



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2025-050045

In the matter between

**THE BODY CORPORATE OF MOOIVERWACHT
SCHEME NO. SS61/1988**

APPLICANT

AND

IRVIN JOHNSON SWART

RESPONDENT

Heard: 27 June 2025

Delivered: 02 July 2025

JUDGMENT

THULARE J

ORDER:

(a) The rule *nisi* issued on 9 April 2025 and lapsed on 11 June 2025 is revived and extended to the date to be arranged in accordance with clause (b) of this order.

(b) Within 5 court days of this order, the parties shall arrange a date suitable to both in consultation with the Registrar responsible for the semi-urgent roll as the return date for the rule *nisi*.

(c) No cost order is made.

[1] This is an opposed urgent application for the revival of a rule *nisi* which was discharged on the return date, 11 June 2025. The rule *nisi* was issued on an *ex parte* basis on 9 April 2025. It was discharged due to non-enrollment of the matter for hearing. The applicant prayed that the rule be revived pending enrolment and finalization of the return date therein on the semi-urgent or opposed roll or as anticipated by the respondent.

[2] The rule operated as an interim interdict pending the finalization of action proceedings between the parties, and prohibited the respondent and/or his agents, employees, contractors and the like, from accessing or making ingress onto the applicant's property; effecting any demolition or building works on or to the border between the applicant's property and that of the respondent and that the respondent and/or his agents, employees, contractors and the like, were compelled to restore the boundary wall between the parties' properties and parts already demolished on 9 April 2025 and to cease with the removal of trees belonging to the applicant.

[3] The parties were engaged in settlement negotiations which failed on 17 June 2025. When the negotiations failed, the respondent proceeded to prepare foundations and to build supporting pillars for the intended boundary wall for which the respondent has approved building plans. The respondent advised the applicants of what he was doing and was advised that the applicant intended bringing this application and out of respect for the court process he temporarily held further construction over. There are action proceedings currently pending between the parties wherein the applicant claimed applicant's encroachment on his property, and the applicant has a counterclaim of acquisitive prescription in respect of the alleged encroachment. As things stand, the respondent's approach is that he is building a boundary wall which can be moved in due

course, on his property, and in terms of approved building plans. The respondent demolished the boundary wall which was the subject of the pending litigation. The respondent's reason was that he did so after he was advised by the City of Cape Town that his building plans were approved, that his actions were not unlawful or *mala fide* and that the wall was situated on his property, and that the wall was erected by the applicant unlawfully and without any building plans.

[4] Rule 27(4) of the Uniform Rules of Court provides as follows:

“27 Extension of time and removal of bar and condonation

(4) After a rule *nisi* has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.”

A rule *nisi* is an unusual indulgence to the applicant. It permits a court, at the instance of unchallenged and untested averments of an applicant, the exception to condemn a respondent in their absence and without being heard. It is an indulgence that pierces at the heart of the sacred principle of a court hearing the other side before deciding on an issue. The rule allows the court to run against the general grain of fairness in the judicial process. Amongst others, it is for this reason that the rule should be strictly temporary and for a fixed limited duration (*National Director of Public Prosecutions v Walsh and Others* 2009 (1) SACR 603 (T); *Does the life of a rule nisi automatically extend on postponement of return date?* Sinazo Ntshangase, De Rebus, May 1st, 2019, DR 10). It is solely the duty of the applicant, on the return day, to bring to the attention of the court the existence of the rule to enable the court to make an appropriate order to avoid the rule lapsing. The applicant omitted to deal with the life of the rule on the return date.

[5] The hearing of an application for the revival of a lapsed rule is not the right time to show cause why the rule should not have been made or should not be made final. The time for such is the return or anticipated date. The revival is limited to whether the rule

should be brought to life again, to become active. Where a respondent, like in the present case, has already filed opposing papers, it is natural that they would strive to have the issues crystallised in the rule itself, adjudicated upon in the revival application. This confuses issues. The revival is at the discretion of the judge hearing the application. The reasons for the default of appearance or failure for enrollment, the nature of the issues between the parties, the need to maintain the status quo, prejudice against any of the parties and the interests of justice are some of the factors to consider.

[6] I for one, frown upon legal practitioners throwing mud at each other or involving themselves in what I call character assassination of the other in order to look good, including on the reasons why a rule lapsed. Whilst there is a need to highlight and even address dereliction of duty or even sheer incompetence, we should never lose sight of the fact that legal representatives act on the complex paradox of the duality of instructions and legal advice. A litigation strategy which seemed simple, cost effective and achievable, like the pursuit of settlement out of court in a pending case, may suddenly and with the change of heart of the other side, with the benefit of hindsight, appear complex, costly and beyond reach. In this matter there is pending litigation involving the extent of the two adjacent properties of the parties, which litigation was initiated by the respondent in action proceedings. The respondent is aware that the boundary is contested. The respondent proceeded to act in accordance with his view of the boundary, and this necessitated the applicant to approach the courts to secure the rule. It may be so that the issue by the Municipality to the respondent, of approved plans for the boundary wall may have fortified his views and change of heart on settlement, but it did not resolve the live disputes between the parties. The two disputes are still live. The second dispute is whether the respondent should be stopped from proceeding with the construction of the wall pending the determination on the boundary. The first dispute is the correct substantive boundary between the parties. It is in the interests of justice that the two disputes, in the absence of settlement by the parties, be resolved by the courts. The respondent was well within his rights to have a change of heart during the settlement negotiations after the return date, but he cannot be heard to complain when such change brings about consequences in the litigation strategy of his adversary.

Ordinarily the applicant sought an indulgence from the court and would be liable for the costs. However, the respondent, in elevating the approved plans to resolution of the dispute, and his hardened attitude to what should be a simple flow of process, cannot go unnoticed and without any significance. For these reasons the order was made:

DM THULARE
JUDGE OF THE HIGH COURT