

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 9 September 2025	SIGNATURE

In the matter between:

NATALIE CELESTE MAROUN

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

THE REGISTRAR OF DEEDS, JOHANNESBURG

Fifth Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

AUCAMP AJ

INTRODUCTION

- [1] Under Section 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted if the court is satisfied that the appeal “*would have a reasonable prospect of success*” or that there is some other compelling reason for the appeal to be heard. Section 17(1) raised the threshold for leave to appeal and it is not enough to show that another court *could* come to a different conclusion. There must be a realistic chance that the appeal *will* succeed. In other words, a mere possibility of success or an arguable case is insufficient. There must be a sound, rational basis to conclude that the appeal would likely succeed on the merits. The Supreme Court of Appeal has repeatedly emphasized that this test is “*stringent*” and should be applied rigorously. If the applicant cannot demonstrate a reasonable (not remote) prospect that another court would reach a different result, then leave to appeal must be refused. Only if such prospects are shown (or a truly compelling reason exists, e.g. an important point of law or public interest) should leave be granted.¹
- [2] In the present matter, an opposed application about an encroaching boundary wall, the applicants for leave to appeal (“*the Trust*”) must therefore satisfy this threshold. The Trust must convince the court that there is a reasonable prospect that the appeal court would disagree with the judgment and not merely that the case is not hopeless or that another court might *possibly* take a different view. This standard provides for appellate restraint, ensuring that appeals are limited to cases with truly arguable merit and avoiding waste of judicial resources on appeals with slim chances of success.
- [3] The initial case called upon the court to decide an appropriate remedy for an encroachment, i.e a portion of a boundary wall built on the Trust’s property. The applicable legal position as stated in my judgment, when one building or structure encroaches on a neighbour’s property, the court has an equitable discretion either to

¹ MEC for Health, Eastern Cape v Mkhita 2016 JDR 2214 (SCA) at para 16 - 18

order removal of the encroachment and in so doing restoring the property to its owner, or to permit the encroachment to remain against payment of compensation to the affected owner. This means the court is called upon to exercise a discretion in resolving the dispute, namely, choosing between two permissible remedies (a) demolition of the encroaching structure or (b) compensation in lieu of demolition. Importantly, this kind of decision is a value judgment based on fairness and the specific facts. It is not dictated by a hard rule one way or the other. The common law default position is that an owner is entitled to the removal of the encroachment (demolition) as the primary remedy, but the court may depart from such remedy and award damages instead if strict enforcement would lead to an unjust result. In exercising this discretion, the court weighs factors such as the extent of the encroachment, whether it was innocent or deliberate, the cost and feasibility of removal, the relative hardships to each party, and overall principles of reasonableness and neighbourly fairness.²

- [4] In the present matter, after considering those factors, I elected the option of allowing the encroachment to remain with monetary compensation to the Trust, rather than ordering the wall's demolition.
- [5] The Trust contends that the nature of the discretion that I should have exercised is a discretion in the true sense. Instead, I exercised a discretion in the loose sense. In support of this argument, I was referred to a judgement of the Constitutional Court, ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another***³
- [6] It is crucial to determine the nature of this discretion, because that affects how an appellate court may intervene. The Constitutional Court in ***Trencon Construction supra*** outlined the distinction between a "*discretion in the true sense*" and a "*discretion in the loose sense*." A *true* discretion exists where the lower court has a range of equally permissible options to choose from – any of which would be legally acceptable. In such cases, if the court follows one of the legitimate options, its choice cannot be labelled wrong simply because another court may prefer a different option. By contrast, a *loose* discretion refers to situations where a court must make a decision by weighing various factors, but there is essentially one correct outcome in law once all factors are considered. The court is not choosing among multiple lawful outcomes

² Trustess of the Brian Lackey Trust v Annandale 2004 (3) SA 281 (C)

³ 2015 (5) SA 245 (CC) at para [82] – [87]

but rather determining the correct result on a continuum of reasonableness. With a loose discretion, an appellate court is generally in as good a position to decide the matter and may substitute its own view more freely, because the decision is more a matter of judgment or evaluation of facts than choosing from distinct options.

- [7] In the context of an encroachment remedy, the court does have a true discretionary choice to either order removal alternatively to order compensation depending on what is just and equitable.⁴ These remedies are quite different in nature, but both are legally permissible, and the court must choose the fairest option. This aligns with the notion of a "*discretion in the true sense*." In the context of encroachment disputes, our courts have described the discretion to award damages instead of demolition as a "*wide and equitable*" one, not confined to minor encroachments. Even significant encroachments can be resolved by compensation if justice so requires. Thus, in making my original decision, I was exercising a true discretionary power. I had to selected one of the permissible remedies based on a balance of fairness.
- [8] The consequence of this classification is that an appellate court's power to interfere is limited. Where a lower court has exercised a true discretion, the appeal court should be slow to interfere with that decision. It may not simply substitute its own preferred remedy just because it would have weighed the factors differently. According to *Trencon Construction supra* an appellate court can only overturn the decision if the discretion was not exercised judicially and properly. An example of this would, if the court *a quo* applied the wrong legal principles, misdirected itself on the facts, took into account irrelevant considerations or ignored material ones, or reached a decision so unreasonable that no reasonable court could have come to that conclusion. Absent such a material misdirection or demonstrable injustice, the *choice* made by the court of first instance among the permissible options stands, even if the appellate court might have chosen differently.
- [9] The Trust's grounds for leave to appeal, beyond the Trencon "*discretion*" point consist of five main contentions. I will address each in turn and assess whether, individually or cumulatively, they demonstrate a reasonable prospect of success on appeal. In doing so, it bears repeating that the test is whether these issues could convince another court to arrive at a different outcome and that such an outcome is reasonably likely, given the applicable law and the discretionary nature of the decision.

⁴ Trustees of the Brain Lackey Trust *supra*

[10] Firstly, it is common cause that the boundary encroachment has existed for a considerable period. Over two decades. The Trust has been aware of it for many years. The Trust contends that I have not given due weight to the fact that that the Trust had raised its objection to the encroachment for an extended period of time. The difficulty with this argument is that the longstanding nature of the encroachment cuts both ways in equity. On the one hand, if the Trust knowingly tolerated or did not promptly object to the encroachment, a court may view the belated demand for demolition with some scepticism. A prolonged inaction can imply acquiescence or at least a lack of urgency. An owner who stands by while a neighbour builds on his land might even be estopped from later demanding removal in certain circumstances.⁵ On the other hand, if the Trust truly *has* objected or been unhappy for 20 years, it shows the grievance is long-running, but it also means it had ample opportunity to seek a remedy earlier.

[11] In my judgment, I considered the history of the matter especially the lengthy period during which the status *quo* persisted, and I found it to be a factor in favour of a monetary compensation solution, because the encroachment had effectively become part of the factual landscape of the properties over time. Ordering demolition after a period in excess of twenty years would likely cause significant disruption and hardship out of proportion to the benefit gained, especially since the Trust lived with the situation for decades. Moreover, not relevant to the present matter, a bargaining dynamic can arise where an encroaching party might be at the mercy of the other's demands if a demolition order is granted after such an extended period of time. The courts have warned against allowing an encroached-upon owner to use a demolition threat to "*extort wholly excessive compensation*" from the neighbour in cases where damages would fully address the infringement. In *De Villiers v Kalsou*,⁶ for example, Graham JP noted that while a wrongdoer cannot insist on simply paying damages in lieu of removal as of right, it would be *equally* inequitable to arm the innocent owner with a demolition order enabling extortion of an unfair price when monetary compensation can do justice. This principle guided my approach. The Trust only took legal action to secure its interests, by way of a counter application in response to the application of the applicant in the initial matter. And it did so knowing that the applicant was in the process of selling the property and that she would not be able to do so unless the present dispute is resolved. This indeed, given the long period of inaction on the part of the Trust, placed the applicant in an unfair bargaining position.

⁵ The Trustees of the Brian Lackey Trust *supra*

⁶ 1928 EDL 217 at 231

Furthermore, the Trust had been willing to consider compensation, which indicated that money could in fact ameliorate the loss. Ultimately, the long existence of the encroachment, without earlier resolution, favoured a pragmatic and fair outcome, namely, to finalize the matter by compensating the Trust and regularising the boundary, rather than resurrecting a 20-year-old conflict by tearing down the wall. An appellate court is unlikely to find that this reasoning constituted a misdirection. This ground does not reveal any error in principle. It essentially re-argues a factual equity consideration that I weighed against the Trust. There is no reasonable prospect that another court would conclude that the mere age of the dispute mandates a different remedy, especially since I did factor it into my fairness analysis.

- [12] Secondly, the Trust contends that the encroached area "*is not being used for parking*" as the encroaching applicant had suggested. It is important to note that this is essentially a factual dispute about the current use of the encroached area. Even if it were true that no car is actually parked on the encroached area on a daily basis, the existence of the boundary wall means the applicant has been treating that land as her own and planned her property layout around it. The absence of a particular use like parking does not mean the land is of no value to the applicant. It still forms part of her yard behind the wall. More importantly, unless I made a clear factual mistake about this point, an appellate court will not readily interfere. An appeal is not a re-trial of factual issues, and a leave to appeal application is not the forum to resolve peripheral factual disagreements unless they would materially alter the outcome. Here, whether or not a car is parked on the encroached area does not fundamentally change the equities. The key point was that the applicant, or the developer for that matter, built a wall and landscaped/used the land as hers, and demolition would require undoing that situation. I was aware of the evidence on use and was not persuaded that the encroached area was "*useless*" to the applicant. Even if the Trust is correct that it's not used for parking, that would at best be a minor factual correction that does not undermine the core reasoning. The remedy decision did not hinge solely on the parking claim. It hinged on the overall balance of prejudice. The applicant would suffer significant loss from demolition, whereas the Trust could be fully compensated for a relatively small loss of land. Thus, the second ground does not raise a substantial prospect of success. It does not point to any legal misdirection, only a factual nuance. An appellate court is unlikely to upset a discretionary judgment on such a basis, absent a glaring misapprehension of the evidence. No such glaring error is apparent here.

[13] Thirdly, the Trust argues that the encroached area is the "*best place to install a borehole*" on their property, implying that by losing this piece of land they lose a unique opportunity for establishing an alternative water source. This ground is essentially an assertion of potential future use. I fully considered the utility of the encroached area to both parties and specifically the expert evidence presented by and on behalf of the Trust. At the time the Trust was not using the encroached area given the boundary wall was in place, nor had any borehole been installed. Whilst I acknowledge that in theory the encroached area could be convenient for a borehole, there was no acceptable evidence presented that it was the only viable location or that water could not be accessed elsewhere on the property. Had there been compelling evidence that the Trust absolutely needed that exact piece of land for a borehole or any other critical purpose, I would have weighed that in the balance. From the information available, the "*borehole*" contention appeared speculative. A generalised desire to possibly drill a borehole at that spot is not enough to outweigh the concrete realities. Moreover, the applicant did offer to the Trust that the encroachment remains in place, that the borehole be drilled on the encroached area and that the water supply be rerouted to the Trust's property, a proposal that was not acceptable to the Trust.

[14] Our law does not require *land-for-land* restitution in encroachment cases when damages can make the owner whole. In my judgment, I concluded that any practical loss to the Trust, including the loss of use of the encroached area for future projects such as a borehole, would be adequately compensated by a financial award. This is consistent with many encroachment cases where courts have found that damages are a sufficient remedy even though the owner loses the opportunity to use that particular ground.⁷ Unless the Trust can show that no amount of money could offset this borehole plans, which was not demonstrated, an appeal court is not likely to fault the decision. This ground therefore does not reveal a legal error or a strong prospect of a different finding on appeal. It was a factor argued at trial and reasonably dealt with in the judgment.

[15] Fourthly, the Trust contends that compensation will not provide adequate comfort. In other words, that a monetary payment is an insufficient remedy for the encroachment from the Trust's perspective. I understand the sentiment. Property has a unique value to its owner, and the loss of land, even a small portion, or the principle of another's structure on one's property can cause annoyance or a sense of violation that money

⁷ Trustees of the Brian Lackey Trust *supra*

alone might not erase. However, our courts have addressed this concern by ensuring that compensation in encroachment cases can include a *solatium*, an added sum to compensate for non-monetary inconvenience or indignity. In the *Trustees for the Brian Lackey Trust supra* for example, the court noted that an award of damages "including an appropriate solatium" would afford the aggrieved owner sufficient compensation for the encroachment. The idea is that the owner should be left financially no worse off and given some additional amount to account for the loss of their property interest and peace of mind. In granting the relief in the present case, I was mindful of this, and unless an agreement on the amount is reached between the parties, the court will determine the appropriate amount taking into account this requirement and meeting the equities and justice of this matter. While the Trust may feel no amount of money is as comforting as reclaiming the encroached area, the applicable legal position is that if full compensation, objective value and solatium is paid, the Trust is made whole in contemplation of our law. It is precisely because money cannot perfectly replicate land that courts are cautious in exercising the discretion, but when compensation is ordered, it is on the premise that equity is thereby satisfied. This ground essentially appeals to a general dissatisfaction with the notion of damages, but that is part and parcel of our encroachment law's policy. In appropriate cases, a court may decide that *patrimonial compensation* is preferable to physical removal, even if it doesn't give the owner the subjective satisfaction of restoration. I did acknowledge the Trust's loss and provided for compensation accordingly. There is no indication that I misunderstood the nature of the Trust's loss and as such this ground, therefore, does not establish a reasonable prospect of the appeal court finding an error in my exercise of discretion.

- [16] Finally, the Trust argues that the precise extent of the encroachment is in dispute. The Trust suggests that the encroachment might be more substantial than what the applicant claimed, implying that the court might have proceeded on an incorrect understanding of how much land is at issue. During the proceedings, survey evidence and measurements were considered, and I made a finding to remove any uncertainty in this regard by pinning the extent to the minimum as suggested by the applicant. Crucially, a dispute of this nature does not constitute a qualitative issue of principle but a quantitative one. It would affect the amount of compensation, not the core decision of compensation versus removal. In principle, even a significant encroachment can be dealt with by compensation. Our law does not limit the

damages remedy only to "*trifling*" encroachments.⁸ As was stated, it would make little sense to allow small encroachments to be bought off but insist on demolishing large ones regardless of cost. Often it is the massive encroachments where the hardship of demolition is greatest and compensation most justified. Consequently, even if the area in question were somewhat larger than the applicant contended, that would not automatically tilt the discretion to demolition. It would simply mean the Trust should get more money for the larger loss of land. In any event, this ground does not suggest that I failed to appreciate the size of the encroachment. It merely states that the parties disagree on it. It is not a reason to overturn the choice of remedy. Accordingly, this ground does not raise a substantial prospect of success on appeal. It does not, impugn the decision to award compensation rather than removal in the first place.

[17] Having considered all the grounds raised, I conclude that none of them demonstrates a reasonable prospect that an appeal court would reach a different outcome. These grounds largely reiterate points on factual disputes and discretionary balance that I considered. There is no clear error of law or principle identified. The complaint about the nature of discretion is unfounded. I exercised a true discretion judicially, considering all relevant factors, which limits appellate intervention. The remaining grounds upon which the application for leave to appeal is predicated do not show that my decision was based on any incorrect principle, or that I overlooked material facts, or that the result was so unreasonable as to constitute a misdirection. At best, the Trust argues that another court *might* weigh the equities differently, but given the wide equitable discretion in encroachment matters, that is not enough – especially under the stringent leave to appeal test in Section 17. The possibility of a different view is not the test; a reasonable probability of success is and that has not been established here.

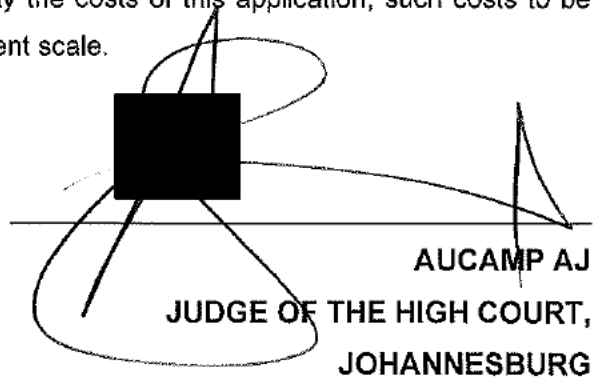
[18] On the issue of costs. Although the application for leave to appeal is directed against the whole of my judgement, including costs, the Trust has not raised any grounds in the application itself or in argument against the costs order and/or the scale. I find no reason to deviate from my initial order.

ORDER

[19] Consequently, I make the following order:

⁸ Trustees of the Brian Lackay Trust *supra*

- a The application for leave to appeal is dismissed.
- b The first respondent is to pay the costs of this application, such costs to be taxed on the attorney and client scale.



AUCAMP AJ
JUDGE OF THE HIGH COURT,
JOHANNESBURG

For the Applicant:

Adv Louis Hollander
Email: lhollander@maisels3.co.za
cstock@maisels3.co.za
Tel: 083 889 2770
Instructed by Jeff Afriat – EFG Attorneys
Tel: 011 341 0510
Janita Correia – EFG Inc Attorneys
Email: Janita@efglaw.co.za
Tel: 082 562 6486

For the Respondent:

Adv Marc Cooke
Email: cooke@counsel.co.za
Mobile: 083 415 8710
Instructed by Chantelle Gladwin-Wood
HBG Schindlers Attorneys
Email: gladwinwood@hbgschindlers.com
Mobile: 083 378 1916