

NOT REPORTABLE

**IN THE EASTERN CAPE HIGH COURT,
(EASTERN CAPE, MTHATHA)**

CASE NO: 1581/11

In the matter between

**SHELL SOUTH AFRICA
MARKETING (PTY) LTD
BALRAZ AUTO CC**

First Applicant

Second Applicant

and

THAMSANQA STEVE HAKU

Respondent

JUDGMENT

HARTLE J

1. The first applicant owns immovable property described as Portion 5 of the Farm Glendon in the municipal district of Mthatha, which it acquired in June 1996 under title deed TF 14/1996. It leases the land to the second applicant from whence the latter operates a retail business t/a “*Shell Ultra City Mthatha*”. As the name suggests, it is a petrol filling station which incorporates a 24 hour convenience store and a fast food restaurant conducted under the “*Shell Select*” and “*Steers*” trademarks and branding respectively.¹
2. The applicants complain that the respondent has erected certain buildings and structures (the encroachment) on the first applicant’s property in the nature of a fenced car wash and tavern.² Initially the respondent conducted his business from a building situate on his own property and within the physical boundaries thereof, but during 2007 he extended it over the boundary line, constructing a lapa with seats

¹ The second applicant’s interest in the suit concerns its right to use the property unfettered by the encroachment referred to in the judgment in order to conduct its business and meet its contractual obligations to the first applicant arising from the retail agreement.

² It was suggested in the founding papers that the respondent’s business operated on the area of encroachment was “*informal*”, but he put up proof of his authority for the sale and consumption of liquor on and off the premises. Seemingly the Applicants are particularly aggrieved by the nature of the respondent’s business being carried on on the adjoining property and how this impacts upon theirs, but the “*clear right*” said to be infringed upon is confined to the encroachment arising from the first applicant’s ownership of the encroached upon property. The irksome aspects alluded to are therefore merely incidental to the matter, although they are mentioned as being relevant to the exercise of the court’s discretion concerning whether the encroachment ought to be removed or not.

around the side and later erecting a fence around the building and structures as well.

3. They seek an interdict for the demolition/removal of the encroachment and an order restoring possession to them of the portion encroached upon respectively, together with certain ancillary relief.
4. The area of the alleged encroachment relied upon by the applicants in their founding papers is depicted on a layout plan drawn by Haines Palmer Reabouw and Associates, Professional Land Surveyors employed by them, marked Annexure “AL 4” (Plan A).³ It represents a quadrilateral shape extending over the boundary of the first applicant’s property in the south- western corner of portion 5.
5. The first applicant claims that the second applicant protested continuously regarding the encroachment after the extensions were erected. A formal letter of demand - constituting according to the first applicant a “*further letter of demand*”,⁴ was addressed to the respondent on 29 April 2010. This letter (which is attached to the founding affidavit) exhorts the respondent to remove the

³ Plan A is dated “September 2009”.

⁴ The assumed initial demand was not attached

encroachments (comprising an “*illegal*” car wash and tavern) to avoid the first applicant approaching this court for an interdict. The respondent denies receiving any demand and claims in his answering affidavit that despite the last structure being built in 2006, and the current fence having been in place since 2005 already, the owners of Ultra City have never before complained to him about any encroachment. On the contrary, he alleges that the sole member of the second applicant requested him in 2006 to sell his site to him (but he declined) which according to him denotes the applicants’ acceptance of his ownership thereof. As far as he is concerned, apart from a minor irritation about a drain onto his site, they have been “*living peacefully*” as neighbours.

6. Far from believing that he has erected the structures and buildings comprising his business partly on the first applicant’s property, he pleads that they are rather “*within (his) land which was lawfully allocated to (him)*” by an authorized headman responsible for the Kwa Payne administration area during 2002. He is confident that an encroachment could not arise because the two properties are distinct from each other; the applicants’ property being at “*Glendon Farm*”

whilst his is at “*Payne Jersey Farm*”. Further, according to him, the two properties are separated by a tar road popularly known as “*KwaLindile*” (previously a gravel road) which was constructed by the applicants themselves, and road rails,⁵ which have always served as the boundary between Ultra City (at Glendon Farm) and Payne Jersey Farm where his business is situate.

7. In amplification of his competing claim to the alleged area of encroachment, the respondent clarifies that in approving the allocation of a business site to him, the headman of Payne Jersey Farm location (in consultation with the Chief of all areas under the Mpeko Traditional Council which includes Payne Jersey as well as Glendon Farm respectively) physically took him to the relevant land and pointed out the extent and measurement thereof. Representatives of the Department of Agriculture were also present at the time.⁶ He then instructed S Vena & Associates (ostensibly also land surveyors) to draw a “*map*” showing the extent of the land allocated to him together with its measurements attached to his answering affidavit marked Annexure “B” (The applicants refer to this in their papers as Plan B).

⁵ The location of the “*road rails*” is unclear.

⁶ The relevance of the Department’s presence or involvement at the time was not made clear.

8. This diagram purports also to be a professional layout plan depicting an obelisk shape of land on a diagram the tapered end of which (at north-east) does, on the face of it, bear resemblance to the same alleged “*area of encroachment*” shown on the applicants’ Plan A. On it a road is depicted as separating the respondent’s property from “*Ultra City*”. (I need mention that no affidavit was deposed to by a representative of Vena & Associates to confirm that the plan ostensibly drawn by them depicts an official representation of the land allocated to the respondent, or that it was prepared and presented contemporaneously with the transfer of the title in and to the respondent. In fact, it is undated and unacknowledged. Other than the “*Ultra City*” marker at the north-eastern end, it is also devoid of any description as to specific location.)
9. A further “*map*” (Annexure “C”) purports to demonstrate that his property resorts under Payne Jersey Farm and that it is demarcated from the respondent’s by a road.⁷ Also attached is a copy of a “*general plan*” of the whole area said to have been obtained from the Department of Agriculture and “*approved*” by the Surveyor-General

⁷ This is a hand drawn plan ostensibly not a formal public document.

(Annexure “D”). I point out however that this plan, which is dated 3 November 1960, appears to have been commissioned by the then Bantu Administration and Development concerning reclamation proposals for trust farms in Mthatha at the time. Although it is ostensibly unhelpful to prove ownership or the location of the true boundary between the parties’ respective properties, evidently the respondent has annexed it to show the areas of responsibility of each headman, part of the Glendon Farm on one side of the road resorting under “*Kwa-Payne*” and the other portion continuing over the road under the “*Glendon Camp*”.

10. In addition, the respondent has produced a certificate of registration dated 12 January 2011 issued to him by the Eastern Cape Liquor Board – being the ostensible authority to sell liquor under the auspices of “*Nongoloza’s Tavern*” upon premises “*situated at PAYNE JEZY FARM, EAST LONDON ROAD, MTHATHA*” (Annexure “F1”);⁸ as well as a Permit to Occupy a “*shopping complex allotment*” situated in “*PAYNE ADMIN area district of Umtata*” dated 24 June 2002 issued under section 5 of Proclamation 174 of 1921 (Annexure “F2”).

⁸ An earlier temporary licence dated 10 December 2004 relates to “*ERF 22/08/2, PAIN JERSEY FARM, UMTATA*” (Annexure E).

11. Mr Z N Abenta, the headman during 2002 of Payne Locality – which is said to include Payne Jersey Farm, has deposed to an affidavit in confirmation of the respondent’s claim. According to him the contentious section of property laid claim to by the first applicant coincides with property allocated by him to the respondent at the time. He avers that he conducted a personal site investigation and can say with confidence that the alleged area of encroachment (including the surrounding fence) is within the boundary of the allocated site.
12. The reigning headman of Payne Locality and the Chief respectively have similarly deposed to confirmatory affidavits to the effect that the alleged area of encroachment resorts within the boundary of the property allocated to the respondent.
13. Mr A *Reabouw* of Haines Palmer Reabouw, who claims to have been personally responsible for the “survey” pursuant to which the layout plan over the first applicant’s property was produced (Plan A referred to above), deposed to an affidavit on behalf of the applicants in which he confirms the accuracy thereof, and in particular the measurements, markings and demarcations set out therein. He further criticizes the

documentation produced by the respondent in support of his claim to be the owner of the contentious area as having no probative value.

14. One of his concerns, which I consider to be of no moment, is that none of the documents produced by the respondent reflect his property at “*Payne Jersey Farm*” to exist or to be adjacent to the first applicant’s. Although the respondent has not produced any documentation which records how his property is described in the deeds office, I accept that the reference to “*Payne Jersey Farm*” is simply the name by which the area is colloquially known and managed by the relevant headmen. This is evident from the letter of the headman (Annexure “A”) who writes concerning “*yakwaPayne*”. Annexure “D” is also endorsed with an area “*Kwa-Payne*” next to “*Glendon Camp*”. This first area ostensibly includes sub-areas (or farms) titled “*Jersey*”, “*Safe Pens*” and “*Glendon*” *inter alia*. The Permit to occupy and liquor licences equally pertain to property resorting under the “*Payne*” area of responsibility.
15. But it is in any event common cause that the property identified by the respondent as his on Annexure “B” to his answering affidavit (Plan B)

is depicted as being adjacent to the first applicant's. There is only one contentious car wash and tavern and that is the respondent's.

16. That leaves the issue as to who is the true owner of the section of land on which the building and structures referred to in the founding affidavit have been built and, therefore, whether it constitutes an encroachment on the first applicant's property at all. Since the applicants have sought to vindicate their rights by motion court proceedings, the dispute of fact which has arisen falls to be determined on the basis of the *Plascon-Evans* Rule.⁹ The applicants contend in this regard that the dispute is not a genuine one in the sense that the respondent's claim to ownership is clearly untenable for two reasons. The first is that the site which the respondent says was allocated to him i.e. Payne Jersey Farm is not adjacent to the first applicant's property. The second is that the first applicant is indisputably the registered owner of Portion 5, the extent and demarcation of which clearly appears from the official diagram referred to in the title deed, hence there can be no quarrel in this regard.

⁹ *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) SA 623 (A) at 634 E – 635 C.

17. Regarding the first aspect, I have already dealt above with what I believe to be applicants' misunderstanding of the respondent's appellation of his property as "*Payne Jersey Farm*". Self evidently (and by virtue of the applicants' recognition of Plan B as depicting property adjoining portion 5), the respondent lays claim to property which is indeed contiguous to it; otherwise the overlap (and the allegation of the encroachment) would be irrelevant. (Inasmuch as it has been suggested that the respondent has not proved ownership of the adjacent property, I mention that I have for present purposes approached the determination of the issues in this matter on the basis of his interest at least in the area depicted on Plan B.)
18. Concerning the second aspect, the submission is that the first applicant's claim to the alleged area of encroachment is supported by and accords with the official Surveyor General's diagram pertaining to portion 5 Glendon Farm, read together with the title deed, which is dispositive of the matter. The fact of the registration and the demarcation as indicated in the official records trumps the respondent's reliance on the mere pointing out of a piece of property

by the headman and Chief and the drawing up of a plan pursuant to such pointing out which does not, so the argument goes, confer a valid transfer of title in and to immovable property.

19. An owner who wishes to claim relief consequent to an encroachment onto property must allege and prove:

(a) ownership of the property encroached upon; and

(b) that the encroaching owner has erected a structure or building partly on the claimant's property and partly on the adjoining property.¹⁰

20. Both requirements are in issue *in casu*, but relative only to the question of the true location of the common boundary between the respective properties. Ownership by the first applicant of portion 5 *per se* is not in dispute, although where its property begins and ends on the southern boundary is.

21. Accurate surveys are a prerequisite for the establishment and recording of the position of boundaries between different plots of land. An effective system of land title registration is impossible

¹⁰ *Smith v Basson* 1979 (1) SA 559 (W)

unless land is divided into units which are property surveyed and represented on a diagram or general plan. A duly approved diagram establishes, for cadastral purposes, the description of a specific land unit; the extent and boundaries of such a unit; the description of the beacons marking the unit and co-ordinates fixing the position of the beacons; and the description, position on or in relation to the unit of any servitude feature already registered, or to be registered, which affects the unit.¹¹

22. Registration of land and the rights in land are regulated by the Deeds Registries Act.¹² This Act provides for the recording in the deeds office of a particular area of a diagram of every piece of land in that area. The diagram is framed after a specific piece of land, which may be a farm, erf, lot, plot or stand, has been surveyed. Thus the deeds office provides a complete picture in miniature of all the surveyed and transferred land in South Africa.¹³

23. A further provision of the Deed Registries Act requires the registrar of deeds to register any real right in or to land on the diagram of the

¹¹ See Lawsa, *Surveying of Land*; Volume 14 (1) at par 176.

¹² Act No. 47 of 1937.

¹³ Lawsa *supra* at par 177.

parcel of land recorded as explained above. Ownership and other real rights in land can be transferred from one person to the other, at least where the transfer is effected by delivery or *traditio*, only by means of registration in the deeds office of a deed of transfer, a deed of grant or a notarial deed. This transfer cannot take place except in accordance with an approved diagram of the relevant piece of land. Every registrable land unit must accordingly have its own separate diagram, except if the Surveyor-General has approved a general plan for a specific area. A diagram approved by the Surveyor-General must be attached to every deed of grant, except a deed of grant in respect of land which has been alienated and reacquired by the state or which has already been held by the state under a certificate of registered state title.

24. The deed to which the diagram is attached is known as the diagram deed and a reference to it is contained in every subsequent deed of transfer or certificate of title, to ensure that there can be no doubt about the identity of the land in question. The diagram is decisive proof of boundaries, as the description of boundaries mentioned in a

diagram need not be repeated in any title deed, if a suitable reference to the diagram is made in the relevant title deed.¹⁴

25. In this regard the first applicant's property is described in the title deed as follows:

"CERTAIN piece of land being PORTION 5 OF THE FARM GLENDON, situate in the District of UMTATA;

MEASURING Four comma four eight two five (4, 4825) Hectares;

EXTENDING as Deed of Grant No. G 575/1988, **with Diagram No. 99/1985 annexed**, made in favour of KAISER DALIWONGA MATANZIMA on the 13th December 1988 and subsequent Deeds of Transfer, the last of which No. TF 26/1989 made in favour of SHELL SOUTHERN MARKETING (PROPRIETARY) LIMITED on the 29th November 1989, **will more fully point out**;

SUBJECT to the special conditions created in Deed of Grant No. G 575/1988 dated 13th December 1988, ...:" (Emphasis added)

26. A photocopy of Diagram No. 99/1985 (Plan C) was produced by the first applicant by way of its replying affidavit.¹⁵ It appears on the face of it to resemble Plan A (the layout plan prepared by Haines Palmer & Reabouw) except in certain respects which I will shortly return to. Evident from it the fixed points A B C D E F G H represent a total surface area of 4, 4825 hectares (ostensibly incorporating

¹⁴ Laws *supra* at par 177 and the footnotes cited therein.

¹⁵ An official extract from the deeds office was not provided by the applicants. Despite the fact that the respondent has not challenged the authenticity of Plan C, this is not the best evidence of the diagram. The diagram ought to be supplemented too with reference to the Surveyor-General's survey records in the case of a dispute such as the present one.

portions 6, 7, 11 and 14).¹⁶ On the west side (A H) the first applicant's property is flanked by the Remainder of the Farm Glendon. On the north side (A B C D) the boundary is represented as a road. On the east side the points D E F are flanked by remainder erf 912 and, F G, by the National Road to Mthatha. On the critical south side (A H) this boundary is also indicated as a road and below it is the Remainder of the farm Glendon. The description to the corresponding diagram notes the presence of beacons at the fixed points of "*20mm iron peg with stones*".

27. Perhaps of significance (as the first applicant may be confusing an access road across its property with the road featured as a boundary on the southernmost side of Portion 5 which the respondent contends demarcates its property from his), a geometrical figure depicting a "*Right of Way*" has also been defined on the diagram, ostensibly by the Surveyor General.¹⁷ I need mention further that the first applicant has also made available a photocopy of the General Plan for the area

¹⁶ These subdivisions appear to have been endorsed after the original survey of portion 5. The extent and size of what remains of the original plot does not appear on the copy of the diagram furnished by the applicants.

¹⁷ The first applicant submits that contrary to what the respondent asserts, the "*tar road*" on its property does not demarcate the boundary between its property and the respondent's "*whatever that may be*" but rather "*it falls wholly within the bounds and extent of Portion 5*". This suggests that the parties are not speaking of the same road.

on which the alleged area of encroachment has been highlighted in blue ink, which area ostensibly overlaps a road coming down from north and ending where it meets the western boundary of Glendon No 26, marked "*Umtata Bypass*".

28. Plan C refers in turn to the original diagram no 610/1884, a photocopy of which the applicants have also provided (Plan E). Evidently this shows the full extent of the farm Glendon no 26 before it was subdivided. It appears faintly from it that portion 5 has been carved out on the north eastern side above and on the border of a either a road or a rail line. (The photocopy is not very clear.)
29. This appears to me to be exactly one of those matters in which the court will be assisted by the opinion of a land surveyor who, as a result of his qualifications, training and experience would be able to interpret, from what appears in all the available information in respect of previous surveys of every involved and relevant piece of land, how the first applicant's property is demarcated from the respondent's and hold it up for comparison with a field inspection. No doubt an examination of the contentious area is necessary with particular reference to the specified beacons and boundaries described on the

diagram (such as the feature of the road at A H for example). A prudent inspection would also have regard to the extent and boundaries of the property allocated to the respondent (as well as the other contiguous properties) as recorded in the deeds office in order to make a meaningful comparison and to discern whether any possible error exists in the records of the deeds office. If a problem exists merely in understanding and applying the rules applicable to a determination of the boundaries of the involved properties, such expert guidance would also be of great assistance to the court.

30. The applicants submit that there can be no questioning the documentation furnished by them and, although the respondent has not challenged their authenticity by any admissible contrary opinion evidence, to my mind several questions arise which require clarification on the part of Mr *Reabouw*. Firstly, for what purpose was the “*survey*” relied upon by him conducted? It postdates transfer of Portion 5 Glendon Farm to the first applicant as well as the date on which the respondent is said to have extended his building and erected the additional structures over the boundary line. Perhaps it was commissioned to advise the applicants regarding their rights in respect

of the alleged encroachment, but in any event does not appear to be a true “survey” within the meaning attributed to this function as provided for in the Land Survey Act, No 8 of 1997. Secondly, if Plan A purports to be his (perhaps official) representation of where the parties’ respective boundaries lie, why does it differ from Plan D dated “*September 2009 – December 2011*” which the applicants have latently produced, for example in respect of the total area of the alleged encroachment. On Plan A this is reflected as being 876 m² but is adjusted on Plan D, without explanation, to 748 m². Plan A further fails to show portion 14, thereby depicting Portion 5 as being larger than it presents on Plan D, alternatively representing that portion 14 is also its property.¹⁸ On comparison some of the sides on the diagrams in Plan A and D respectively are also drawn in different places and the artificial features of roads as cadastral boundaries is omitted.

31. When both plans A and D are compared with Plan C ultimately, discrepancies are also evident in relation to how the sides are drawn, no doubt because further subdivisions since transfer to the first applicant of the land were effected. The addition too of the “*right of*

¹⁸ As an aside it is not clear who lays ownership to this narrow band of land.

way” since the transfer of the property to the first applicant (and its possible impact on the boundary issue) requires elucidation in view of the right reserved to the “*Transkei Government*” in the Deed of Grant which the transfer was subject to, to resume the whole or portions of the land held if required for public purposes, to make roads, or for “*competent authorities*” to alter roads etc.

32. The fact that the first applicant’s property is bounded on the south side by a road on the official diagram representing portion 5 gives credence to the respondent’s claim that the road adjoining his business premises is in fact the boundary between his property and the first applicant’s. This eventuality is supported in turn by the photographs supplied by the applicants themselves which depict the road adjoining the fence closest to the Ultra City forecourt. This physical manifestation (coupled with the discrepancies highlighted above when compared with the photocopies purporting to be the official diagram and plan) requires explanation.
33. Apart from the desirability to have before the court oral expert testimony which assists it to understand and interpret the registrar’s survey records concerning the first applicant’s property, it would be of

great assistance to view those applicable to the respondent's property as well. The survey records pertaining to Portion 14 would also be essential to have regard to since it adjoins the first applicant's property and seemingly abuts the respondent's property, or at least the diagrammatical representation of it, on the plans put forward by Mr. *Reabouw*.

34. Although the deponent on behalf of the applicants refers to a "surveyed encroachment (by the respondent onto Portion 5)" in his replying affidavit, it is not apparent from Mr. *Reabouw*'s confirmatory affidavit that a true survey was carried out in the sense contemplated by the Land Survey Act. The mere drawing of a plan, albeit using the co-ordinates on the general plan in order to make a comparison with Plan B, is of no assistance in the absence of an *in situ* examination for purposes of refuting where the respondent says the physical boundary of the road is plainly evident. If it is his contention that the respondent is misinterpreting the diagram because the boundary between the beacons H and G is not a natural one but rather a rectilinear one, he does not say so at all. The fact that he does not deal with the feature of the road (and rail road) as constituting a boundary at all is in my view significant in determining, as I do, that there is

insufficient evidence before me to make a definitive determination of the issues. If both the diagram and grant or title deed are ambiguous or defective (as may be the case in the present instance), the grant is to be reasonably construed in the light of all the surrounding circumstances, including occupation, the belief of the owner and other persons concerned, the opinion of surveyors, and so on.¹⁹ For this reason, apart from the need for clarification of the Surveyor-General's documentation in relation to the physical features at the site, oral testimony regarding the complete facts and surrounding circumstances should ideally be adduced.

35. Despite the reservations I have that this matter cannot properly be resolved on the affidavits (and regardless of the respondent's contention that the application ought to be dismissed outright on the basis contemplated by Rule 6 (5) (g)), I believe that this is peculiarly one of those matters where in order to ensure a just decision it would be appropriate, in the light of the parties' equivocal claims to the property, to refer it to trial. I am mindful that it is considered a "*bold*

¹⁹ *Cape Town Council v Sassin* 1912 CPD 578; *Surveyor-General v Ford* 1923 EDL 437.

step”²⁰ for a court in an opposed application to refer the matter to trial *mero motu*, but much rides on the question whether the buildings and structures erected by the respondent constitute an encroachment which fall possibly to be demolished. The thought occurs to me too that the Respondent has not pleaded over (neither was argument presented to me in this regard on his behalf) to deal with the issue of whether it would be just for the court to order the removal should the first applicant succeed in proving that the boundary line is where it contends it is. In such an event the material facts on which the allegation of the injustice is based are required to be set out.²¹

36. I express the hope that a proper investigation of the matters which I have highlighted above may encourage an appropriate settlement of the matter. In the event that an exchange of expert views supports a true boundary issue, the Land Survey Act provides its own mandatory machinery²² for a resolve in this regard which may dispense with the need for the drastic relief claimed by the applicants. Further, although it would not strictly have been necessary for the papers to have been

²⁰ *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428 – 29.

²¹ *Rand Waterraad v Bothma* 1997 (3) SA 120 (O).

²² Section 29.

served upon the Registrar of Deeds at the outset by the applicants, the competing claim to the property asserted by the respondent may render it necessary to obtain his views on the basis envisaged by section 97 of the Deeds Registries Act. The land Survey Act similarly requires that the Surveyor General be given notice of proceedings where the relief ultimately sought may affect the performance of any act in his office.²³ The interests of other contiguous land owners possibly require their joinder to the proceedings as well, as the circumstances may dictate.

37. In the result I make the following order:

1. the relief claimed by the applicants in the notice of motion is postponed for trial on a date to be arranged with the registrar;
2. the issues to be decided on trial shall be:
 - 2.1 where the boundary lies between the first applicant and the respondents' respective properties;
 - 2.2 whether the buildings and structures erected by the respondent comprising the car wash and tavern extend over the boundary of

²³ Section 46.

his property onto the first applicant's property and thereby constitute an encroachment; and

2.3if so, whether the court should exercise its discretion in favour of granting the applicants the relief prayed for in prayers 1 – 3 of the notice of motion.

3. the notice of motion shall stand as a summons, the respondent's answering affidavit shall stand as a plea and the applicants' replying affidavit as a replication;
4. the Uniform Rules shall apply to the further conduct of the trial; and
5. the costs of the application shall stand over for determination at the trial.

B C HARTLE

JUDGE OF THE HIGH COURT

DATE OF APPLICATION : 5 February 2013

DATE OF JUDGMENT : 26 March 2013

APPEARANCES:

***FOR APPLICANTS: Mr R D E Gordon instructed by Cliffe Dekker Hofmeyer Inc.
c/o Smith Tabata Attorneys, Mthatha.***

FOR RESPONDENT : Mr Notyesi, Mvuso Notyesi Inc., Mthatha.