



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7934/2020

In the matter between:

AAVISHKAR CHUNDHUR

APPLICANT

and

SANDEER RAMPERSAD

RESPONDENT

ORDER

- 1 The application is adjourned *sine die*, with costs reserved.
- 2 The applicant and respondent are directed to file reports by suitably qualified experts to determine suitable alternate remedies to the main relief sought by the applicant including, but not limited to, a compensatory order.
- 3 Such reports are to be filed within 60 (sixty) days of the grant of this order.
- 4 A copy of this order together with the relevant reports are to be served on the trustees of the Body Corporate Lea Gardens and the Ethekewini Municipality to allow for any written representations or written submissions to be made.
- 5 The applicant and respondent are directed to file supplementary affidavits incorporating the reports referred to in paragraph 2 above and the representations or submissions referred to in paragraph 4 above. Such supplementary affidavits are to be filed within 90 (ninety) days of the grant of this order.

6 In the event of the applicant, respondent, the trustees of the Body Corporate of Lea Gardens and the Ethekwini Municipality not complying with the orders above, the matter will be determined on the papers as filed.

JUDGMENT

HENRIQUES J

Introduction

[1] The application which serves before me relates to an encroachment and the enforcement of the owner's right to seek an order from the courts for the removal of such encroachment.

[2] The principle of the common law remedy lies in the owner's right to the use and enjoyment of his property free from any interference.¹

The facts giving rise to this application

[3] It is common cause that the applicant and respondent are neighbours in a sectional title complex described as Lea Gardens situate at 116 Naicker Road, Shallcross, Durban. The applicant is the owner of unit 5 and the respondent is the owner of the adjacent unit 6. The applicant, who took occupation of the property during February 2019 and thereafter purchased it, was informed by the erstwhile seller that the current fence line between the two properties did not reflect the official boundary between the two properties.

[4] The report filed by the land surveyor, Rajan Govender, accurately depicts the beacons in respect of the applicant's and respondent's properties and the encroachment of the respondent's driveway and the portion of the carport onto the applicant's property. From the date of acquisition of the property by the applicant, the issue of the encroachment was not officially addressed nor resolved by the parties or

¹ *Phillips v South African National Parks Board* [2010] ZAECGHC 27 para 21 (*Phillips*).

any statutory body.

[5] It is further common cause that other units within the sectional title scheme are also affected by encroachments relating to the location of the individual units respective driveways.

The parties contentions

[6] The applicant primarily places reliance on the common law principle as elucidated in the introduction and seeks removal of the encroachment. The respondent has raised several points *in limine* including *lis pendens* and non-joinder and opposes the relief sought. For the reasons set out hereunder, these preliminary points *in limine* will not be adjudicated upon and will be dealt with in the judgment to follow once there has been compliance with the orders.

Analysis

[7] At the outset it is patently clear that the catalyst precipitating this application related to a dispute between the respondent and the applicant over a bougainvillea tree which dispute arose on or about July 2020. Such dispute galvanised the applicant into obtaining the report from the land surveyor in August 2020, the contents of which report was rendered somewhat superfluous as the applicant already had previous knowledge of the encroachment.

[8] The timing of the procurement of such report is not a coincidence in my view as clearly illustrated by the text messages annexed to the respondent's papers. Against the background of the applicant having constructive knowledge of the encroachment in regard to his property as at the date of acquisition, the applicant's denial of the catalyst to the dispute as alleged by the respondent is improbable.

[9] Common law principles relating to encroachments have developed to the extent that courts are vested with a wide discretion in dealing with encroachments as opposed to adopting the strict common law principle of ordering the removal or

demolition of such encroachment.² 'The right of an owner to demand removal would, in theory, seem to be absolute for he is vindicating the freedom of his property from unlawful interference.'³ The common law position relating to encroaching structures accordingly applied a strict principle in favour of the owner of a property demanding the removal of any such encroachments, which was traditionally described as a default remedy.

[10] The legal position has been developed to the extent that the law apropos encroaching structures has progressed away from the default remedy referred to above.

[11] In *Phillips*⁴, *Rand Waterraad v Bothma en 'n Ander*⁵ and *Trustees, Brian Lackey Trust v Annandale*⁶ the courts entrenched the principle that in deciding whether or not to enforce the removal of an encroachment, the court was vested with a wide discretion.

[12] In exercising such discretion, a court is enjoined to apply a policy-driven approach as to whether the removal is warranted and necessary. Alternatively, whether other forms of relief should be considered, for instance, compensation or transfer of the encroached upon land.

[13] The consideration of transfer of the encroached upon land was discussed in the *Phillips* case and has led to an academic debate as to whether a court is empowered to order the transfer of encroached upon land, and the consequent loss of property and deprivation of property. Whether such order is consistent with the Constitutional imperatives referred to in s 25 of the Constitution has notably raised constitutional debate.

² *Serengeti Rise Industries (Pty) Ltd and Another v Aboobaker NO and Others* [2017] ZASCA 79, 2017 (6) SA 581 (SCA).

³ J R L Milton 'The law of neighbours in South Africa' (1969) *Acta Juridica* 123 at 241.

⁴ *Phillips v South African National Parks Board* [2010] ZAECHGC 27.

⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

⁶ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 27-28.

[14] The judgement in the *Phillips* case did not extend to the transfer of the encroached upon land hence the obiter dictum remains a moot point that does not require exhaustive analysis by this court.⁷

[15] In the present application, neither the applicant nor the respondent has seen fit to make submissions regarding policy considerations or alternative remedies to resolve the encroachment dispute. Given the wide and unfettered discretion this court has in such disputes I deem it prudent they and any interested parties do so.

[16] For the above reason and to assist the court in the exercise of its discretion, I deem it just, equitable and in the interests of justice that both the applicant and the respondent together with the interested parties be given an opportunity to make such submissions prior to a final determination of the appropriate order being granted.

[17] Regard being had to the circumstances of the present application, it would, in my view, be grossly unfair to both the parties, if they were denied the opportunity of filing further representations and submissions which would clearly not be in the interests of justice.

Costs

[18] In light of the orders set out in the preamble hereto, I deem it appropriate that the question of costs be reserved for later determination. In the result, I accordingly grant the following orders:

18.1. The application is adjourned *sine die*, with costs reserved.

18.2. The applicant and respondent are directed to file reports by suitably qualified experts to determine suitable alternate remedies to the main relief sought by the applicant including, but not limited to, a compensatory order.

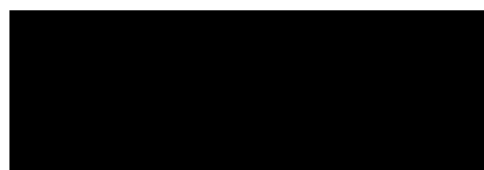
18.3. Such reports are to be filed within 60 (sixty) days of the grant of this order.

18.4. A copy of this order together with the relevant reports are to be served on the trustees of the Body Corporate Lea Gardens and the Ethekwini Municipality to allow for any written representations or written submissions to be made.

⁷ Zsa-Zsa Temmers Boggenpoel 'The discretion of courts in encroachment disputes [Discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)] (2012) 2 *Stellenbosch LR* 253.

18.5. The applicant and respondent are directed to file supplementary affidavits incorporating the reports referred to in paragraph 2 above and the representations or submissions referred to in paragraph 4 above. Such supplementary affidavits are to be filed within 90 (ninety) days of the grant of this order.

18.6. In the event of the applicant, respondent, the trustees of the Body Corporate of Lea Gardens and the Ethekewini Municipality not complying with the orders above, the matter will be determined on the papers as filed.



HENRIQUES J

Case information

Date of Set Down : 14 February 2022

Date of Judgment : 24 June 2022

Appearances

Counsel for the Applicant : Elad Mizrachi

Instructed by

Applicant's Attorneys : K. Suliman Attorneys
21 Sinai Street
Shallcross
Durban
Tel: 082 578 6865
Email: kassim@ksulimanattorneys.co.za
c/o Pather & Pather Attorneys Inc.
3 Nollsworth Crescent
Nollsworth Office Park
La Lucia Ridge
Durban
Tel: 031 304 4212

Counsel for Respondent : Adv. K. Hennessy

Instructed by

Respondent's Attorneys : Uresh Dorasamy & Associates
33 O' Flaherty Road
Clare Estate

Durban

Ref: R152

Tel: 031 269 1419

Email: reception@udattorneys.co.za

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 24 June 2022.