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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 048126/2023

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

2 August 2024

DATE

SIGNATURE

In the matter between:

LEBOGANG MOROPA

First Applicant

SEIPATI PORTIA MOROPA

Second Applicant

And

MORWESI RAMONYAI

Respondent

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date for hand-down is deemed to beJuly 2024.

JUDGMENT

KEIGHTLEY J

[1] This is an application for declaratory and interdictory relief. The dispute in question is between neighbours who own separate pieces of land which, prior to sub-division, formed part of one original erf. One of the conditions of the subdivision imposed by the City of Johannesburg (the City) was that a right of way servitude, in favour of the applicants' property, was to be registered against the respondent's title deed. This was duly effected, making the latter the servient tenement and the former the dominant tenement.

[2] The servitude is 9.25 metres in width and 29.29 metres in length. It acts as a driveway, giving the applicants access to their property. The respondent also accesses her property by way of a set of steps leading off the driveway. The first dispute between the parties relates to the use of the servitude. Initially, the applicants also disputed an alleged encroachment by the respondent's steps into the servitude area. However, at the hearing of the matter, counsel for the applicants did not press for the relief sought in this regard, given the apparent de minimus nature of the encroachment. In the circumstances, I do not consider it necessary to deal with this aspect of the original dispute.

[3] A further physical consequence of the subdivision is that there is a boundary wall between the properties. One portion of the boundary wall acts as a retaining wall. This is the section labelled A to B on the sketch-plan attached to the applicants' affidavit. The second remaining dispute between the parties relates to this section of the boundary wall and, in particular, the ownership thereof.

[4] It seems that the relationship between the applicants, as owners of the dominant property and the respondent, the owner of the servient property, was originally cordial. In fact, the parties engaged with one another on the possibility of agreeing to a division of the servitude area to provide for separate entrances for each property. This would have averted the dispute leading to the present litigation. However, the talks between the parties broke down. The respondent then applied to the City for a reduction of the servitude area. However, this was refused on the basis that the City could only grant approval with both parties' consent. An internal appeal by the respondent against this refusal was unsuccessful. The respondent contends that she intends to review the latter decision but has not done so to date.

[5] Matters became strained further when the applicants commenced renovations on their property. This necessitated that access to the property was required by various contractors, using the servitude area. Citing safety concerns, the respondent's husband, Mr Thonga, sent various text messages and emails to the applicants regarding third parties' use of the servitude. He insisted that anyone other than the applicants would have to identify themselves, register with the applicants and be positively identified or else 'we will not allow them passage.' Mr Thonga also attempted to prevent persons accessing the applicants' property from parking in the servitude area. The applicants contend that the imposition of these limitations and conditions on the use of the servitude by the respondent and Mr Thonga constitutes an unlawful interference with their servitude rights.

[6] The applicants complain that the respondent has further intruded on their servitude rights by placement of rocks in the servitude area. The rocks were initially stored by the respondent against the boundary wall between the two properties. When the applicants voiced their concern about possible damage that would be caused to the wall by the weight of the rocks, the respondent moved the rocks and placed them in front of the entrance to one of the applicants' garage doors leading onto the servitude. The rocks prevent the applicants from turning after exiting the garage. It means that they must reverse for the full length of the driveway/servitude to enter the street. The respondent's response to requests to move the rocks is that this should be done at the applicant's expense.

[7] As for the boundary wall, the ownership is disputed. The applicants have obtained a surveyor's report confirming that as between points A to B, the wall falls solely on their property. Thus, they claim ownership of the wall, with all rights concomitant with ownership. The respondent disputed this in letters preceding the institution of the application, but never obtained a report from a surveyor appointed by her to contest ownership as she had threatened to do.

[8] In her answering affidavit the respondent asserts that she and Mr Thonga had never denied the applicants' contractors access to the property. She also frames the applicants' case as being an attempt to expropriate her property. Her view is that the servitude only allows the applicants to access their property, and nothing more. What is more, the respondent contends that the application is premature, as she intends to review the City's refusal to approve a reduction of the servitude area.

[9] I deal first with the last-mentioned point of opposition by the respondent. Counsel for the respondent sought to persuade me at the hearing that the application was premature pending the outcome of the intended review by the respondent. In supplementary heads of argument, various grounds of review were outlined with a view to supporting an argument that the servitude had been established in an unusual manner that was not prescribed by law. It is not necessary to consider the possible merits of the intended review. Even assuming the review is instituted and is successful, it will simply regulate the conduct of the parties henceforth. For present purposes the relationship between the parties vis-a-vis the servitude and the boundary wall must be dealt with so that there is some form of certainty as to what the position is while the servitude exists in its current form. The application is thus not premature.

[10] As far as the servitude is concerned, it is trite that a servitude imposes a burden on the servient owner of the property concerned in favour of the servitude holder: it permits the latter to exercise rights over the servient owner's property. This means that the servient owner, in this case the respondent, is permitted to exercise her rights of ownership only in such a way as to not infringe on the rights of the applicants, as holders of the servitude right of way.

[11] At the hearing counsel for the respondent accepted the legal position. However, she sought to contend that the respondent and Mr Thonga had done nothing to interfere unreasonably with the applicant's servitude rights, and that the applicants have always enjoyed reasonable access to their property via the servitude. It was also contended on behalf of the respondents that the applicants were complaining of nothing more than past harm, and that there was no ongoing harm to establish grounds for interdictal relief.

[12] These contentions do not square with the facts as averred in the founding and answering affidavits. It is quite clear from these that the respondent's attitude throughout has been that as the owner of the property, she can 'call the shots' so to speak, as to the manner in which the applicants are entitled to use the right of way. The respondent essentially endorsed Mr Thonga's repeated assertions in his text and email communications that he and the respondent had a right to vet and permit or refuse access to third parties wishing to access the servitude at the behest of the applicants. This attitude did not change despite attempts by the applicant to resolve the situation. The respondent

has remained steadfast in her view that she is entitled to control access for security reasons.

[13] There is no dispute that the applicants themselves have the right of use of the servitude. By logical extension, the right to access their property must extend also to the applicants' visitors and other persons, such as contractors, who require access to the property as an adjunct to the applicants' rights of use. The respondent has no right to block their access or to lay down conditions or insist on having a final say as to who, and how, other persons enter the servitude area. One would hope that safety issues would be negotiated and agreed upon between the parties. After all, it is an issue of mutual interest to them. In the absence of this, however, as the servient owner, the respondent cannot insist on laying down what she believes should be the law concerning access to the servitude.

[14] This is essentially what the respondent did. She has not changed her attitude. There is no indication from the respondent that going forward she will not insist on controlling access in this manner with other contractors. Indeed, her attitude appears to have remained intractable on this score. I conclude in this regard that her conduct constituted an unlawful restriction on the applicants' servitude rights. Furthermore, the harm remains ongoing in the sense that all indications are that she will continue to assert her right to control access until a court rules on the unlawfulness of her conduct.

[15] Counsel for the respondent attempted to downplay the extent of the blockage caused by the rocks that are being stored in the servitude area. It is plain from the photographs provided that applicants' access to the left-hand entrance to their garage is materially affected by the large rocks stored there. It is common cause that they were removed from the respondent's land. They were placed in the servitude area after the applicants complained that they were unduly placing weight against the boundary wall. At best for the respondent, the applicants agreed to no more than temporary placement in the servitude area. Once the discussion for a division of the driveway fell through, there was no advantage to the applicants having access to or any use for the rocks. The respondent has no right to store the rocks in a manner that obstructs the applicants' use of the servitude right of way. Nor does the respondent have any legal basis for insisting that the applicants should pay to have them removed. They are the respondent's property, and she must remove them or pay to have them removed.

[16] In the circumstances, the applicants are entitled to declaratory relief in respect of the servitude. They have also established harm to their servitude rights and have no effective alternative remedy without an interdict to prevent the respondent from unlawfully continuing to restrict their reasonable use of the servitude. Unfortunately, the respondent's recalcitrant attitude to discussing and resolving the issue made legal action necessary.

[17] As far as the boundary wall is concerned, it was submitted by the respondents at the hearing that the applicants had not established that the wall falls entirely on their property. This is because the surveyor's report showed that a portion of the wall extended over the respondent's boundary line. This submission overlooks the fact that the small overlap with the respondent's boundary line is in a portion of the wall that is not in dispute. The disputed section, as I mentioned earlier, is between points A to B. According to the surveyor's report, this section is situated entirely on the applicants' property. The respondent failed to commission a report to contradict the surveyor's conclusion. In the circumstances, the applicants have established ownership of this section of the wall and are entitled to an order to give effect to their rights of ownership.

[18] As the successful party, the applicants are entitled to costs in their favour. They sought costs on a punitive scale. In my view, despite the respondent's recalcitrant attitude, punitive costs are not justified. Unfortunately, neighbour disputes are often messy affairs. The respondent's conduct was no more deserving of censure than any other party in a dispute of this nature.

[19] I make the following order:

1. It is declared that the ownership of the boundary wall as depicted by the lines A to B on the plan of Brian Viljoen & Partners (the boundary wall) vests in the Applicants.
2. The Respondent shall not interfere with the Applicants' ownership of the boundary wall.
3. The Respondent shall, upon 14 days' notice being provided by the Applicants, allow the Applicants access to the boundary wall, through her property to facilitate its maintenance and repair.
4. The Respondent shall not interfere with the Applicants' (their agents', employees', contractors' or visitors') reasonable use of the right of way servitude

(the servitude) of 9,25 meters wide and as indicated by figure K,F,G,J,K on Surveyor General diagram number 5493/2012, over Portion 1 of Erf 1[...], H[...] E[...] (the servient property) in favour of the Remaining Extent of Erf 1[...], H[...] E[...] (the dominant property), as it relates to access to the dominant property.

5. The Respondent shall not restrict access of the servitude to the Applicants (their agents, employees, contractors or visitors) by any reasonable use of transportation or on foot.

6. The Applicants shall be entitled temporarily to store materials on the servitude in a manner that does not block access to the servient property.

7. The Applicants (their agents, employees, contractors or visitors) shall be entitled temporarily to park vehicles on the servitude in a manner that does not block access to the servient property.

8. The Respondent shall, within 14 days of service of this order, at her own cost, cause to be removed the rocks presently being stored on the servitude to a suitable area that does not place pressure on the boundary wall of infringe the servitude rights of the Applicants.

9. The Respondent shall pay the costs of the application on a party and party scale.

**R KEIGHTLEY
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

For the Applicant: S. Mitchell

Instructed by HBG Schindlers

For the Respondent: B.B Mkhize

Instructed by Kekana Hlatshwayo Radebe Attorneys

Heard: 05 June 2024

Delivered: 02 August 2024