



**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 relief in paragraph 1 of the notice of motion is dismissed.
2. The respondent is directed to pay the applicant the sum of R11 500.00 as compensation for the encroachment which the parties agreed is 46m2 in extent.
3. The amount referred to in paragraph 2 above is to be paid within 21 days of receipt of the order.

4. The respondent is directed to do all things necessary and incidental to ensure the transfer and registration of the encroachment into his name.

5. The respondent is directed to pay the costs occasioned by the application up to and including 22 June 2022, thereafter each party is directed to pay their own costs.

JUDGMENT

HENRIQUES J

Introduction

Demolition or compensation?

[1] This is the main issue for determination in the second part of this opposed application relating to an encroachment and an enforcement of an owner's right to seek an order from the courts for removal of such encroachment.

[2] It is common cause that the parties are neighbours in a sectional title scheme described as L[...] G[...] situate at 1[...] N[...] Road, Shallcross, Durban. The applicant is the owner of unit 5 and the respondent is the owner of the adjacent unit 6. The property was registered in the name of the applicant on 15 February 2019. At the time he purchased the property on 12 October 2018, he indicates he was informed by the erstwhile seller that the current fence line did not reflect the official boundary between the two properties.

[3] Since the applicant took occupation of the property the issue of the encroachment was not officially addressed either at the time of conclusion of the sale or registration of transfer, nor raised by the parties or any statutory body. In actual fact, the catalyst for the application was the applicant's bougainvillea tree and the dispute which arose between the parties as a consequence of the respondent's request for the applicant to trim and eventually cut it down as it was causing a nuisance and the applicant's failure to comply with such request.

[4] The applicant indicates he engaged the services of a land surveyor, Rajen Govender to prepare a report, which report accurately depicts the beacons in respect of the applicant's and the respondent's properties and the encroachment of the respondent's driveway and a portion of the carport onto the applicant's property. Most notably, it is common cause that all the other units within the entire sectional title scheme are also affected by encroachments relating to the location of each of the individual units' respective driveways.

[5] In February 2022, when the opposed application first served before me, the various points *in limine* raised by the respondent including that of *lis pendens* and non-joinder, were not canvassed and adjudicated upon and I indicated that it would follow in the main judgment.

[6] The parties had only dealt with the encroachment and the applicant's demand for demolition. Neither parties' affidavits dealt with policy considerations or alternative remedies to resolve the encroachment dispute although Ms Hennessy, who appeared for the respondent at that time made submissions in this regard. Both parties' legal representatives agreed that the application papers would have to be supplemented in this respect.

[7] This court, given its wide discretion, and considerations of fairness and equity, adjourned the application *sine die*, reserved costs and issued the following orders:

"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 L[...] G[...] and the Ethekwini

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 L[...] G[...] and the Ethekewini Municipality not complying with the orders above, the matter will be determined on the papers as filed.”

[8] In October and November 2022, unbeknown to me the legal representatives complied with the orders referred to in paragraph 7 above, and filed supplementary affidavits. This was not immediately brought to my attention by the registrar’s office. On learning of compliance with my order, the matter was then re-enrolled for hearing in October 2023 to address the appropriate remedy given the particular circumstances of the matter and the additional affidavits filed.

[9] At the time of preparation of the judgment, the parties had not agreed on the square meterage of the encroachment as evidenced from the reports of their respective experts, Rajen Govender (Govender) and Rose Ginya (Ginya). The report of Ginya specifically recorded that the services of a property valuer would need to be engaged to determine the value to be attached to the square meterage of the encroachment. This was relevant to a compensatory award.

[10] This necessitated a further written query directed to the parties’ representatives as follows:

“1. Do the parties agree on the square meterage of the encroachment having regard to the expert reports of Govender and Ginya?

2. The report of Ginya dated 14 September 2022 records a reservation of the value and seeks to employ the services of a property valuer. Does the respondent accept the certificate of valuation contained in the report of Hlanganani Group (Pty) Ltd dated 01 September 2022 reflected at page 61 of the index to reports? In the event of the respondent seeking to obtain its own valuation it is to do so and file under cover of a confirmatory affidavit.

3. The parties are requested to revert by 5 July 2024.

4. Should the parties deem it necessary to convene a court to address these issues, they are to indicate and confirm same by 5 July 2024.”

[11] A delay was experienced in obtaining the necessary valuation reports from the respondent’s valuer. This court and the applicant’s legal representatives were kept informed thereof through the exchange of correspondence. The valuation report was eventually received on 29 August 2024.

Factual Matrix

[12] At this juncture it is appropriate to set out the facts against which the appropriate relief to be ordered must be determined. What emerges from the affidavits filed is the following. The respondent and his wife purchased Unit 6 in the L[...] G[...] sectional title scheme in 2015 and had lived there for approximately 6 years at the time of institution of the application. The applicant purchased unit 5 in 2018 and had been living there for 2 years at the time of the institution of the application.

[13] Even though the seller had informed him of the incorrect boundary lines, he did not engage with the body corporate or with the seller prior to purchasing the property and registration of the transfer thereof, nor did he record any reservation of his rights in relation to this.

[14] The bougainvillea trees grow successfully in the complex and according to the respondent cause a nuisance as the applicant’s bougainvillea tree is right at the

entrance gate of the respondent's property and scratches their vehicles as they drive through. The parties appeared to have regularly engaged each other on the trimming of the tree as it was creating a nuisance.

[15] On 7 July 2020, the respondent's wife sent a WhatsApp message to the applicant requesting that he remove the bougainvillea tree which was obstructing the entrance to their driveway. The applicant agreed to do so. The tree was not removed by the applicant and from July 2020 the relationship between the parties deteriorated. Because the applicant did not remove the bougainvillea tree as per his undertaking and several requests, the respondent's wife messaged him indicating that she would have to take the issue up with the body corporate or the Ombudsman as the applicant was refusing to cut back the tree or remove it.

[16] The WhatsApp message exchange between the applicant and the respondent's wife reads as follows:

Figure 1

"Hi there I don't mean to be rude. But I need you to remove the boganvillea from the side of my driveway. I will send u a video of the mess it is creating in my property. Especially on a windy day like today"

"Ok, I will do so" "Thank you"

"Will sort it out in an hour or so. Busy online with work right now. "Ok thanks. Also ur palm tree has fallen into my gate"

Figure 2

"Hi there again. You said you will remove the tree. And unfortunately the two which are most problematic are still there. I did explain that this creates constant mess. And Bob did speak to you many times about having it removed, redirecting the branches are pointless in windy conditions such as today. Unfortunately if you aren't willing to compromise I am now forced to take the issue up further with Uth and the ombudsman.

As they know this has been an issue before. Thanks anyway." "It's fine go ahead and take it up further"

"Sure."

[17] Due to the applicant's inactivity the respondent referred the matter for adjudication in terms of s48 of the Community Schemes Ombud Services Act (CSOS Act) on 23 October 2020. Presumably on receipt of the referral by the respondent, the applicant sent a WhatsApp message which read as follows:

Figure 3

"Hi, I got the email from UTH about my bougainvillea"

"Your'll made a big mistake by replying to Sheri that way. Now you will see who I am..." "Mark my words"

"It starts right now"

"Have you just threatened me sir? Be sure that God will do the rebuking"

Figure 4

"Hi, I got the email from UTH about my bougainvillea"

"Your'll made a big mistake by replying to Sheri that way. Now you will see who I am..." "Ok"

[18] As a consequence, the applicant, a professional quantity surveyor, instructed Govender on 15 August 2020 to do the survey. The matter was escalated to the body corporate of L[...] G[...] and the dispute was noted in the minutes of the body corporate meeting held on 14 September 2020.

[19] At such meeting, the body corporate resolved that:

"It has been noted that the owners of Unit 5 obtained the services of a Land Surveyor that shows an encroachment of the driveway of unit 6 onto their exclusive use garden. It does however show that there is also an encroachment of unit 5 onto the neighbouring property as well as all exclusive use gardens encroaching onto the complex central roadway. It has **therefore been determined that that the Owner of unit 5 should escalate the matter to CSOS for resolution as there may be an order passed onto the Body Corporate to engage a Land Surveyor to identify all the pegs and**

boundaries and adjust all the properties at owners' expense.
Alternatively, to have the EUA redefined."

[20] Most notably, the body corporate noted that the encroachment was not isolated to unit 6 and extended to all the units in the complex as regards the placement of the driveway. It is evident that from the time the respondent purchased the property in 2015 his driveway and carport as well as fence has been located where it is. The driveways of the complex slopes downward and has a cascading effect on all the properties within the body corporate.

[21] Following the meeting of the body corporate, there was no dispute as recommended to CSOS and on 14 September 2020 the respondent referred a dispute against the trustees of the L[...] G[...] Body Corporate to the Community Schemes Ombud Services. The referral records the following:

"I purchased the above mentioned property in 2015. my levy clearance was passed with no objections from trustees or other owners. The property next to me, unit 5 was sold and levy clearance was passed by trustees. The new owner is claiming that my driveway falls into their property and is making demands for me to relocate my driveway. it should be noted that every property from unit 2 up to unit 6 has been laid out in a manner that every property overlaps the neighboring yard. As such it is unfair that these demands should affect me only, as the layout of the complex was as is from its time of registration and there are a few units including unit 5 that are using a portion of the neighboring property. The properties were sold this way and it is not acceptable to force me to remove my driveway, that was not brought to my attention in purchasing the property."

[22] Both these matters are still pending.

[23] In the replying affidavit, the applicant refers to the encroachment and reiterates his demand for the removal of the encroachment. He admitted that the bougainvillea tree was causing a nuisance, however he had trimmed it and as it was in his yard he was not required to remove it. None of the pertinent allegations made

in the respondent's affidavit relating to the cause of the dispute were dealt with and have merely been denied. The applicant indicates that he is not in receipt of the CSOS referrals and reiterates his demand for the removal of the encroachment.

[24] In the supplementary affidavit served on the respondent, the body corporate and eThekweni on 28 October 2022, the applicant persists in seeking an order for demolition. The applicant annexes invoices in relation to the demolition and remedial work required from KP Engineering and DC Brothers Building Contractors in the amount of R137 655.00 and R94 096.20 respectively. The reports obtained by the applicant require the removal of the encroachment, the widening of the existing driveway, the creation of a new driveway along the existing boundary wire fence.

[25] In addition, applicant's valuation report from Hlanganani Group (Pty) Ltd has placed a market value on the encroachment of R21,400.00. It would appear from the report that Hlanganani has used the replacement less depreciation method of valuation for determining the market value of the subject property. This is also referred to as the "cost approach" and considers the possibility that as a substitute for the purchase of a given property one could construct another property that is either a replica of the original or one that could furnish equal utility. In doing the calculation and certifying of value, Hlanganani has arrived at a value which they submit should not exceed R21,400.00. In doing so, consideration was given to the land extent, location and accommodation as well as the impact of Covid-19 on the selling price. They could find no immediate evidence of a significant reduction in sales price.

[26] The valuers indicated that the estimated value was based on his interpretation and calculations on assumptions of information gathered from estate agents and other property professionals active in the area. The assumptions were interpreted, amended and applied in determining an appropriate market value. He applied a rate of R461.20/m² at +/- 46.35m² = R21 376.62 rounded off to an amount of R21 400.00. In arriving at an average rate, the valuer considered that sales conducted vary between R235.15/m² and R461.20/m² with an average rate of R355.62/m². The average rate determined a value of R16 483.00 and the maximum rate determined the value of R21 378.00/m².

[27] Because the sales rate increases as the land size decreases a higher rate was applied in the calculations. In addition, the valuer recommends that to possibly remedy the encroachment, the owner of exclusive use area G14 could demolish the improvements and build a boundary wall along the surveyed dividing line or alternatively buy the portion of the exclusive use area of G13 at a market related value. In determining the market related value, she has analysed sales of units in the same sectional scheme, improvements were depreciated and deducted from the purchase price to determine the value of the exclusive use land area. This approach was followed due to the lack of sales of small high density zoned vacant land.

[28] The respondent in a supplementary affidavit which was served on the applicant, the eThekweni Municipality and the Trustees of the Body Corporate of L[...] G[...] on 1 November 2022 has indicated that on the applicant's version, the costs of the encroachment should not be more than R21 400.00. The two quotes for the building and remedial work which the applicant obtained, he submits that these amounts when viewed against the market related value of the encroachment and the possible transfer of the exclusive use area is disproportionate and consequently demolition ought not to be granted as same is not fair and equitable given the facts of this particular matter.

[29] In addition, the respondent submits that the applicant has failed to maintain the exclusive use area and the applicant had no intention to use the area as he has erected a bank between the two properties. His property also requires repairs in the sum of approximately R64,722.00 which have presumably increased over time. The last quotation he received for the repairs to his house was from Pilekon Construction in 2020.

[30] Rose Ginya (the respondent's expert), who provided a report on 14 September 2022, relating to the encroachment as surveyed by Govender estimated that the encroachment is at least 46m². Her recommendation is the following:

“The two Exclusive Use Areas, G13 and G14, should be cancelled. This will be done by a duly qualified land surveyor using the Sectional Titles Act (Act

95 of 1986), Sectional Titles Amendment Act (Act 33 of 2013) and the Land Survey Act (Act 8 of 1997) and Regulations promulgated under these acts by amending the Sectional Plans of the scheme.

The cancellation of these two Exclusive Use Areas will allow for the re-registration of new Exclusive Use Areas in their place, which will amend the encroachment indicating the new extents for each of the affected Exclusive Use Areas. From a land surveying point of view and under the presented circumstances, this is the best possible approach to amending the encroachment.

The cancellation and re-registration of the Exclusive Use Areas will result in what is now EUA G13 decreasing by at least 47 square metres in extent and the same 47 square metre area increase on what is now G14. The exact change in square meters in these EUAs will be determined upon placing of new Exclusive Use Area boundary pegs by survey.”

[31] In essence, she recommends the re-registration of the exclusive use area and the cost of the land surveyor to amend exclusive use areas and such costs to be borne by the respondent.

[32] The respondent's property valuers, Roper and Associates prepared a valuation report.¹ The market value of the encroachment was assessed at R11 500.00. An amount of R250/m² was used to make the valuation, taking into account comparable vacant land sales in the area, the time lapse, the steep topography and the close proximity to informal settlements. The method of calculation adopted by Roper and Associates was a market approach using the comparable transactions (direct comparison) method and comparable sales in the area. Such method is a comparison of sales of similar properties making necessary adjustments with the subject property to determine the value that the market would place on it.

¹ This was also served on the applicant's attorneys, the eThekweni Municipality and the Trustees of the L[...] G[...] Body Corporate

[33] The approach is based on the principle of substitution and holds that the buyer will not be prepared to pay more for the subject property than the price which alternative to comparable property could be purchased. The valuer studied records of sales and transfers as indicated in the Deeds Office, Pietermaritzburg, consulted with estate agents, valuers, landlords and developers and undertook a detailed search of comparable properties sold.

[34] In relation to the square meterage of the encroachment, the parties were directed to agree on the exact extent. Govender and Ginya reflected the square meterage of the encroachment as being 46m². On receipt of my query, the parties' legal representatives agreed in writing on 2 May 2024 and 5 July 2024 respectively, that the extent of the encroachment was 46 m².

Analysis

[35] Turning now to deal with the various points *in limine* raised in opposition to the application, these are the following.

35.1 the failure of the applicant to join the Community Schemes Ombud (CSOC), the body corporate of L[...] G[...] and the municipality;

35.2 *lis pendens* as there is a pending referral before CSOC;

35.3 there is a similar encroachment in each and every neighbouring property of the sectional title scheme.

[36] The question whether a party has a "direct and substantial interest" in the subject matter of a legal dispute as formulated by the uniform rule requires a legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment of the court or if the order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.

[37] Most of the authorities on this point rely on the test for joinder as set out in *Amalgamated Engineering Union v Minister of Labour*². The mere fact that a party has an interest in the outcome of the litigation does not warrant a non-joinder plea and the right of a party to validly raise the objection that other parties should have been joined to the proceedings has thus been held to be a limited one. The joinder of a party is only required as a matter of necessity as opposed to a matter of convenience if that party has a direct and substantial interest which may be prejudicially affected by the judgment of the court in the proceedings concerned.³

[38] Both the eThekweni Municipality and the body corporate have been served with the application papers as well as supplementary papers. In the supplementary affidavit of the applicant he also raises the fact that the bondholders had a vested interest in the proceedings as the properties were registered as security for the home loans advanced over the respective properties and had not been joined.

[39] At the time the bonds were registered, the respective bondholders were not affected by the property extents as both parties specifically, the applicant registered the extent of the property as per the sale agreement and the deed of transfer between him and the former seller. The same position maintains in respect of the respondent. It would not affect the security they hold. The possibility does exist that a bondholder may be affected, should this court order compensation. However, the parties will have to notify the bondholders depending on the final order that this court issues in this regard. It is not a joinder of necessity in my view but rather of convenience.

[40] Although notification has been provided to the body corporate, I agree with the submissions of Mr Mizrachi, who appeared for the applicant that neither the body corporate nor the individual owners of units 2 to 7 within the sectional title scheme need to be joined. The dispute between the applicant and respondent is confined to

² *Amalgamated Engineering Union v Minister of Labour* 1949(3) SA 637(A) at 659 to 661; *Bowring N.O. v Vrededorp Properties CC & Another* 2007 (5) SA 391 SCA para 21

³ *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 SCA at para 12. Although the decision arises in the context of applications to intervene, the principles in *SARDA v Regional Land Claims Commissioner and Others* 2017(5) SA 1 CC at paras 9-11 echo the requirements of necessity as opposed to convenience.

an encroachment of private property and does not deal with any common area or exclusive rights area which will affect the body corporate and individual owners.

[41] The respondent's contention that there is a material non-joinder of the municipality is also misplaced. The encroachment relates to a dispute between neighbours under the common law⁴ and does not in any way impact on the municipality. The relief that is sought is not in terms of the National Building Regulations and Building Standards Act, 103 of 1997. The municipality does not have an interest as it relates to a dispute between neighbours under the common law.

[42] Any structural alterations that may be required to the respondent's property consequent upon the granting of the relief would still require the passing of plans and oversight by the municipality and consequently, the municipality would not be adversely affected by the relief granted.

[43] As regards the non-joinder of CSOS, CSOS was established in terms of the Community Schemes Ombud Services Act 9 of 2011. It is a body established to deal with disputes relating to a body corporate. Section 38 and 39 of the Act deal with the nature of disputes which can be referred for dispute resolution and the relief which the Community Schemes Ombud can grant. The relief in the present application falls outside the ambit of the relief which CSOS is capable of granting as it does not fall within the disputes contemplated in the ambit of sections 38 and 39 of the Act. Consequently, the body corporate does not need to be joined as the dispute relates to property owned by the applicant and respondent and does not deal with any common area.

[44] As regards the defence of *lis alibi pendens*, a party wishing to raise such defence bears the onus of alleging and proving pending litigation between the same parties, based on the same cause of action in respect of the same subject matter. Once the requisites have been established, a factual presumption arises that the second proceedings are *prima facie* vexatious. The onus shifts to the party who

⁴ *Serengeti Rise Industries (Pty) Ltd and Another v Aboobaker NO and Others* (845/2015) [2017] ZASCA 79, *Readam SA (Pty) Ltd v BSB International Link CC and Others* 2017 (5) SA 184 (GJ)

instituted the second proceedings to convince the court that the new proceedings are not vexatious. To do so, such party must satisfy the court that the balance of convenience and equity are in favour of allowing the second case to proceed. A court however, has an overriding discretion to order a stay even if the elements of *lis alibi pendens* have not been established.⁵

[45] The two referrals which have been made by the respondent to CSOS are, in my view irrelevant to these proceedings. The first deals with the dispute over the bougainvillea tree and the second, although mentioning the subject of the dispute being the encroachment seeks a declarator that the respondent reasonably requires exclusive use rights over a certain part of the common area. This does not relate to the current dispute between the parties, and consequently there is no merit to the defence of *lis alibi pendens*. Given the facts in this particular matter, I am not disposed to ordering a stay of the proceedings in the circumstances as envisaged in Caesarstone.

[46] At the initial hearing of the matter, Ms Hennessy, who appeared for the respondent, submitted the court must hear the matter from a point of fairness and equity. Her submissions can be summarised as follows namely:

46.1 the removal of the encroachment will have a cascading effect on the neighbours of the adjacent properties in the scheme;

46.2 the applicant has resided on the property for a period of two years and what precipitated the application was an argument between neighbours over essentially a nuisance being a bougainvillea bush which resulted in the breakdown of the neighbourly relationship between them;

46.3 the removal of encroachment would have huge financial implications for the respondent and his wife, and consequently the court ought to consider the alternative of compensation as opposed to demolition;

⁵ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 SCA

46.4 the respondent has enjoyed undisturbed possession of the property for a period in excess of six years;

46.5 he received permission from the body corporate to erect the carport and gate;

46.6 the applicant was aware of the encroachment as the previous owner informed him of this at the time of him purchasing the property in October 2018 and did nothing about this;

46.7 the timing of the institution of the application follows an altercation between the parties in which the applicant threatened to take steps against the respondent;

46.8 the respondent had attempted to resolve the matter by the body corporate to no avail;

46.9 any order which the court grants would potentially cause further disharmony in a relationship between neighbours.

[47] In a dispute like the present where there is an encroachment, the landowner has a choice between three remedies, namely the removal of the structures, ejectment and compensation for the value added to that land or transfer of the encroached area. A view was held that the right to insist on the removal of the encroachment is lost if the owner elects to do nothing and with the full knowledge of all relevant facts does not insist on removal for a year and a day. This was the applicable rule in English law. The year and a day rule, it was decided, was not received in South African law and was not part of our law.⁶

[48] In *Rand Waterraad v Bothma and Another*⁷, the court confirmed that the one year and a day rule does not form part of our law and that reasonableness and

⁶ Silberberg and Schoeman Law of Property, Fifth Edition

⁷ *Rand Waterraad v Bothma and Another* 1997 (3) SA 120 OPD

fairness were prominent factors as well as an attitude of mind in determining what a remedy ought to be. At paragraph 133I-134B, the court held the following:

“Neighbour law sought to harmonise the property interests of neighbouring property owners. Reasonableness and fairness were prominent factors: not only were considerations of fairness and reasonableness important in the limitation of a subjective right, but attitude of mind also played an important, although not necessarily decisive, role in determining what conduct was unlawful and what was not.”

[49] In circumstances where an owner allows the encroachment on the clear understanding and subject to the condition that he or she may demand a removal at a later stage, then the court does not have the discretion and has to order a demolition. Our courts have also recognised that they have a discretion to award damages instead of an order for removal if the justice of the case is met by such an award. This would be, for example, where the cost of removing an encroachment would be excessive in comparison to any damage or inconvenience which a plaintiff may suffer.⁸ Where an award for damages is made instead of an order for removal, an order for transfer of that portion of the land encroached upon may, in an appropriate case, be made as “incidental to and consequent upon” such an award.⁹

[50] Kumleben J stressed that an order for transfer of the portion of land encroached upon is merely incidental to an award for damages as the latter is the true basis for the granting of relief.¹⁰ The academic Scott¹¹ opines that if a court refuses to order the removal of an encroachment but orders payment of compensation in the interests of legal certainty, a court should also order payment of solatium and transfer of the land in the name of the encroaching owner at the latter's expense. In this particular matter, the respondent admits that I must treat this case as an exception and determine the issues based on equity and fairness in terms of

⁸ *Rand Waterraad v Bothma and Another* at 138H-I

⁹ *Meyer v Keyser* [1980] Vol 2 All SA 119 (D) at 201

¹⁰ At 201

¹¹ S Scott “Recent developments in case law regarding neighbour law and its influence on the concept of ownership” (2005) 16(3) Stellenbosch Law Review 351-377

the principles of neighbour law and order payment of compensation as opposed to demolition.

[51] As was stated in the *Fedgroup Participation v Trustee, Capital Property*¹² our law has always carefully protected the right of ownership, especially of immovable property as an important and extensive right. In *Phillips v South African National Parks Board*¹³ the court held the following:

“It is indisputable that an encroachment of the nature and issue in the instant case constitutes an interference of the applicant's property rights, such as to constitute a deprivation in terms of the provisions of section 25 of the Constitution. It follows that, in exercising its discretion, the Court will accept, as a starting point, that the owner is entitled to obtain a demolishing order in respect of the encroaching structure. The primary remedy therefore is an order for the removal of the structure.”

[52] If an encroachment is the only problem, then the court has a discretion to either order the removal of the encroachment or to award damages and compensation.¹⁴ The deciding factor in such instances is the disproportionality or otherwise between the removal of the encroachment as against the damage or inconvenience suffered by the aggrieved land-owner.¹⁵ Having regard to the decision in *Fedgroup* at paragraph 35 where court orders compensation as opposed to demolition it is normally done on the basis of policy considerations such as an unreasonable delay on the part of the landowner, or what might be viewed as acquiescence, and prejudice and the principles of neighbour law are to be taken into account.

[53] In *BSB International Link CC v Readam SA Pty Ltd*¹⁶ the Supreme Court of Appeal held that although the court has discretion to reach an equitable and

¹² *Fedgroup Participation v Trustee, Capital Property* 2015 (5) SA 290 SCA at para 33

¹³ *Phillips v South African National Parks Board* 2010 JDR 048 (ECG) at para 24

¹⁴ *Lester v Ndlambe Municipality* 2015 (6) SA 283 SCA at para 22

¹⁵ *Lester supra* at para 22, *Rand Waterraad v Bothma supra* at 138, *Phillips v South African National Parks Board supra* at para 24, *Trustees Brian Lackey Trust v Annandale* 2004 (3) SA 281 CPD at para 23

¹⁶ *BSB International Link CC v Readam SA Pty Ltd* 2016 (4) SA 83 SCA at para 26

reasonable solution in terms of the common law by ordering payment or compensation as opposed to demolition, where the cost of removal will be disproportionate to the benefit derived from the removal what tipped the scales against *BSB* was that it had been warned it had been acting illegally. The facts of *BSB International* however are distinguishable as in such matter, the respondents had been warned by the municipality since 2016 to remove the encroachment but refused to do so. What is noteworthy about the decision in *Lester*¹⁷ is that when the court applies the disproportionality of prejudice test an encroaching owner's own conduct plays an important role.

[54] I agree with the authorities that this court has a wide and equitable discretion, having regard to the principles of fairness and reasonableness to award damages in a given situation, as opposed to the demolition of the encroaching structures. This wide and equitable discretion is consistent with our law and similar situations found in claims for enrichment, specific performance or interdicts. The rigid adherence to the primary remedy of demolition of an encroachment can, in my view, have unjust results. The purpose of the exercise of a court of its discretion is to prevent such unjust results and do justice between man and man.

[55] In *BSB International Link*¹⁸ the court reaffirmed the common law position that a court is vested with a discretion by holding as follows:

“In the case of encroaching structures the owner of the land which is encroached upon can approach the court for an order compelling his or her neighbour to remove encroachment.... Despite the above rule, the court can, in its discretion, in order to reach an equitable and reasonable solution, order the payment of compensation rather than the removal of the structure.”

[56] The default position is that an owner has a clear right to the removal of an encroachment. However, the discretion to award demolition exists even when it causes a severe limitation on an affected landowner's rights. The discretion to award

¹⁷ *Lester supra* at para 28

¹⁸ *BSB International Link CC supra* at para 24

compensation instead of demolition is wide and equitable and one must consider the surrounding circumstances of a particular matter (*Rand Waterraad v Bothma*).

[57] Fairness, equity and reasonableness are among the considerations. A court has a discretion to refuse demolition “where the costs of removal would be disproportionate to the benefit derived from the removal” (*Trustees Brian Lackey Trust v Annandale*).

[58] In my view the applicant’s insistence on the respondent removing the encroachment, by demolition and having to reinstate the driveway is opportunistic. The cost of demolition for the respondent is substantial on the applicant’s own estimations. Given the circumstances of this particular matter, it is just and equitable as well as reasonable for the applicant to be compensated for his loss and the respondent has tendered compensation.

[59] This matter is unlike the matters involving a contravention of the National Building Standards Act, where a party proceeds nonetheless, despite warnings and contravention notices issued. The respondent in these proceedings had sought the permission of the body corporate, which was granted.

[60] That brings me to the next issue being that of the value to be placed on the encroachment. The property valuers do not agree on this. I have had regard to the reports, and I am of the view that the estimate placed by Roper and Associates is a far more realistic figure and market related for the encroachment. I am also mindful of the fact that apart from placing a market related value on the encroachment, there are other costs associated with the conveyancing required to cancel the existing exclusive use areas, the registration of the new exclusive use areas and the bondholders consent. Although the applicant has placed a value of R45 000.00 thereon, the respondent has indicated that, should this court be amenable to granting an order for directing the transfer he would be entitled to instruct his own conveyancer and may obtain a lesser quotation to effect this.

[61] In determining that compensation is a fair and equitable order given the facts of this matter, I have had regard to the quotations from KP Engineering and DC

Brothers Industries obtained by the applicant. He instructed both entities to provide three separate figures in their quotations catering for three steps, namely the removal of the encroachment, the widening of the respondent's existing driveway and the creation of a new driveway on the opposite side elevation.

[62] A further consideration relates to the aspect of *solatium* as indicated by Scott. I can find no decided authorities dealing with this aspect. In any event, I am of the view that the facts do not warrant an award. Any award would not be in keeping with the with the traditional line of cases in which *solatium* is awarded.

S 25 of the Constitution

[63] There has been much debate about whether an award for compensation coupled with an order for transfer of the property constitutes an arbitrary deprivation of property.

[64] In *Trustees Brian Lackey Trust v Annandale*, the parties had agreed that the "law of general application" included a reference to the common law. In this particular matter, neither of the parties raised nor argued the constitutionality of an award for compensation and resultant transfer in the context of s 25 of the Constitution. Based on the oral and written submissions the parties in this matter proceeded on the basis that a court has a discretion in certain circumstances to order compensation instead of demolition. This court need say no more about s 25 of the Constitution.

[65] It warrants mentioning that valuable judicial resources could have been saved, as well as costs and inconvenience to all concerned if the body corporate had resolved the matter much earlier on. I have no doubt that given the cascading effect of the driveways, this order may very well result in consequential litigation and demands for transfer and re-establishment of the common areas throughout the scheme.

[66] What may be considered as a victory to the applicant, may eventuate into a hollow one. He may very well be faced with a similar action by his neighbour given

the encroachment of all the driveways. It is incumbent on the body corporate to give serious consideration to re-aligning the common areas.

Costs

[67] The usual rule is that costs follow the result. During the course of argument and the various court hearings as well as in his written submissions, the applicant persisted in seeking an award of costs. There was no proposal from either of the parties that each party should bear its own costs. Although the applicant has not succeeded in his primary relief, he has had to approach the court in order to find a resolution to the matter.

[68] The question remains whether the respondent ought to be mulcted with the costs occasioned by the entire application. The respondent had never denied the encroachment and has throughout, in my view, behaved in a responsible manner. The body corporate had provided him with permission to erect the carport and his driveway and the boundary wall.

[69] Although I accept that the applicant was entitled to seek a resolution in the matter, this was not due to the recalcitrance of the respondent, but as a consequence of the applicant's *mala fides* in bringing the application and not seeking to resolve it via alternative means. This was a matter which cried out for alternate dispute resolution and more so for the body corporate and managing agents to actively get involved to resolve the matter. It does not bode well for good neighbour law for parties to resort to litigation given that they both reside in the same scheme next to each other.

[70] It would have been a simple matter for the body corporate to have intervened and possibly cut down the tree, which may not have necessitated the application. In my view, the applicant would only be entitled to costs occasioned by the institution of the application and the initial court hearing. Thereafter each party would be liable for the costs occasioned thereafter. These costs would be on scale A.

[71] This is due largely to the conduct of the applicant, but also as a consequence of the fact that both Mr Mizrachi and Ms Hennessy, who appeared at the hearing on the first occasion had to concede that no alternatives to demolition were considered specifically, given the change in our law and the fact that courts, in circumstances where encroachment or buildings were erected with parties being unaware thereof, have been reluctant to order demolition.

Order

[72] In the circumstances, the following order is granted:

1. The relief in paragraph 1 of the notice of motion is dismissed.
2. The respondent is directed to pay the applicant the sum of R11 500.00 as compensation for the encroachment which the parties agreed is 46m² in extent.
3. The amount referred to in paragraph 2 above is to be paid within 21 days of receipt of the order.
4. The respondent is directed to do all things necessary and incidental to ensure the transfer and registration of the encroachment into his name.
5. The respondent is directed to pay the costs occasioned by the application up to and including 22 June 2022, thereafter each party is directed to pay their own costs.

HENRIQUES J

Date Judgment reserved : 29 August 2024

Date of Judgment : 08 May 2025

Appearances

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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 14h30 on 8 May 2025.