

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 2463/2007

In the matter between

LAURENCE ANTHONY GREEN
MANDY LUCY GREEN

First Applicant
Second Applicant

and

LEZMIN 2069 CC

Respondent

JUDGMENT DELIVERED ON 28 MARCH 2008

SAMELA, AJ

INTRODUCTION

[1] This is an opposed application whereby the Applicants sought a mandatory relief compelling the Respondent to erect a boundary wall on the common boundary between their residential properties. In the alternative the Applicants sought relief directing the Respondent to allow the Applicants and their contractors access to the Respondent's property in order to erect a boundary wall along the full extent of the common boundary.

Mr D Borgström represented the Applicants.

Mr R Stelzner represented the Respondent.

FACTUAL BACKGROUND

[2] The Applicants' and the Respondent's properties, and several others surrounding were created in the subdivision of previously under-developed erf in 2003. Both properties are situated on a hilly slope outcrop in a new, upmarket area of Protea Heights near Brackenfell.

[3] On the Applicants' property the slope rises diagonally from about 10,5 metres in the south-west corner to 18,5 metres in the north east corner of the two properties. The Applicants purchased their property in March 2003, measuring 1010 square metres and opens onto Keurboom Road. The Applicants' eastern boundary is shared with the Respondent's property. The common boundary between these properties is 39,94 metres long. The natural landscape, that is before construction, rose from 14,5 metres at the front (close to Keurboom Road) to 18,5 metres at the far back corner.

[4] Construction on the Applicants' property commenced in June 2005 with excavations to flatten the platform upon which the Applicants' residence was to be built. The upshift excavation exposed a wedge of earth along the common boundary of the two properties. The exposed wedge measured 1,8 metres deep at the back north-eastern corner and dropped over a distance of 16,5 metres.

[5] The Respondent bought its property, which measured 1003 square metres in 2005. It is situated at the corner of Keurboom Road and Alomzicht Close. Shortly thereafter, construction commenced on its property. The defendant brought large quantity of fill material for raising its platform on which to build the residence. This resulted into a two metres platform created which was higher than the one created by the Applicants, running the full length of the common boundary between the properties. The ridge mostly made up of rubble and other fill by the Respondent required stabilization and retention. Both the Applicants and the Respondent were bound by the "Design Guidelines" approved and provided by the City of Cape Town.

INSPECTION IN LOCO

[6] At the commencement of the trial counsel for the parties suggested that an inspection in loco might be of assistance in resolving the disputed issues. The court agreed that an inspection in loco of the parties' properties be held. On 27 August 2007 an inspection in loco of the two properties was undertaken and a joint minute by the parties was produced. The purpose of the inspection was to have a good overview of both properties.

[7] The inspection in loco took place at the properties of all the parties (i.e. the Applicants and the Defendant). It was attended by representatives from the legal

teams, including their respective counsel and attorneys. All the parties agree that the relevant observations made and information gleaned during the inspection, would be recorded in minutes to be duly approved and signed by the representatives from both sides. The minutes were subsequently handed up.

[8] Behind the Applicants' and the Respondent's properties the following was observed:

- (i) The Alomzicht Crescent, descends steeply joining onto Keurboom Road;
- (ii) The Respondent's property is situated at the corner of Alomzicht Crescent and Keurboom Road;
- (iii) The Applicants' property is situated at 19 Keurboom Road and is the Respondent's property's neighbours;
- (iv) The contours of the terrain, rises diagonally across the Applicants' and the Respondent's properties, towards a point where the inspection party stood;
- (v) The back walls of the Applicants' and the Respondent's properties are currently over six feet high.

[9] The dividing boundary between the Applicants' and the Respondent's properties, the following was observed:

- (a) The boundary between the properties was 39.5 metres long. The platform on which the Respondent's house is built being at a level two metres higher than the level on which the Applicants' house is built all along the common dividing boundary;
- (b) A terrace retaining structure runs from the back walls of both properties for a distance of about 30 metres in the direction of Keurboom Road, retaining the exposed face of earth between the levels of the two properties;
- (c) The terrace retaining structure is made up of hollow, semi-circular cement blocks. The top row of the blocks is situated on the Respondent's property. The retaining structure terraces outwards, with its foot encroaching approximately 15-30 cm onto the Applicants' property;

- (d) The top of the blocks of the retaining structure is at the ground level on the Respondent's property, with a further two to three rows of blocks loosely packed (i.e. not cemented into place) on top; and
- (e) Mr Borgström demonstrated how someone on the Respondent's property could climb down the terraced structure onto the Applicants' property.

[10] On the Respondent's property, along the boundary of the properties towards the Keurboom Road, the following was observed:

- (i) A grassed area of approximately 3 metres wide runs down the side of the Respondent's property passed the kitchen door and washing line;
- (ii) The grassed area leads to stairs which descends into a small sunken courtyard nearest to Keurboom Road. The sunken courtyard had no fence or balustrade along its edge on the Keurboom Road side; and
- (iii) A terraced retaining structure made out of hollow, semi-circular cement blocks (identical to those along the common boundary between the parties' properties) retains the bank of earth at the front of the sunken courtyard, which terraces out to the pavement on Keurboom Road which is approximately 2 metres below.

The front of the Respondent's property had also partially collapsed.

[11] There is a wall separating the properties along the 8 metre stretch nearest to the Keurboom Road, with the following identifiable:

- (a) A retaining wall was built on the Respondent's property, which rose about half a metre above the main ground level on the Respondent's property, and formed the side of the sunken courtyard;
- (b) A second "buttressing" wall was built on the Applicants' property to the same height; and
- (c) A cavity between the two walls was partly filled.

[12] At the Applicants' wooden staircase, it was observed that the main portion of the Applicants' front garden and its house are situated on a levelled platform which had been excavated into the hill.

[13] Outside both properties on the opposite side of the road, it was observed that there were vibracrete wall erected between boundary of numbers 74 and 76. The vibracrete wall had not been built on the apex of the structure, but at the foot thereof. A similar vibracrete wall also divided numbers 70 and 72 at the same street, namely Keurboom.

ISSUES TO BE DECIDED

[14] This court is called upon to decide whether a mandatory relief should be granted in favour of the Applicants against the Respondent, compelling the Respondent to erect an effective boundary wall on the common boundary between the two properties (i.e. the Applicant's and the Respondent's properties). Alternatively, granting a relief sought by the Applicants directing that the Respondent to give the Applicants and their contractors access to the Respondent's property for the purpose of erecting a proper boundary wall along the full extent of the common boundary.

EVALUATION OF EVIDENCE

[15] Mr Borgström argued on Applicants' behalf that:

- (i) the Applicants are unable to build the boundary wall themselves without Respondent's permission to access to its property, as the Respondent refused them such;
- (ii) there was a duty on behalf of the Respondent to act reasonably and to eliminate dangers arising from the usage of his property which the Applicants cannot be reasonably expected to tolerate;
- (iii) the Respondent has caused the boundary wall on the front section of the property to be lowered by four rows and this could easily be scaled by anyone on the Respondent's property;
- (iv) the inadequate barrier between the two properties has caused the following dangers:
 - (a) Security danger. In the absence of an adequate barrier the Applicants' house is forever dependant on the security of the Respondent;
 - (b) Swimming pools on both properties which are not fenced;

- (c) The swimming pool paving ends abruptly with a sheer fall of 3 metres to the road below; and
- (d) That the Respondent's children and pets come onto the Applicants' property and that the Applicants have to keep their dog indoors;
- (e) All the above result in an unacceptable lack of privacy for the Applicants as the Respondent and his family can stand on their front lawn and look down onto the Applicants in their pool area.

[16] Mr Stelzner argued on Respondent's behalf that the following are disputes of facts between the parties:

- (a) whether the building plans were required for the retaining structure;
- (b) whether the retaining wall was built in accordance with engineers specifications;
- (c) what the specifications were, e.g. what type of structure can safely be built on top of the retaining wall;
- (d) whether the retaining wall is indeed safe and stable enough for a further wall to be built on it;
- (e) whether the retaining wall constitutes an adequate boundary;
- (f) what the parties' agreement in respect of the costs of the retaining wall;
- (g) what Applicants' liability in respect of the retaining wall is;
- (h) what type of dividing wall would be suitable or permissible;
- (i) how much this wall will cost;
- (j) are building plans required for the dividing wall;
- (k) who will draw the plans for the wall and when;
- (l) when will the plans be lodged with the local authority;
- (m) when will the local authority pass the plans.

[17] As regards to the final interdict sought by the Applicants, Mr Stelzner has argued as follows:

- (a) The Applicants have failed, in their founding affidavit, to indicate that they have a clear right which would compel the Respondent to build a boundary wall;

- (b) There is no specific rule in our law which imposes a duty on a neighbour to construct a boundary wall, although there appears to be a joint responsibility to maintain such a wall;
- (c) Pertaining to "reasonableness" and "enforceability" consideration, the order prayed for:
 - (i) gives no indication what type of wall the Applicants want the court to order the Respondent to build;
 - (ii) makes no provision for plans for the wall to be passed; and
 - (iii) sets a time limit which is such that it affords the Respondent no time to submit any plans, let alone for investigations to be done to determine what would be a suitable and/or permissible wall;
- (d) The Applicants for the first time made a tender to pay half the costs of a vibracrete wall. However, a dispute between the parties exists whether such a vibracrete wall is "effective", proper and/or permissible. The Respondent contends that the suggested vibracrete wall by the Applicants is in breach of the guidelines which the Applicants say are applicable.

Mr Stelzner submitted further that the order sought by the Applicants is neither reasonable, proportionate, practicable or enforceable.

[18] Referring to alleged danger, Mr Stelzner argued that the 2 metres high retaining wall constitutes an adequate boundary between the two properties. In addition, all children are competent swimmers and therefore, the retaining wall structure constitutes an adequate boundary. Mr Stelzner argued further that there is therefore no danger, alternatively, no real or imminent danger that needs to be addressed.

[19] Mr Stelzner is of the view that the failure by the Respondent to take any steps in the present circumstances, more so, its failure to build a boundary wall other than the 2 metre high structure is indeed an adequate boundary between the properties. Therefore, Mr Stelzner finally submitted that the Applicants' demands are clearly unreasonable and that the conduct of the Respondent is reasonable. Against the aforesaid, I ask myself the following:

- Is there a clear proof of illegality?

- Is this court competent to order the Respondent to construct a boundary wall on the common boundary between the two properties?
- Can the court refuse the final interdict?
- Is there no joint responsibility for the two properties to maintain the common wall?
- What is a proper boundary wall between the two properties?
- Are there any real dangers, which constitute serious risk that the Respondent has to take steps to eliminate the same?
- Would the court order be reasonable, proportionate, practical and enforceable in these circumstances?

APPLICABLE LAW

[20] It is trite law that where an Applicant sought a final interdict, the following requisites have to be met:

- (a) A clear right. The Applicant must indicate to the court that he/she has a clear right, that is, a right which can be protected by an interdict (see **Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd** 1967 (3) SA 45 (o) at 55 compare **Tavern Drankwinkel (Edms) Bpk v Munisipaliteit van Stellenbosch** 1985 (4) SA 894 (C) at 901 A-B;
- (b) An injury actually committed or reasonably apprehended. This means an infringement of the right which has been established and also resultant prejudice. The injury must either have been actually committed or reasonably apprehended (see **Phillip Morris Inc & Another v Marlboro Shirt Co SA Ltd & Another** 1991 (2) SA 720 (A) at 735 B; and
- (c) The absence of similar protection by any other ordinary remedy (see **Setlogelo v Setlogelo** 1914 AD at 221, 227).

An Applicant will not ordinarily get an interdict if the Applicant can obtain adequate redress through another remedy. The alternative remedy, therefore, must be adequate in the circumstances of the case, be ordinary and reasonable, and that it be a legal remedy which grant a similar protection.

The National Building Regulations and Buildings Standards Act 103 of 1977 is also applicable (hereinafter called the Act). Section 4 of the Act provides that:

- (1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.
- (2) Any application for approval referred to in subsection (1) shall be in writing on a form made available for that purpose by the local authority in question.
- (3) Any application referred to in subsection (2) shall –
 - (a) contain the name and address of the applicant and, if the applicant is not the owner of the land on which the building in question is to be erected, of the owner of such land;
 - (b) be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act.

APPLYING THE LAW TO THE FACTS

[21] The Applicants demand that the Respondent must raise the common boundary higher than the current 2 metre high retaining structure. The Applicants are of the view that a vibracrete wall is an ideal one to be erected on top of the present or current retaining structure.

[22] The neighbour law does not impose a duty on a neighbour to build or construct a boundary wall. However, where there is an existing common boundary wall, both landowners adjacent to such wall are expected to jointly maintain the same. In this matter, the Respondent was responsible for building the bottom wall which is 2 metres high with no contribution from the Applicants as to the costs of the wall (see *Fourle v Bakrivier* (Edms) Bpk 1982 4 SA 187 (NC)). The failure by the Respondent to build a boundary wall other than the 2 metre high retaining structure is, in my view, not unreasonable. The Applicants demanded in the alternative, that the Respondent allows the Applicants and their contractors access to the Respondent's property for purposes of erecting "a proper boundary wall" along the

full extent of the common boundary. The Applicants have provided no written approval from the local authority (in this matter City of Cape Town) to erect such a wall. Should the court direct the Respondent to allow the Applicants into the Respondent's property for purposes of erecting the so-called "proper boundary wall", it will be frustrating or going directly against the purpose of section 4 of the National Building Regulations and Building Standards Act 103 of 1977 (see 20 above). In my view, the Applicants do not have a clear right or definite right that can be protected by an interdict.

I am not convinced that; the failure to raise the current 2 metre common boundary wall though interfering with the Applicants' comfort (on a minimal scale) can be considered unreasonable; there are real dangers, which would require the Respondent to take positive steps to prevent the same. I hold the view that there was no infringement of the Applicants' rights which has been established, resulting in prejudice. Although it has been submitted that the Applicants do not have other remedies, I hold a different view

CONCLUSION

[23] In conclusion I am of the view that the Applicants have failed on balance of probabilities to prove that they have a clear or define right; that an injury to them had been actually committed or reasonably apprehended and finally, that there is no alternative remedy that the Applicants could obtain to adequately redress their concerns. Even the alternative remedy sought has no legal basis.

I accordingly make the following order:
The application is dismissed, with costs.



SAMEELA, AJ