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

Case Number: 2024-003605

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: /NO
DATE: 02 July 2025
SIGNATURE

In the matter between:

N[...] C[...] M[...]

Applicant

and

**THE TRUSTEES FOR THE TIME BEING OF
THE RED CHERRY TRUST**

(Registration no: 35012002)

First Respondent

FORD: BRYAN CHRISTOPHER

Second Respondent

WEBB: CHANTAL

Third Respondent

**THE TRUSTEE FOR THE TIME BEING OF
MISSAIKOS INVESTEMENTS & HOLDINGS TRUST**

(Registration no: IT9324/03)

Fourth Respondent

JUDGMENT

AUCAMP AJ

INTRODUCTION

- [1] In a long-standing neighbour dispute concerning two adjoining residential properties, the central factual issue is the construction of a boundary wall approximately 22 years ago that was erected on the incorrect boundary line, resulting in a portion of one neighbour's property being encroached upon. Although the affected neighbour intermittently raised objections over the years, they took no steps to address the encroachment. The encroaching neighbour, acting in good faith, has since offered compensation, but the affected party now seeks a court order for demolition of the wall. Legally, the matter engages the principles of common-law rights of ownership and encroachment, particularly the default remedy of *removal* of an unlawful structure versus the court's equitable discretion to award compensation instead of demolition in appropriate circumstances. The present matter requires a determination of whether to order the demolition of the wall, alternatively to allow the encroachment to remain and to order the payment of compensation.
- [2] The applicant is the registered owner of an immoveable property, Portion 1 of Erf 2[...] B[...] 4[...] Township, ("**Portion 1**"). The first respondent ("**the Trust**") on the other hand is the registered owner of the adjacent immoveable property, Portion 2 of Erf 2[...] B[...], Extension 4[...] ("**Portion 2**"). Both properties are situated within the P[...] Estate ("**the Estate**") in B[...] and the two properties share a common boundary wall.

- [3] The applicant, albeit through a personal asset company, purchased Portion 1 in 2002 whereas the Trust became the owner of Portion 2 in 2003. Portion 1 was subsequently in 2010 transferred into the applicant's personal name.
- [4] The applicant alleges that she developed and built the house on Portion 1 and that it was subsequently discovered, after the foundations of the house had already been constructed, that the main building was built some 800mm further than was originally planned. The consequence of this error was that the front façade of the residence was too close to the boundary wall to access the car park next to the house. The error had a further knock-on effect in that the boundary wall needed to be built beyond the area covered by the servitudes originally planned and approved.
- [5] The net effect of the error was that an encroachment arose in that Portion 1 encroached onto Portion 2 by some 3.45 square meters. I pause to state that there is some dispute over the extent of the encroachment.
- [6] Subsequent attempts to remedy the error by certain interested parties failed.
- [7] The applicant admits the encroachment but denies any involvement in causing it. She further acknowledges that she was aware of the encroachment from the outset but laboured under the belief that the matter would be resolved by the relevant parties. It was only during a homeowners' meeting of the estate in 2007 that she became aware that the issue remained unresolved. As a result, on 11 June 2007, the applicant approached the first respondent and requested that the Trust provide her with a reasonable settlement value for the encroached area. This request was made because the applicant, rather than correcting the error years later, intended to compensate the first respondent fairly at that time.
- [8] The Trust, contrary to its undertaking to revert to the applicant with a proposed amount, failed to do so. Moreover, the Trust did not at that stage raise any objections and/or concerns over the encroachment. It bears mentioning that a similar encroachment exists between Portion 1 and Portion 3. The owner of

Portion 3 however has not taken any issue with the encroachment and instead has agreed to the regularisation of thereof without any demand for compensation.

[9] The issue between the applicant and the Trust received no genuine attention until November 2023 when the Trust issued the applicant with a letter of demand demanding that the encroachment be removed. The Trust did not insist on a new boundary wall being erected in the correct location.

[10] The parties, not able to resolve the dispute between them, approaches this court for resolution and proposes the following respective relief:

The Applicant

- a. Authorising the applicant to effect the registration of an encroachment servitude in perpetuity in favour of Portion 1, burdening Portion 2, over a portion of land by which Portion 1 is encroaching upon Portion 2 by 3,45 square meters as more fully depicted in the surveyor diagrams attached to the founding affidavit ("**the encroachment area**");
 - i. against payment by the applicant to the Trust for the fair market value of the encroachment area'
 - ii. the fair market value is to be determined by an expert land valuer nominated and appointed either by agreement between the parties within 20 (twenty) days of this judgment, failing such agreement, by an expert land valuer nominated by the South African Institute of Valuers, the costs to be borne by the applicant;
 - iii. the costs of the registration of the encroachment servitude to be borne by the applicant;
 - iv. the Trust be ordered to sign and/all documents necessary to effect the registration of the encroachment servitude in perpetuity within 7 (seven) days of demand by the applicant's conveyancer, failing which signature for any reasons, the sheriff be authorized to sign such documents;
 - v. the Registrar of Deeds is ordered to attend to the registration of the servitude upon application for same having been applied for by the

applicant's conveyancers, whether the servitude documents are signed by the Trust or by the sheriff.

- b. In the alternative to prayer a, the applicant seeks an order entitling it to take transfer of the encroachment area:
 - i. against payment by the applicant to the Trust for the fair market value of the encroachment area;
 - ii. the fair market value is to be determined by an expert land valuer nominated and appointed either by agreement between the parties within 20 (twenty) days of this judgment, failing such agreement, by an expert land valuer nominated by the South African Institute of Valuers, the costs to be borne by the applicant;
 - iii. the costs of the registration of the transfer of the encroachment area are to be borne by the applicant, such costs to include the surveyor's costs, surveyor general costs, subdivision costs and any transfer duty);
 - iv. the Trust be ordered to sign and/all documents necessary to effect the transfer of the encroachment area within 7 (seven) days of demand by the applicant's conveyancer, failing which signature for any reasons, the sheriff be authorized to sign such documents;
 - v. the Registrar of Deeds is ordered to attend to the registration of the transfer of the encroachment area upon application for same having been applied for by the applicant's conveyancers, whether the servitude documents are signed by the Trust or by the sheriff.

The Trust

- c. The Trust on the other hand seeks the vindication of the encroachment area, including the demolition and rebuilding of boundary wall.

THE LEGAL PRESCRIPTS

[i] Common-Law Right to Removal vs Court's Discretion

[11] In terms of the common law, a landowner whose property is encroached upon by a neighbour's building or structure has a clear right to demand removal of the encroachment. In ***Smith v Basson***¹, the court confirmed that a mandatory

¹ 1979 (1) SA 559 (W)

interdict or a removal order is available to compel a neighbour to remove an encroaching structure, since every landowner has a duty not to deprive an adjacent owner of possession of their property.² This reflects the traditional principle that one should not unlawfully build on or over someone else's land. Thus, as a point of departure, the Trust, *prima facie* has the right to insist that the boundary wall be demolished, and the encroachment ended.

[12] However, South African courts have also recognized that strictly enforcing removal in every case can lead to unfair or impractical outcomes. In recent decades, courts have developed a *discretion* to deny demolition and award compensation instead in appropriate circumstances.³ This aligns with the trend towards balancing the rights of the landowner against considerations of equity, hardship, and public policy. Whilst an owner is ordinarily entitled to the removal of an encroachment, a court may depart from that primary remedy in *exceptional* cases to avoid an unjust result.⁴ The Western Cape High Court in **Mbane** *supra* summarized the position, i.e the default remedy for encroachment remains removal, but the court has a wide, general discretion, in appropriate circumstances, to award damages instead of demolition.

[13] The court's discretionary power was first acknowledged in **Rand Waterraad v Bothma**.⁵ In that case, the court undertook a comprehensive review of old authorities, including the so-called “*year and a day*” rule and concluded that there is no automatic prescription or time-bar that deprives the affected owner of the removal remedy.⁶ Even so, the court in **Rand Waterraad** *supra* emphasized the need to balance the interests of both parties and held that only exceptional circumstances would justify deviating from the normal rule of demolition. In other words, a court will not lightly refuse an innocent

² Mbane v Gxenyana and Another (14211/2022) [2023] ZAWCHC 91 (2 May 2023)

³ See: Compulsory Transfer of Encroached – Upon Land: A Constitutional Analysis; Z Boggempoel

⁴ Mbane *supra* at [41]

⁵ 1997 (3) SA 120 (O)

⁶ The “year and a day” rule – an old Dutch notion that of an encroachment stood for a year without objection to the owner lost the right to removal, was found not to be part of the South African Law.

landowner's demand to reclaim their property; it must be convinced that fairness strongly favours leaving the encroachment in place.

[ii] Tacit Consent, Delay, and Estoppel (Acquiescence)

[14] The encroachment has existed for approximately 22 years, during which the Trust, on the odd occasion, raised the issue, primarily with the homeowners' association, but took no formal action address the encroachment. This failure to act can be interpreted as a form of tacit consent, or at least acquiescence, to the wall's position. It could be argued that the Trust, effectively for 22 years allowed for the encroachment to persist and it would be unfair to now insist on demolition. In law, such approach would be framed in terms of estoppel or acquiescence – essentially claiming the Trust's inaction amounted to an implied permission or waiver of strict rights. Indeed, the court in **Rand Waterraad** *supra* observed that a long delay in bringing an encroachment claim might signal acquiescence or lack of real prejudice, and it noted that one could explain the decision to award compensation in that case on the basis of prescription or estoppel due to the delay. A 22-year delay is substantial and would weigh heavily in the applicant's favour as an "*exceptional circumstance*" justifying a departure from the default rule. The fact that the Trust only periodically objected without taking action may suggest that the encroachment was not viewed as an urgent or intolerable infringement until now.

[15] That said, mere inaction or passive knowledge of an encroachment does not automatically strip a landowner of their rights. True "*tacit consent*" (acquiescence) requires more than just silence. There must be evidence that the landowner knowingly waived their right or led the encroacher reasonably to believe the situation was accepted. In **Higher Mission School Trustees v Grahamstown Town Council**⁷, the court held that even if a plaintiff should have known of an encroachment for some time, that alone was insufficient to prove they acquiesced to it. In casu, the complainant did voice objections, which may indicate that they never truly accepted the wall as correct, which undermines any claim that they gave full consent. There was no express

⁷ 1924 EDL 354

consent or agreement about the shifted boundary – only a failure to enforce their rights sooner.

- [16] However, on the authorities referred to, the 22-year inaction constitutes a strong factor in equity. The long delay could indicate that the encroachment caused no serious interference with the Trust's use of the land. Perhaps the affected area was minor or not needed, and that Trust tolerated the wall for over two decades. This might not meet the strict test for estoppel which would bar the claim entirely, but it certainly favours the applicant's plea for a compensatory solution rather than demolition.

[iii] Balancing Prejudice: Demolition v Compensation

- [17] Encroachment disputes, it seems to me, are approached from a neighbour-law reasonableness approach. The goal is to harmonise the neighbouring owners interests and reach a fair outcome in light of all circumstances. As the Cape High Court in **Mbane** *supra*⁸ explained, the aim is to achieve "*harmony in the relationship between neighbours when conflict arises*", rather than a rigid enforcement of bare legal rights. This means weighing the relative prejudice each party would suffer from either granting a demolition order or denying it.

- [18] In **Trustees of the Brian Lackey Trust v Annandale**⁹ the defendant's building encroached on the plaintiff Trust's land. Initially, the Trust offered to buy the affected portion and even the whole property from the neighbour, indicating a willingness to resolve the matter with money. Negotiations failed and instead the neighbour demanded an exorbitant sum, and the dispute went to court. The court confirmed that it had a wide equitable discretion in encroachment cases and that considerations of reasonableness and fairness are paramount in neighbour-law disputes. Significantly, it was noted that courts have a natural aversion to ordering the demolition of valuable structures where a monetary compensation could suffice. The court found that the neighbour (Annandale) had effectively been open to selling the land for a price before, so his insistence on removal appeared driven by profit rather than genuine injury. The

⁸ At [55]

⁹ 2004 (3) SA 281 (C)

encroacher's hardship if forced to demolish was far greater than the inconvenience to the landowner if the structure remained. Therefore, the court exercised its discretion to deny the demolition. It ordered that the encroaching structure could remain and declared that the neighbour was not entitled to demand its removal, provided that the encroaching party pay compensation. This outcome demonstrates that where an affected owner has shown willingness to accept compensation or has delayed so long that compensation seems fair, a court will be reluctant to grant a demolition order. The guiding principle is that no one should unreasonably refuse a monetary solution if the intrusion is slight and money can make them whole.

[19] In ***Rand Waterraad v Bothma***¹⁰ a public utility's structure encroached on private land. The court similarly stressed balancing the parties' interests and noted that if strict adherence to the common law rule would lead to a grossly unjust result, the court is justified in deviating from it. In ***Rand Waterraad*** *supra* one factor which the court regarded as relevant to its decision was the landowner's long delay in objecting suggesting the encroachment was not causing significant harm. The court used its equitable discretion to permit the encroachment to remain with compensation, rather than order removal.

[20] In ***Phillips v South African National Parks Board***¹¹ the Eastern Cape High Court, a large "*predator-proof*" fence was built by SANParks that encroached substantially incorporating approximately 20 square metres of the neighbour's land. The landowner sued for removal of the fence. SANParks argued in support of leaving it in place and even asked the court to order a transfer of the encroached land to them if the fence stayed. The court balanced the hardships and found that the prejudice to the landowner if the fence remained (*loss of a substantial portion of land and property rights*) outweighed the prejudice to SANParks of moving the fence. For the fence to remain, the landowner would effectively be forced to surrender ownership of the strip of land behind the fence. A forced sale, the court deemed unjustifiable and constitutionally problematic. The court noted there was no compelling reason to deprive the

¹⁰ 1997 (3) SA 120 (O)

¹¹ 2010 JDR 0480 (ECG)

owner of his property by transferring it to the encroacher, and doing so without a law authorizing such deprivation would violate Section 25(1) of the Constitution. Consequently, the court refused compensation as a solution and ordered the fence to be relocated to the true boundary. **Phillips** *supra* demonstrates that if leaving the encroachment would significantly impair the owner's property rights or require effectively expropriating land, the courts lean toward removal.

[21] In **Roseveare v Katmer**¹² a boundary wall encroaching in segments with a kink. The court took a split approach and it ordered demolition of the portions of the wall that were significantly encroaching but allowed a minor encroaching portion to remain in place. Uniquely, the court went further and ordered the registration of a servitude in favour of the encroacher over that remaining encroaching area. In other words, it formally adjusted rights by granting the encroacher a legal servitude for the wall. This approach was intended to clarify the parties' rights going forward. However, legal commentators have criticized this solution as potentially unconstitutional absent explicit statutory authority, since it forces an unwilling landowner to endure a permanent property right in favour of the neighbour. The key takeaway is that the courts are willing to be flexible – even creative – in resolving longstanding encroachments, sometimes tailoring the remedy by removing what is untenable and legalizing what is trivial or benign.

[22] In **Mbane v Gxeny**¹³ a boundary wall built in the wrong place was discovered after about 15 years, and the encroached upon owner urgently wanted to build on that area. The court reaffirmed that the primary remedy is still removal and placed the burden on the encroaching party to prove why compensation should be substituted. Because the encroached owner in **Mbane** *supra* never acquiesced or showed willingness to accept money, instead she objected as soon as the encroachment was known and needed the land for a building project. The court saw no reason to spare the wall. The encroacher's claimed hardship, losing a parking space, was minimal and unsupported by evidence.

¹² 2013 JDR 0329 (GCJ)

¹³ (14211/2022) [2023] ZAWCHC 91 (2 May 2023)

However, the prejudice to the complainant if the wall stayed, she'd be unable to extend her house as planned, losing significant property value, was far greater. The court held that financial compensation was not an adequate alternative in those circumstances, because money could not enable her to use her land as intended. Thus, demolition was ordered, with the court pointedly noting that an encroacher cannot simply propose to pay money without solid grounds to deny the neighbour the use of their land. *Mbane supra* underscores that when an encroachment actively interferes with the owner's developmental plans or use of their land, courts will enforce the owner's property rights and not force them to accept damages.

[23] From these cases, certain practical guidelines can be distilled. The court will compare the harm caused to each side by either outcome. Relevant factors include:

- a. The extent of encroachment, minor or substantial area, the usefulness or value of the structure (*is it a major building or a simple fence?*).
- b. The cost and feasibility of removal (*would demolition be disproportionately expensive or even wasteful?*).
- c. The behaviour of the parties (*did the encroacher act in good faith or deliberately?*).
- d. Did the owner protest or tacitly allow it to continue?; and
- e. Whether compensation can truly make up for the loss to the landowner, especially if the owner's plans are thwarted, no sum of money may substitute for the use of their own land.

[24] Courts also consider broader notions of fairness and neighbourliness – for example, whether one party is acting out of spite or opportunism rather than genuine injury. Importantly, if the innocent owner has in fact been willing to accept compensation or negotiate (as evidenced in **Brian Lackey Trust** *supra*), a court will be reluctant to grant a demolition order against the encroacher. Conversely, if the owner always insisted on removal and has legitimate need of the land, the court gives significant weight to their property right.

[25] The applicant objects to the demands made by the Trust on the grounds that (a) a demolition of the boundary wall will put her at a security risk and remove all privacy between the two properties, (b) diminish the value of Portion 1 and (c) she would not be able to drive her vehicle around to the parking area situated on the side of her residence and in which instance she will not have enough space within the boundary of Portion 1 to do so. I find no merit in the first two grounds. A security risk, if on existence, given the fact that Portion 1 is situated in an estate will be temporary until the new wall is constructed. The apparent diminishing value is non-existent. The encroached area is part of Portion 2 and should not form part of Portion 1, especially in determining the value of Portion 1. However, the third ground may have some merit.

[26] The applicant continues to allege that the Trust, ever since 2007, at no stage used or raised any issue regarding the encroached area. However, so the applicant alleges, when she intended to sell Portion 1, the Trust decided to install a water purification plant on the encroached area. The Trust furthermore confirmed for the first time in these proceedings, that it was not interested in any form or compensation in exchange for the ownership / right to use the encroached area. The Trust went further and threatened the applicant with court action seeking an order interdicting the intended sale and transfer of Portion 1 if its demands were not complied with, i.e the demolition of the boundary wall.

[27] The Trust disputes the extent of the encroached area. The applicant states the encroached area at 3.45 square meters whereas the Trust sets it at approximately 23 meters in length or 11 square meters. The Trust alleges that the encroachment extends the entire boundary wall between the two properties.

[28] The Trust denies that it was understood by all of the interested parties that the servitude diagrams were or would be rectified to regularise the encroachment by Nedbank / BOE. At least, the Trust denies such an understanding on its part.

[29] In relation to the allegations concerning the Trust's inaction since 2008 the Trust, in vague and unsubstantiated remarks, alleges that the issue was

continuously raised at homeowners' meetings. Save for the minutes of the meetings of 5 September 2006, 11 June 2007 and 11 September 2008, no other minutes of meetings recording the raising of this issue by the Trust are provided. And even on the Trust's version, the minutes do not record a clear and unequivocal insistence on the demolition of the boundary wall. To the contrary, the minutes of 11 June 2007 records the Trust's willingness or openness to entertain the offer made by the applicant.

[30] Even if the version of the Trust is to be accepted that the issue was raised repeatedly at homeowners' meetings, it was resolved at the meeting of 11 September 2008 that the issue did not concern homeowners' association and instead the issue was between the respective owners of Portion 1 and 2. The Trust clearly intended to resolve the issue through the homeowners' association, however when the decision was made on 11 September 2008 that it did not concern the homeowners' association, the Trust should reasonably have changed tact. Notwithstanding, the Trust alleges that it again attempted to raise the issue at subsequent meetings.

[31] The Trust alleges that no inference should be drawn from the fact that it failed to take legal action sooner, from 2003 until 2024, against the applicant to obtain a court order for the demolition of the boundary wall. The explanation consists of a divorce in 2006, the raising of three children and the running of his own business left the Trust hopeful that the issue could be resolved amicably. The believe that the issue would be resolved is simply not born out by the Trust's own account of events, especially the exchanges between the applicant and the Trust in a meeting, the date of which is not provided, but at which meeting the applicant apparently said to the Trust: *"I am not discussing this with you", "Let me shut you down right now", "If this is about the wall, I am not discussing it", "Go f..k yourself", "F..k you" and "Why don't you sue me. I've got the best lawyers in town. They will chew you up and spit you out."*

[32] I am not persuaded by the Trust's explanation for having failed to take any decisive action earlier. Equally, the explanation advanced why the Trust, after all the years of having done no more than raising the issue at homeowners'

meetings, decided to, at this stage only, insist that the encroached area be returned, is less than convincing. This is especially true taking into account that the Trust for a period in excess of 20 years paid for municipal services and rates and taxes in respect of the entire extent of Portion 2 which included the encroached area and of which it had no access to or use and enjoyment. It was only when it became known that the applicant intended to sell Portion 1 that the Trust decided to take decisive action. And the reason advanced, is the sudden need to install a water purification plant including the drilling of a bore hole and the best location for such plant, happens to be in or at the encroached area. The Trust's assertion that the encroached area was the most suitable location for the intended plant is founded on the expert view of a certain Mr Roy Cross of Raincor Irrigation Maintenance CC. Save to rely on his 20 years of experience in the industry, Mr Cross provides no factual basis for his conclusion as far as the location of the plant is concerned.

- [33] It is trite that a court is not bound by the opinions expressed by an expert and that the court is required to determine the issue, even of an expert nature, for itself. Rule 36(9)(b) requires of a litigant who intends to lead the evidence of an expert to deliver a summary of such expert opinion and his / her reasons therefor. In **Coopers (SA) (Pty) Ltd v Deatshe Gesellschaft für Schädlingsbekämpfung mbH**¹⁴ held that the summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion (i.e the opinion). IN this regard Wessels JA stated:

“As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on [sic] data, which are either common cause, or established by his or own evidence or that of some other competent witness.”

- [34] It is rather challenging to understand and appreciate the value of the evidence presented by Mr Cross as there is simply no way of establishing on what basis he arrives at his conclusions. It is impossible to interrogate his evidence. Mr Cross refers to “*the high incidents of water outages*”, he states that: “*After*

¹⁴ 1976 (3) SA 352 (A) at 371B

looking around your property, and divining for water, the best spot for drilling is in my opinion on the north-east side over the wall from your swimming pool pumphouse: the filtration on average will need a space roughly three meters by one meter.”

[35] The fact that the applicant herself during November 2023 installed a borehole and water filtration system is of no moment. The issue is not whether a need was established for supplementation and filtration of water resources. The issue is rather the location where the system is to be established and according to the Trust, the best place would be the encroached area. If this was indeed to be accepted as correct, one does then wonder why the applicant's system was not installed and established at the encroached area. This may also explain why Mr Cross did not provide any reasoning to his conclusions.

[36] The applicant alleges that the sudden need expressed by the Trust is opportunistic, an allegation that is denied by the Trust. I think there is merit in the allegation. When it became known that the applicant intended to sell Portion 1, the Trust, must reasonably have realised that the applicant would not be able to sell the property unless the encroachment issue is resolved. It is for this reason that the Trust, not having taken any steps to assert its rights for a period of over 20 (twenty) years, suddenly threatened to obtain an interdict against any intended sale. The intended sale no doubt presented the Trust with a much stronger position to force a bargain, a position which was manifestly weaker prior to the intended sale. The fact that the Trust is not seeking any compensation from the applicant is no answer to the allegations of opportunism.

[37] The Trust takes issue with the alleged use by the applicant of the encroached area, i.e parking. The Trust alleges that the use of the encroached area by the applicant is a matter of convenience only and not of necessity. At best for the Trust, the current use of the encroached constitutes a dispute of fact which I have to approach on the version presented by the Trust. The (undisputed) fact of the matter is this: - the *status quo* has been the order of the day for a period over two decades if no more. The applicant may have used the encroached

area for a particular purpose in the past and the said use may change in future. The issue is not for what purpose the encroached area was used and will continue to be used. Instead, the issue is that the applicant has had the use of the encroached area for an extended period of time. On the other hand, the Trust, probably with reference to **Mbane** *supra*, seeks to establish an intention that the encroached area for purposes of drilling a bore hole and that the encroached area, is critical. I have already stated that I am not persuaded by the sudden intended use thereof and the importance to regain possession thereof.

[38] Furthermore, the Trust, up and until these proceedings and in response to a 2007 tender for payment has at no stage outrightly rejected the tender. To the contrary the 2007 minutes of the meeting of the homeowners' association contains the following recordal:

“[Ms Ferreria] wants time to consider both possibilities – financial compensation for her land or the reconstructions of the wall in a mutually agreed position.”

[39] The possibility of accepting a tender for compensation instead of an insistence that the wall be demolished, was repeated by the Trust's attorney of record in the letter of demand in 2023. More specifically, the letter records:

“... Further in this regard, whilst our client would be within its rights to compel you to take transfer of that portion of our client's property over which the encroachment exists against payment to our client of the value of such portion (in regard to which relief our client reserves its rights) our client intends to make use of the portion of our client's property over which the encroachment exists.”

[40] On the disproportionality of prejudice to the relief claimed, I accept the applicant's version that (a) the current *status quo* has been the default position for the last two decades, (b) the area of encroachment is rather small and insignificant, (c) the Trust has not established that the encroached area is the only place for the drilling of the intended bore hole, (d) the Trust has already established an alternative or reserve water system, i.e the tanks, (e) the Trust

will be compensated for the encroached area, (f) the demolition and replacement of the boundary wall will cause significant inconvenience, not only to the immediate parties to these proceedings, but possibly other members of the estate as well.

[41] If one therefore discards the suggestion that the boundary wall needs to be demolished as it is the most suitable area for the drilling of the bore hole it would seem to me all that remains of the Trust's opposition to the application and/or the counter application, is what was stated in *Trustees, Brian Lackey Trust v Annandale*:

“In the final analysis, the defendant's attitude and his counterclaim in these proceedings are based on anachronistic concepts of ownership: it represents a rigid and dogmatic insistence upon which his perceived absolute rights as owner, irrespective of broader considerations of social utility, economic waste and neighbourliness.”

[42] Against the aforesaid circumstances I am of the view that the demolition of the wall, *in casu*, will not promote the protection of the neighbourly relationship and instead will serve the individual interest of the Trust only. Furthermore, the demolition of the wall, *in casu*, does not establish a just and equitable result. Instead, I am of the view that the applicant's proposed resolve to the impasse, is the appropriate resolution.

[43] There are three further aspects that requires my attention. Mr Hollander, appearing for the Trust argues that (a) the approach adopted by the applicant is incompetent in that it is not open to the applicant to initiate steps to seek the relief that she claims. Instead, placing reliance on ***Fedgroup Participation Bond Managers Ltd v Trustee, Capital Property Trust***¹⁵the applicant can only do so reactively and in response to steps taken by the Trust to have the wall demolished, (b) the extent of the encroached area is disputed and (c) the determination of the amount of compensation, not an issue before this court, is complex and militates against the relief claimed.

¹⁵ 2015 (5) SA 290 (SCA)

[44] Mr Hollander, correctly in my view concedes that the first objection by virtue of the existence of the counter application, has become moot. The purported dispute over the extent of the encroached area for present purpose is irrelevant. The applicant's relief is limited to an extent of 3,45 square meters. No more. Lastly, the determination of the amount of compensation, is an aspect that a subsequent court can and should be able, with the assistance of the appropriate experts, be able to calculate. As such I am not convinced that the further grounds of objections carry any merit thereto.

ORDER

[45] In the result I make the following order:

- a. The applicant is entitled to take transfer of the portion of land by which the applicant's property is encroaching upon the first respondent's property (***"the encroachment area"***)
 - i. Against payment by the applicant to the first respondent for the fair market value of the encroachment area;
 - ii. The fair market value of the encroachment area is to be determined by an expert land valuer nominated and appointed either by agreement between the parties within **20 (twenty)** days of the handing down of this court order, failing such agreement, by an expert land valuer nominated by the South African institute of Valuers, the cost to be borne by the applicant;
 - iii. The costs of the registration of the transfer of the encroachment area are to be borne by the applicant (including the surveyor costs, surveyor general costs, subdivision costs and any transfer duty payable);
 - iv. The first respondent is ordered to sign any/all documents necessary to effect the transfer of the encroachment area within **7 (seven)** days of demand by the applicant's conveyancers, failing which signature for any reason, the sheriff is authorised to sign such documents;
 - v. The Registrar of Deeds is ordered to attend to the registration of the transfer of encroachment area upon application by the applicant's

conveyancers, whether the transfer documents are signed by the first respondent or the sheriff;

- b. The first respondent is to pay the costs of this application on the attorney and client scale.

NAME OF JUDGE

JUDGE OF THE HIGH COURT

JOHANNESBURG

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