

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

Case Number: 25-112741

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES (13 August 2025)

12 AUGUST 2025

In the matter between:

MICHAEL <u>FRIDJHON</u>	First Applicant
JANICE LYNN <u>FRIDJHON</u>	Second Applicant
and	
KWAMANZI INVESTMENTS (PTY) LTD	First Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Second Respondent
PROVINCIAL HERITAGE RESOURCES AUTHORITY, GAUTENG	Third Respondent
JOHANNESBURG HERITAGE FOUNDATION	Fourth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the applicant's legal representatives by e-mail and by uploading to Caselines.

Civil procedure – Order obtained *ex parte* – Reconsideration proceedings under Rule 6(12)(c) – Urgency – Relevance of delay in seeking – Non-applicability of Rule 6(12)(b).

Civil procedure – Order obtained *ex parte* – Unjustified – Discretion of court whether to set aside – Award of punitive costs even if order not set aside – Costs to be paid *de bonis propriis* by legal representatives.

Civil procedure – *Ex Parte* proceedings – Duty of utmost good faith to disclose and deal fairly with adverse material – Extends only to material that is objectively relevant to the order.

Property – Party walls – Threatened demolition – Neighbours' rights – Interdictory relief – Defences – Contravention notice and order issued by local authority under National Building Regulations and Building Standards Act, 103 of 1977, Section 12(1) – Satisfaction of – *Semble*: Sections 12(1) and 12(3): Powers of local authority upon forming opinion that building is dangerous to life and property to require submission of expert opinion – Party walls: duties of local authority to notify "owner" – Role of Courts, Separation of powers – Enforceability of administrative act that is not "a necessary precondition for the validity of consequent acts" which "exist in fact", *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) paras 31 – 38.

Moultrie AJ:

[1] This is a Rule 6(12)(c) reconsideration of an order issued in the urgent court on an *ex parte* basis at the instance of the applicants on 15 July 2025. In terms of

the order, the first respondent was interdicted from proceeding on the following day with its intended action of demolishing the boundary wall that separates two erven, owned by the first respondent on the one hand and the applicants on the other. The order as granted was framed as follows:

1. *The First Respondent is hereby interdicted and restrained from demolishing, either partially or completely, the boundary wall situated on the common boundary between Erf 6[...] Parktown Township and Erf 6[...] Parktown Township, unless and until it has the written consent to do so of the Applicants or it is ordered to do so by this Court; and*
2. *ordering and directing that the costs of this Part A of this application be costs in the cause of Part B.*

[2] The first respondent contends that the order falls be set aside upon reconsideration with punitive costs on the grounds that: (i) it was improper for the applicants to have sought and obtained the order without notice to it; (ii) the applicants failed to comply with their obligation of utmost good faith in seeking the order *ex parte*; and (iii) the order should in any event be set aside on the merits. The first respondent delivered an answering affidavit. Apparently satisfied with the case made out in their founding papers in view of the content of that affidavit, the applicants did not deliver a reply.

[3] In seeking to accurately identify the issues that arise for my determination, both in relation to the ‘procedural’ questions and in relation to the merits, it is necessary to emphasise certain salient features of the applicants’ case on the merits as advanced in their founding papers, and the defence that that the first respondent advances in response thereto in its answering affidavits.

[4] In his founding affidavit, the first applicant explained that first respondent had in late January 2025 indicated its intention to unilaterally (i.e. without the applicants’ consent) demolish the wall on 10 February 2025, on the basis of an unverified contention that the wall was located solely on its land. However, this threatened demolition did not proceed after the applicants pointed out to the first respondent that (i) the boundary wall is not located entirely on the first respondent’s land, “but straddles the boundary between the erven”; (ii) as such, it is “jointly owned” by the

parties; (iii) and it therefore had no right to unilaterally demolish the wall without the applicants' co-operation or consent; (iv) which was not forthcoming.¹

[5] I should immediately note that the legal proposition advanced in (iii) above is correct. The mere fact that the wall straddles the boundary (even though a significant majority of its bulk is on only one side) means that it is a 'party wall' *stricto sensu*,² and notwithstanding the academic debate as to whether the rights of neighbours in a party wall arise as a result of co-ownership of the 'whole' structure, or whether they each retain ownership of half of the wall to the median line and each have tacit servitudes of lateral support against each other,³ there is no doubt that neither owner may unilaterally demolish any part of a party wall or threaten its structural integrity, even by conduct undertaken only on 'their' side.⁴

[6] The applicants' belief that the first respondent had accepted that it was not "entitled" (i.e. of as of right) to unilaterally demolish the wall was borne out by subsequent conduct when, on 4 July 2025 the first respondent's attorneys indicated that it would be proceeding with the demolition of the boundary wall on 16 July 2025 – not on the basis of any claimed right to do so but on the basis that it was obliged to do so "so as to comply with" a Notice of Contravention that the second respondent (the City) issued to it on 4 July 2025, ostensibly under section 12(1) of the National Building Regulations and Building Standards Act, 103 of 1977. The contravention notice: (i) stated that the first respondent had "permitted the condition of the boundary wall ... to become dangerous to life and property"; and (ii) "ordered [the first respondent] to rectify [this] matter within 30 days ... by ... demolishing the boundary wall or to appoint a structural engineer to inspect and give written confirmation to the [City's] Council that the wall in question is structurally sound".

¹ Founding affidavit, paras 58 – 74. The first applicant also alleges that the applicants furnished the first respondent with a surveyor report confirming the position of the wall on the boundary. There is no indication that the allegation regarding the location of the wall has been in dispute at any subsequent time. In addition, the allegation that the wall is "jointly owned" is not disputed before me in this application.

² *Dorland v Smits* 2002 (5) SA 374 (C) at 382H-J.

³ Van der Walt, AJ. *The Law of Neighbours*. (Juta, 2010) pp. 71 – 77.

⁴ Van der Walt (above); Muller *et al Silberberg and Schoeman's The Law of Property*, 6 ed. (LexisNexis, 2020) p. 147; *Wiener v Van der Byl* (104) 21 SC 92 at 96; *De Meillon v Montclair Society of the Methodist Church* 1979 (3) SA 1365 (D) at 1371F.

[7] The first applicant alleged that the contravention notice was issued after the first respondent itself had requested the City's Building Inspectorate to inspect the boundary wall, and that it was addressed only to the first respondent. He also alleged that "no regard was had to the fact that the boundary wall is located [on both erven] and is owned by both" parties.⁵

[8] The applicants nevertheless proceeded to dispute the first respondent's reliance upon the contravention notice as imposing any obligation to unilaterally demolish the wall on the basis that "the requirement of written confirmation to the City referred to in the contravention notice" had been satisfied. In particular, they alleged that they had arranged for the boundary wall to be inspected on 11 July 2025 by a registered civil engineer, Mr Anderson, and that he had issued an inspection certificate in which he referred to the contravention notice and proceeded as follows:

2. I confirm that in my professional opinion the boundary wall is structurally sound and that it does not present any imminent danger to life or property as indicated in the Contravention Notice. My inspection of the boundary wall revealed that it is solidly founded on weathered granite rock and that there is no imminent danger of collapse, however it is suggested that detailed inspection of the weathered granite should be taken out.

⁵ Founding affidavit, paras 31, 34.3, 34.4, 75 and 80. Although none of these allegations is disputed before me, the applicants pleaded no case that the contravention notice was invalid and unenforceable. In the circumstances, it is not open to me to decide this matter on the basis that it was (cf. *DB v CB* 2024 (5) SA 335 (CC) paras 23 to 45). It is, however, appropriate to observe that it seems to me that the first respondent's purported reliance on the so-called "*Oudekraal* principle" is misplaced. In the first place, it does appear that the order in the contravention notice was, on its face, beyond the powers afforded to the City in terms of section 12(1) of the Building Standards Act. That section requires that the notice must be given to, and the "order" must be made against, the building's "owner" (defined in section 1 as meaning "the person in whose name the land on which such building ... is erected ... is registered in the deeds office"), which does not appear to have been the case here (cf. *Ekurhuleni Metropolitan Municipality v Volatire Investments* CC 2019 JDR 2484 (GJ) para 32). In addition, nothing in section 12(1) empowers the City to make an order such as the one contained in the contravention notice requiring the submission of an expert opinion. While section 12(3) provides for similar procedures, that subsection does not empower the City to make an order of demolition. In the circumstances, it seems to me that the City may follow the 12(3) procedure before forming the "opinion" referred to in section 12(1), but it may not form that opinion (or provisionally do so) and then make a demolition order conditional upon the views of some person who might otherwise have been appointed to perform functions under section 12(3) (cf. *Stellenbosch Municipality v De Canha NO and Others* 2025 JDR 1578 (WCC) paras 39, 46 – 50 and 59 - 61)). Secondly, given that there is no suggestion in the current matter that the validity of the contravention order "was a necessary precondition for the validity of consequent acts" which "exist in fact", it seems to me that it would be open to a party to refuse to comply with it, and to require the City to show that it was not *ultra vires*: see *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) paras 31 – 38.

3. *I also inspected the substantial excavations which have occurred on Erf 6[...] recently, and appear to be still in progress. To the extent that these excavations have removed any lateral support for Erf 6[...] and/or the boundary wall, I presume that the engineer responsible for such excavations will have complied with the requirements of the National Building Regulations and Building Standards Act insofar as those require measures to prevent instability to the adjacent Erf 6[...] and/or to any improvements thereon.*

4. *I was not able to do a detailed inspection however there is a deep excavation next door and appropriate measures must be undertaken to provide for the loss of lateral support until such time as a solid retaining wall is built.*

5. *That, however, does not detract from the fact that the immediate demolition of the boundary wall is certainly not necessary.*

[9] The first respondent went on to state that Mr Anderson's certificate would be furnished to the City's building inspectorate on Monday, 14 July 2025.⁶

[10] In view of the legal position set out in paragraph [5] above, it is apparent that the only issue that could potentially arise in relation to the merits of the applicants' pleaded case (either upon reconsideration or at the time of the *ex parte* application) is quite simply whether or not Mr Anderson's certificate served to satisfy the requirement of written confirmation to the City referred to in the contravention notice. Furthermore, in view of the limited scope of the first respondent's pleaded case before me,⁷ the only possible basis upon which I might find this not to be the case

⁶ Nothing in the papers that served before the court hearing the *ex parte* application, or before me for that matter, suggests that this was not done.

⁷ The first respondent's answering affidavit raises no dispute as to whether or not: the report: (i) is in writing or (ii) has been given to the City; or as to whether Mr Anderson (iii) was appointed by the first respondent; or (iv) is a structural engineer. The first respondent mounted a belated and unpleaded attack on Mr Anderson's credentials as a "structural engineer" during argument that was in no way foreshadowed in the answering affidavit. Again, it would be inappropriate and unfair for me to consider this question because it is one that may well have prompted the applicants to file a replying affidavit. I was advised from the bar by the applicants' counsel, apparently on the assumption that section 12(3) could have been invoked as the basis for the requirement of "written confirmation", that Mr Anderson, who is a civil engineer, is a "registered person" as contemplated in that section. What is more, it seems to me that that could well open the door to a consideration of the issues discussed in *fn. 5* above.

would be a finding that that the certificate itself does not “confirm that the wall in question is structurally sound”.

[11] However, for reasons that are not expressly stated (but which I assume arose at least partly from a desire to demonstrate compliance with their duty of utmost good faith as applicants for *ex parte* relief, and partly from the obviously fractious relationship between the parties), the founding affidavit included a wide range of bristling (and obviously disputed) allegations, including as to (i) whether, as a matter of objective fact, the boundary wall was indeed “dangerous to life or property” or “is structurally sound”; (ii) whether “the City can now be satisfied of [the boundary wall’s] stability by reason of the certificate”; (iii) whether the reports put up by the first respondent’s experts regarding the stability of the wall could be accepted;⁸ (iv) whose actions caused, or what the true reasons might be for, the current state of the wall; (v) the extent to which the demolition would affect the “amenity and usefulness” of the applicants’ home; (vi) whether the demolition would affect the cultural heritage of the area; and (vii) what inferences might be drawn from the first respondent’s unwillingness to disclose its approved plans to the applicants. Unsurprisingly, these allegations elicited similarly prickly responses from the first respondent in its answering affidavit.

[12] Critically, however, none of these were questions that the court hearing the *ex parte* application was required, let alone entitled, to decide,⁹ and none of the facts alleged in relation to them was relevant to its decision on the merits. I should also note that, in the absence of any counter-application by the first respondent, the question whether or not it possesses a right – as opposed to merely being obliged by the contravention notice – to demolish the wall on the basis of any factual

⁸ Although it is not the basis of the conclusion I reach as to the irrelevance of these three issues for the court’s decision, the finding of irrelevance has the effect of simultaneously avoiding a potential judicial overreach into the proper realm of the executive. I say this because it seems to me that the legislative scheme of section 12(1) of the Building Standards Act allocates the function of deciding (i.e. forming “the opinion”) whether or not a building (defined in section 1 to include “any wall”) is “dangerous or is showing signs of becoming dangerous to property to life or property” to local authorities such as the City, and not to the courts. Furthermore, the section proceeds to empower a local authority that has made such a decision (and not a court) to “order the owner of such building” to either demolish it, or to “alter or secure it in such a manner that it will no longer be dangerous or show signs of becoming dangerous to life of property” (or in certain circumstances to take such steps itself without notice and at the cost of the owner).

⁹ *DB v CB* 2024 (5) SA 335 (CC) paras 23 to 45.

conclusions that might possibly be capable of being extracted from the papers is similarly not a pleaded issue into which I may enquire.¹⁰

[13] In light of this discussion, the issues raised for my determination are quite simply the following:

- a. Whether the reconsideration application is urgent;
- b. Whether there was any basis for the applicants to have sought the order on an *ex parte* basis without notice to the first respondent and, if not, whether the order should be set aside for that reason alone;
- c. Whether the applicants failed to comply with their duty of utmost good faith in seeking *ex parte* relief and, if not, whether the order should be set aside for that reason alone;
- d. If the order does not fall to be set aside on either of the above grounds, whether it should be set aside on the merits, in relation to which the only pleaded dispute before me is whether Mr Anderson's certificate constituted "written confirmation that the wall in question is structurally sound"; and
- e. Costs, and in particular whether the applicants should, irrespective of the outcome, be ordered to pay the first respondent's costs on a punitive basis (either alone or jointly and severally together with their legal advisors on a *de bonis propriis* basis).

Urgency

[14] I do not accept the contention impliedly advanced in the applicants' heads of argument that the first respondent is required to meet the ordinary test for "objective" urgency as contemplated in Rule 6(5)(b) (i.e. that it "could not be afforded substantial redress at a hearing in due course"). Requiring a party seeking reconsideration of an *ex parte* order to demonstrate this would, in my view, only serve to encourage potentially unscrupulous applicants to seek far-reaching *ex parte* relief before the

¹⁰ Still less am I entitled or required to decide whether the boundary wall: (i) is "unsafe"; (ii) "poses a risk to life and property"; (iii) "does not meet the minimum acceptable structural engineering requirements"; (iv) is in a "dire state"; (v) has "structural defects"; (vi) is in a "precarious condition"; (vii) "does not require immediate demolition"; (viii) requires "further investigation"; (ix) is "stable"; (x) is "inherently stable"; (xi) "lacks structural integrity"; (xii) is "structurally defective"; (xiii) could "collapse"; (xiv) is in "danger"; (xv) is at "risk of possible collapse"; or whether any of the other multifarious adjectival descriptions advanced in the affidavits and reports may be correct.

overburdened urgent court and then rely on every means provided by the process for enrolment of matters on the opposed motion roll (for example by refusing to file heads of argument) in order to achieve an extensive delay in the reconsideration.

[15] In my view, the purpose of a rule 6(12)(c) reconsideration (i.e. to remedy the harm caused by the breach of the right to be heard) presumptively justifies its enrolment on the urgent roll, and such an application should be heard as long as the party seeking reconsideration it has not unduly delayed in doing so.¹¹ That is not the case here, and I am thus satisfied that the matter merits the attention of the urgent court.

Absence of any reason to seek relief without notice to the first respondent

[16] Although relief granted on an *ex parte* basis is always only “provisional”,¹² “it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of *audi alteram partem*”.¹³ In *Mazetti*, a full bench of this division held that this “sacred right” requires that “no decision adverse to a person ought to be made without giving that person an opportunity to be heard” and “in a court of law this norm is scrupulously observed”, save in rare and exceptional circumstances where “prudence dictates that ... pragmatism must be applied”.¹⁴ It seems to me that the

¹¹ I do not think that this approach is inconsistent with the statements in *Sheriff Pretoria North-East v Flink and another* [2005] 3 All SA 492 (T) at 497i that “nothing in rule 6(12)(c) suggests that such a respondent would be entitled to enrol the matter for reconsideration again on an urgent basis merely because the order had been obtained on an urgent basis” and that “a proper case will have to be put independently for reconsideration”. It also seems to me that it is reflected in the most recent decisions on the subject in this division (cf. *Caterpillar Financial Services South Africa (Pty) Ltd v Musor Consultants and Project CC* [2025] ZAGPJHC 763 paras 13 – 14; and *Hlabang Trading Enterprise (Pty) Ltd v Caterpillar Financial Services (Pty) Ltd and Others* [2025] ZAGPJHC 761).

¹² *Mazetti Management Services (Pty) Ltd And Another v Amabhungane Centre For Investigative Journalism NPC And Others* 2023 (6) SA 578 (GJ) para 1.

¹³ *Republic Motors (Pty) Ltd v Lytton Road Service Station (Pvt) Ltd* 1971 (2) SA 516 (R) at 518G.

¹⁴ *Mazetti* (above) para 1. According to the full bench, “the principle which governs whether to grant an order against a person without their prior knowledge is straightforward: only when the giving of notice that a particular order is sought would defeat the legitimate object of the order”. The court in *Republic Motors* (above) contemplated at 518G that such exceptional circumstances might, for example, be found to exist where an applicant shows that she harbours a “well-grounded apprehension of perverse conduct on the part of a respondent who is informed beforehand that resort will be had to the assistance of the Court, that the course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained”.

most authoritative pronouncement as to the circumstances that might qualify as being exceptional is that of the Appellate Division in *Knox D’Arcy*, namely that *ex parte* relief should only be sought and granted is where it is “very clear” that “justice cannot be served otherwise than by depriving the respondent of his right to be heard”.¹⁵

[17] In this case, the applicants made no allegations in their founding papers that were capable of sustaining any such conclusion.

[18] The first applicant alleged that that once the first respondent indicated on Friday, 4 July 2025¹⁶ that it intended to demolish the boundary wall on 16 July 2025, he was “advised that the short time period allowed was hopelessly insufficient to allow us to approach the above Honourable Court, even on an urgent basis if we were to comply with the relevant Practice Directive of the Gauteng, Johannesburg Division ...”. I was not referred to any practice directive of this court that governs the circumstances under which relief may be sought *ex parte* in a matter such as this, and I am not aware of any. It thus appears that that what was being referred to here was the directive that the urgent roll closes at noon on a Thursday for the following Tuesday and that “the applicant must properly consider the appropriate notice period to give to the respondent”.¹⁷ While the applicants’ concerns about the possibility of meeting the deadline for the closing of the urgent roll proved to be correct in view of the further attempts that were then undertaken to resolve the dispute without the need for litigation (including by means of an initial request for an undertaking that the threatened demolition would not proceed as threatened, and then an attempt to bolster this request this by means of a report procured by a civil engineer, Mr Anderson),¹⁸ I cannot see how that is of any relevance whatsoever to the question whether the first respondent should have been notified of the urgent application.

¹⁵ *Knox D’Arcy v Jamieson* 1996 (4) SA 348 (A) at 379H.

¹⁶ As will be seen from the discussion below relating to the applicants’ duty of utmost good faith, I accept that this is the date on which the “clock started ticking” for the purposes of urgency.

¹⁷ Judge President’s Revised Consolidated Practice Directive, 1 of 2024 (as amended), para 28.10.

¹⁸ In my view, these actions were reasonably taken in the circumstances, and I do not consider that these actions should be held against the applicants as having resulted in self-created urgency (see *Transnet Limited v Rubenstein* 2006 (1) SA 591 SCA paras 21 and 33), but in any event are not directly relevant to any issue requiring determination in these proceedings.

[19] What is of relevance is the allegation that the first applicant makes in his founding affidavit that, when these steps proved fruitless,

50. ... we were left with no option but to instruct Mr Frank and our counsel to work over the weekend and to prepare papers for the present urgent application so that it could be served on Monday, 14 July 2025 in the hope that the demolition of the Boundary Wall will be averted or at least postponed. We are, however, now left in a position where there is simply no time to approach the Urgent Court in the manner required by the relevant Practice Directive.

51. As a result, Mr Frank now holds instructions to arrange for our counsel to approach a Judge in chambers on Monday, 14 July 2025 or on Tuesday, 15 July 2025 and to seek an urgent interdict against Kwamanzi preventing it from proceeding with the demolition on 16 July 2025.

[20] Although I do not agree with the first respondent that any significance should be attached to the reference to approaching a judge in chambers,¹⁹ it does appear from this that, even as late as the evening of Friday 11, July 2025, the applicants and their representatives intended to “serve” the application on the first respondent, but that this intention was abandoned and a decision was evidently taken between that time and the time when affidavit was settled and signed on Sunday, 13 July 2025 not to do so, and not to give any notice at all. The reason for this decision is quite simply not explained in the founding affidavit. Certainly nothing is alleged that would give rise to any suggestion that there could have been any legitimate concern that the first respondent might, upon receiving notice of the application, “perversely” proceed with the demolition in advance of the threatened date (i.e. 16 July 2025), let alone prior to the hearing which took place on 15 July 2025.

¹⁹ It seems to me that this is the procedure stipulated in the Practice Directive for “late” enrolment of urgent applications (see para 28.6), and the applicants’ counsel expressly states in his heads of argument that he “presented the *ex parte* application in open court on Tuesday, 15 July 2025, [and is] in a position to confirm that, although I supplied a copy of the notice of motion and founding affidavit to the Judge’s registrar on the morning of Monday, 14 July 2025, so that his Lordship would have an opportunity to read them prior to the hearing”. I have no reason to disbelieve this statement, or his further statement that he “had no communication whatsoever with the learned Judge other than during my introduction to him in the presence of a number of other counsel in other matters on the urgent roll for that week, and in my address to the open Court”.

[21] In the heads of argument delivered by the applicants' counsel, the basis of the *ex parte* relief is described as follows: "the order was granted in the Urgent Court and on an *ex parte* basis because the demolition of the Boundary Wall was to occur on the following day and because of the irreparable harm the Applicants would suffer in consequence of the demolition". Assuming that this is correct (and I have no reason to doubt that it is) it again boils down to a contention that the sole basis for the absence of notice was urgency, and that a conscious decision was made by the applicants and their legal representatives not to notify the first respondent of the application.

[22] While urgency alone appears to have been considered as a potential basis for *ex parte* relief in *Republic Motors* (and while I do not exclude the possibility that there may be circumstances of truly extreme urgency that might possibly, on their own, justify the absence of any kind of notice – i.e. even in the absence of a threat of "perverse conduct"), it is abundantly clear that such circumstances of extreme urgency were not present in the current instance. Not only were the applicants' legal representatives aware that the first respondent was represented by attorneys and counsel (whose identity was also known to them), they were in constant contact via email with them, and they had made it clear that they expected their client would be given a hearing. On the Friday evening, they had advised the applicants' attorneys as follows "we invite you to proceed with your application, should your clients believe that it has merit (it should be supported by your clients' engineers report), so that all matters and things affecting this issue may be properly ventilated."

[23] In the circumstances, I do not accept that any acceptable basis existed for the applicants to seek the relief without any notification at all to the first respondent's attorneys.²⁰

Costs

²⁰ I should note that the first respondent seeks to make out no case that the application should have been served on any of the other respondents, or that they should have been notified. In those circumstances, it is not open to me to decide whether it should have been: see **DB v CB** (above) paras 23 – 45.

[24] It is appropriate at this juncture to immediately address the question of costs. I am of the view that, irrespective of the outcome of the case (i.e. even were they ultimately to be successful in resisting the reconsideration relief sought by the first respondent), the applicants' deliberate conduct in proceeding without notice in circumstances where they well-knew that the matter was opposed and without any good reason for doing so constitutes vexatious conduct that justifies the censure of the court by awarding costs against them on a punitive scale as between attorney and client.²¹ What is more, given that the principles of proceeding *ex parte* are trite, I consider that their legal representatives acted negligently in a serious degree in advising them to follow (or at least in not advising them against following) this course of action, and that the applicants' attorneys of record²² should be jointly mulcted in costs *de bonis propriis*.²³

Can and should the order be set aside on that basis alone?

[25] The next question that arises is whether the applicants' conduct of improperly proceeding without notice is, on its own, a basis upon which the order can or should be set aside.

[26] While it does appear to be open to a court to set aside an *ex parte* order on this basis alone, it seems clear that (as with an order that is "erroneously sought" in the absence of an affected party)²⁴ the court nevertheless retains a discretion in this regard, to be exercised with reference to the interests of justice.²⁵

[27] For the reasons that I canvass below, I am of the firm opinion that the applicants are entitled to the substance of the relief that they sought and were

²¹ *In re Alluvial Creek Ltd* 1929 CPD 532; *Marsh v Odendaalsrust Cold Storages Ltd* 1963 (2) SA 263 (W) at 270C-F.

²² The first respondent's notice of motion does not seek that such costs should be awarded against the applicants' counsel.

²³ *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board & Others* 2009 (1) SA 565 (CC) para 54; *Barak Fund SPC Ltd v Insure Group Managers Limited (in liquidation) and Another* 2022 JDR 1910 (GJ) paras 168 – 173, and the cases cited there.

²⁴ cf. Rule 42(1)(a) and the discretion afforded thereunder: *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* 2021 (11) BCLR 1263 (CC) para 53.

²⁵ *Mazetti* (above) para 15.

granted. In those circumstances, and particularly in view of the doubts that I have expressed in footnote 5 above regarding the validity and enforceability of the contravention notice, I cannot see how it would be in the interests of justice to exercise my discretion to set the order aside on this basis alone.

Did the applicants fail in their duty of utmost good faith?

[28] The nature and scope of the duty of utmost good faith that must be complied with by a party seeking relief *ex parte* has been comprehensively set out by the Supreme Court of Appeal in *REDISA*.²⁶ Only one aspect requires elaboration for the purposes of this application. The question of whether the duty has been breached is to be answered by considering (on an objective basis) whether the applicant has disclosed and dealt fairly with “relevant” adverse material that the absent respondent might have put up in opposition to the order ... And even where the *ex parte* applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective”.²⁷

[29] In this instance, the first respondent’s contention that the applicants failed to comply with their duty of utmost good faith is not a failure to disclose any facts *per se*, but primarily that the applicant failed to deal fairly with the facts that were disclosed:

10. ... *although care has been employed to have most of the documents attached to the founding affidavit, pertinent portions in them have not been adequately highlighted in Mr Fridjhon's affidavit.*

11. ... *the order [must be] reconsidered ... on the basis that, had all of the relevant and material facts been properly highlighted (as they ought to have been), [the court] would have refused the relief sought outright.*

[30] I am unable to agree. Even assuming that I might be able to conclude that any of the aspects to which the first respondent refers in this regard was indeed not

²⁶ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) paras 45 - 51.

²⁷ *REDISA* (above) para 47 (emphasis supplied).

adequately or properly “highlighted” in the founding affidavit or in argument, my difficulty with the first respondent’s contention of a failure to comply with the duty of utmost good faith is that none of those facts was objectively relevant, either to the question of urgency or to the only issue required to be determined for the purposes of the merits in this matter, namely whether Mr Anderson’s certificate constituted “written confirmation that the wall in question is structurally sound”.

[31] Firstly, it is argued that the applicants downplayed the significance (for the purposes of the question of urgency) of the fact that they were aware of the first respondent’s contentions regarding the structural instability of the wall and the need for demolition from January 2025, but took no action to investigate the issue of the wall’s instability until they took steps to procure Anderson’s report in July 2025.²⁸ This criticism is misplaced. As I have noted above, the demolition threatened in January 2025 had been entirely defused when it was demonstrated that the boundary wall was a party wall and that the first respondent had no right to unilaterally demolish it. The issue that arose in July 2025 was not whether the first respondent had a right to demolish the wall, but whether the contravention notice imposed an obligation on him to do so. As such, there can be no question of the applicants having dealt unfairly in this regard.

[32] Secondly, it is contended that the applicants did not adequately identify equivocal aspects of Mr Anderson’s certificate, and did not fairly present the respects in which it was contradicted by the other engineers’ reports that it had obtained with regard to the stability of the boundary wall.²⁹ As noted above, the status of the wall as a matter of objective fact was simply not relevant to the question that arose for decision.

[33] Thirdly, it is contended that notwithstanding their purported reliance on Mr Anderson’s certificate, the applicants’ own subjective, and allegedly correct, view (as reflected in Annexure AA4) was that the boundary wall is indeed structurally unstable

²⁸ Answering affidavit, paras 18, and 39 – 43.

²⁹ Answering affidavit, paras 51 – 60.

and at risk of collapse.³⁰ While I have some doubts as to whether the first respondent is itself “dealing fairly” with the contents of annexure AA4 (in particular as to whether it is properly placing the relevant words in their full context), such doubts need not detain me given that the issue of the stability of the boundary wall as a matter of objective fact was simply not an issue that the court was required or entitled to decide.

[34] In the circumstances, I find that there is no merit in the first respondent’s contention that the applicants breached their duty of utmost good faith.

The Merits

[35] As I have noted above, the only pleaded question that arises on the papers before me is whether or not Mr Anderson’s certificate constituted “written confirmation ... that the wall in question is structurally sound”.

[36] There can be no question that it does. It is a written document that expressly confirms that the wall is structurally sound, and the fact that the first respondent’s experts disagree with it is of no moment.

[37] In the circumstances I am satisfied that the requirements of the contravention notice have been met and that applicants are entitled to an interdict preventing the first respondent (alone) from completely or partially demolishing the boundary wall “unless and until it has the written consent to do of the applicants”. While it is not completely clear to me why the words “or it is ordered to do so by the Court” were included, I assume that it was included for the benefit of the first respondent, who might wish to seek an order that he be entitled to do so unilaterally.

Conclusion and order

[38] In conclusion, I am of the view that while it was not proper for the applicants and their legal representatives to have sought the order that they did without any

³⁰ Answering affidavit, paras 36 – 37 and 64 - 67.

notification to the first respondent and that they should thus be required to pay the first respondent's costs on a punitive basis, I do not think that that justifies the setting aside of the order, especially given that I am also of the view that the applicants did not fail to highlight (let alone fail to disclose) relevant facts favourable to the first respondent. On the other hand, I find that the applicants are indeed entitled to the order that they sought and obtained.

[39] My reasons for setting aside the costs order that the applicants obtained, and for ordering them to pay the first respondent's costs notwithstanding their success in this reconsideration application are explained in paragraph [24] above.

[40] I thus make the following order:

1. The reconsideration application is dismissed insofar as it relates to paragraph 1 of the order granted in this matter on 15 July 2025;
2. Paragraph 2 of the order granted on 15 July 2025 is reconsidered and set aside;
3. The first respondent's costs are to be paid by the applicants and their attorneys of record jointly and severally (one paying, the others to be absolved) on the scale as between attorney and client.

RJ MOULTRIE
ACTING JUDGE

Reserved: 25 July 2025

Appearances: For the applicants: GF Porteous, instructed by Brian Frank Inc., (011) 661 2065; bfrank@brianfrank.co.za

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