title Deeds, the first respondent is entitled to a right of way over Portion 3. The applicants contend that there is clear dispute as to what rights, titles, and powers the first respondent has in respect of the right of way and that that dispute should be determined in action proceedings. However, in the interim the applicants seek an order inter alia restraining the first respondent from continuing with its *“unlawful conduct and construction activities on the servitude area, to mitigate the damages that the applicants may suffer, and are currently suffering, as a result of the conduct of the first respondent, and finally to seek restoration of the property damage caused to the applicants boreholes and borehole pumps, restoration and repositioning and installation where respondents caused removal and/or displacement of electric cables, waterpipes and fibre cables, removal of the*

main sewerage pipe serving Portion 3 and Portion R and to restore the applicants' rights to, and use of these amenities."

- [4] The first respondent's property is subject to a 1,89-metre-wide servitude in favour of the local authority for sewerage and other municipal purposes. Portion 2 is subject to the condition that boundary walls or approved fences have to be erected simultaneously with, or prior to the erection of dwelling houses on Portion 2, with the approval only of the local authority. Portion 2 is further entitled to a right of way with the width of 7,56 metres over Portion R (Manningstraat property), which right of way shall run next to and parallel with the Western border of Portion 2. Portion 1 (the Botes property) is entitled to a right of way with the width of 7,56 square metres over Portion R (Manningstraat property), which right of way shall run next to and parallel with the Eastern border of Portion 2. Portion R is subject to a right of way 7,56 metres wide in favour of Portion 1. Portion R is subject to a right of way 7,56 metres wide in favour of Portion 2. Portion 3 is subject to a right of way 3,78 metres wide in favour of Portion 1 and Portion 2.
- [5] The first respondent took transfer of Portion 2 on 2 March 2018. Construction took place for approximately six months thereafter and halted until October 2022.
- [6] The parties have been involved in disputes since 2019 and contend that the first respondent has not complied with promises given.

[7] As a result of grievances that arose, the applicants' appointed Cawood Attorneys who addressed a letter to the first respondent on 20 February 2023.

In terms of the letter the first respondent was afforded 7 (seven) days to:

- 7.1 Refrain from using the right of way of Portion 3;
- 7.2 Provide approved building plans for the retaining wall on the Southern portion of Portion 2 and to immediately commence with the completion of the retaining walls only as per the approved building specifications and engineer specifications. Also the cavity behind the wall should be filled up and compacted;
- 7.3 Do all things necessary to restore extreme and Manningstraat's boreholes to a proper working condition;
- 7.4 Replace all electrical cables and installations of XStream Holdings (Pty) Ltd ("Xstream") in a properly excavated trench as per the building regulations and properly mark the installation for further purposes;
- 7.5 Repair the driveway situated on the right of way of Portion 1 to a state of good repair.

[8] There was no adequate response. The applicants then appointed new attorneys of record and on 23 June 2023 they conducted a site inspection with the right of way. Various irregularities were detected, giving rise to a letter of

demand of 28 June 2023. An undertaking was sought from the first respondent to refrain from further building activities within the servitude area and to specifically refrain from removing, dismantling, replacing or repositioning the sewer pipe of Xstream and Manningstraat, failing which the applicants would apply to the High Court for urgent relief.

[9] As a basis for urgency, the applicants contend that the first respondent is continuing on its road of destruction, taking the law into its own hands with no regard for the rights and entitlements of the applicants. It is alleged that the first respondent recently constructed a wall over the servitude area and damaged waterpipes and sewerage pipelines. When it became apparent that an undertaking would not be given, the current application was formulated.

[10] The first respondent denies that the application is urgent. In support of this contention, the following is advanced:

10.1 The first respondent is in the process of an extensive renovation of the dwelling house and commenced construction activities in 2018 on Portion 2. During such construction the applicants' municipal services and boreholes were damaged by building contractors. The damage to the boreholes and municipal services was repaired in 2018. There was no construction between April 2019 and October 2022. Construction has been ongoing since 10 October 2022;

10.2 The respondent contends that the applicants has waited five years after commencement of construction and damage to services and boreholes;

10.3 They have waited nine months after construction activities recommenced and damage was again caused to the relevant services and boreholes;

10.4 They waited some five months after the letter of 20 February 2023 in which the applicants threatened with an interdict and sought undertakings from the first respondent within a period of seven days;

There has therefor been a significant delay in bringing this application.

[11] By contrast, the first respondent was afforded only two days in which to answer the answering affidavit.

[12] The first respondent contends that all municipal services are fully functional and that the damage to the first and second applicants' boreholes have been repaired. Further, the municipal services and boreholes have been restored and replaced, deeper underground, within the right of way. The respondents contend that the applicants took no steps against the first respondent in 2018, November/December 2022 or February 2023. There are no new incidents or threats mentioned after February 2023 that would justify the urgent

application. By contrast the applicants contend that they only became aware of illegal structures being built during the site inspection in June 2023.

- [13] The first respondent contends that the construction is aimed at repositioning municipal services at a suitable depth to avoid damage by vehicles using the road of way during the construction process of his dwelling.
- [14] .This doesn't appear to be a communication which the first respondent had conveyed to its neighbours prior to unilaterally commencing with the construction on the right of way. The first respondent contends that the applicants cannot physically access the right of way by vehicle from Edgehill Lane. Further it contends that pedestrians are still using the right of way unhindered.
- [15] The first respondent contends that the application is moot since none of the activities referred to in par 2 of the notice of motion are being conducted by the first respondent. The only activities within the right of way servitude, that have practically been completed, are those activities referred to in para 4 and 5 of the notice of motion. Consequently, the relief sought has become academic.
- [16] This is a matter in which the parties as contiguous neighbours have rights and obligations in respect of the right of way, which requires a degree of cooperation between them, which has been strikingly absent. The

requirement of utilisation of a right of way *civiliter modo* implies that the right of way is utilised, taking into account the rights of others to the right of way.

- [17] The first respondent appears to be motivated by good intentions in replacing municipal services at an appropriate depth so that they are not adversely affected by vehicles during construction. The right of way is paved, and the end result of the construction would be that it would again be paved, but with municipal services at an adequate depth.
- [18] Had this intention been disclosed to other rightsholders when construction commenced in 2018, a communication channel might have opened, which would avoid precipitate conduct in rushing off to court, rather than having meetings amongst neighbours. Unilateral action on a commonly used right of way is to be discouraged.
- [19] In my assessment of the issue of urgency, I am not satisfied that the matter is sufficiently urgent for purposes of Rule 6(12). Much of the complaints arose prior to the appointment of Cawood Attorneys in February 2023. Nothing significant has happened thereafter, other than the appointment of new attorneys and the inspection *in loco* in June 2023.
- [20] I am therefore going to strike the matter for lack of urgency. However, the first respondent is at fault for not having communicated his intention appropriately and courteously at a time prior to commencement of construction. Such

unilateral conduct can also not be commended. In the light thereof, I make the following order:

1. The matter is struck from the roll for lack of urgency.
2. No order as to costs.



E. LABUSCHAGNE
ACTING JUDGE OF THE HIGH
COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

Applicant's Counsel: Adv. JHF Le Reoux

Instructed by: E.Y Stuart Incorporated

First Respondent's Counsel: Adv. JA Venter

Instructed by: Weavind & Weavind Inc.