



IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 16864/2024P

In the matter between:

BELINDA JEAN CHARLTON

APPLICANT

And

MITCHELL FARMING ENTERPRISES (PTY) LTD

FIRST RESPONDENT

THE SURVEYOR GENERAL: KWAZULU-NATAL

SECOND RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] At the commencement of the argument I was informed that the application to strike out portions of the answering affidavit by Applicant was not being pursued. It was not in the court file and Applicant then withdrew the application and tendered the costs.

[2] The issue in this matter concerns a dirt road along the boundary fence of two adjoining properties in the Dargle area KwaZulu-Natal Midlands. The contention is that

the road used by First Respondent at certain points encroaches into the property of Applicant. Applicant therefore seeks that the encroached area be removed and the affected area be restored to its original condition.

[3] This relief is opposed by First Respondent and First Respondent has also filed a counter application that it be declared that First Respondent is entitled to the registration of an encroachment servitude in respect of that portion which encroaches onto that of Applicant and that Applicant needs to sign all necessary documents and if she refuses to do so that the Sheriff is authorised to do so and that First Respondent to make payment of R2 500.00 in compensation therefore. The counter application is headed Notice of Counter Application and states that:

“Kindly take notice that the First Respondent intends making a counter application to the above Honourable Court, simultaneously with the hearing of the main application for an order in the following terms.”

Mr. Ender referred to it as a conditional counterclaim but on my reading of the notice of the counter application it is not such but is a specific counter application seeking specific relief.

[4] Applicant purchased the property described as portion 34 (of 5) Dargle 913 during June 2021. First Respondent purchased portion 33 (of 5) Dargle 913 during December 2020. These two properties boarder each other and were previously both timber farms. It is common cause that when First Respondent purchased portion 33 it was a timber farm with no residence and that First Respondent commenced building a residence there after Applicant had purchased portion 34.

[5] It was contended by Applicant that First Respondent had a gravel road constructed along the south western common boundary to give access to the residence which it built. After the road had been constructed the fence was reinstated.

[6] It is contended by First Respondent that it did not construct the road but it worked on the road that was already there to shape it and harden it. It is unknown who constructed the road and when it was constructed.

[7] Since January 2022 the road had become a bone of contention between the parties. If one considers that Applicant only purchased the property during June 2021. It is clear that very soon thereafter the issue of this road became a contention between the parties.

[8] During September 2024 Applicant employed KM Surveyors to confirm whether the reinstated road and fence was along the boundary and correctly positioned. In his report, which was later confirmed by an affidavit, the land surveyor, in annexure "FA5" concluded that the said gravel road did encroach onto Applicant's property portion 34 (of 5) and indicated on "FA5". This was brought to the attention of First Respondent who replied that Applicant knew that the road was there when she purchased the property and therefore tacitly consented thereto. There is a servitude registered over the property but not where this road is. This appears from the drawing of the survey general. This is not relevant in these proceedings. Applicant denied that she at any stage gave permission or consent for a servitude where this gravel road was.

[9] A perusal of annexure "FA5" indicates that for a distance the gravel road goes along the boundary on the side of portion 34 (of 5) and then crosses into portion 33 (of 5).

[10] In *limine* it was submitted on behalf of First Respondent that there was a dispute of fact in that Applicant in paragraph 12 of the founding affidavit referred to a construction of a gravel road along the south western common boundary. This was disputed in

paragraph 23 on page 45 of the answering affidavit of First Respondent where it contended that it only hardened and shaped the said existing road. It was contended that Applicant was bound by its predecessor in title and there was therefore a material dispute of fact.

[11] Whether First Respondent built the road or merely improved it is irrelevant as this does not create a dispute of fact as far as the issue before Court is concerned. It is a fact which is uncontested that there was a road along the boundary and it was found by the surveyor to encroach onto the property of Applicant. The fact that the road may have been constructed by one of the previous owners who appears at some stage owned both these properties also does not cause a dispute of fact. The report of the surveyor is not disputed. It is also not contradicted and therefore it is clear that the road is encroaching onto the property of Applicant. The point in *limine* that there is therefore a dispute of fact is dismissed and the matter is to be decided on the facts as appear from the affidavits.

[12] There is no evidence to contradict the report and affidavit of the Surveyor Mr. Khanyile nor is it disputed. It can therefore be accepted that it is encroaching. The question which then arises is whether the encroachment must be removed or whether the Court must exercise its discretion to ensure that a fair solution is found in the circumstances. It was submitted on behalf of Applicant that First Respondent's structures may not encroach onto the property of Applicant and if the parties could not agree that the Court is to make a determination and I was referred to BSB International Link CC v Readam South Africa (Pty) Ltd and Another 2016 (4) SA 83 (SCA). The encroachment is in the report of the land surveyor, Mr. Khanyile, conclusive and there has been no expert report to the contrary by First Respondent.

[13] On behalf of First Respondent, I was referred to the decision of Maroun v Trustees for the time being of the Red Cherry trust & Others 2025 JDR 2944 (GJ) especially at paragraphs 23 and 24 thereof. In paragraph 23 it refers to guidelines which courts have

considered in deciding such matters which included whether the encroachment is substantial, the costs of removal thereof, the behaviour of the parties, did the owner protest or allow it to continue and whether compensation can truly makeup for the loss to the land owner. It is further in paragraph 24 set out that the court must consider fairness and neighbourliness. It further in paragraph 24 states:

“Conversely if the owner always insisted on removal and has legitimate need of the land the court gives significant weight to the property right.”

[14] In the matter of Trustees, Brian Lacky Trust v Annadale 2004 (3) SA 528 (O) it was held that to grant a demolition would bode ill for the long term relationship between the parties and remedy in damages would meet the justice of the case. There are also other cases where the court found that compensation was the best solution. In this regard there is the matter of Lombard v Fisher 2003 (1) All SA (0) 698 where it was held that because of the exceptional nature of the case in that the two houses were next to each other and they used one driveway of which the boundary was in the middle thereof could not in that case allow the wall to be constructed on the boundary which is in the middle of the driveway and ordered the applicant to construct its boundary wall closer to its property to allow for a vehicle to pass next to it to the adjoining property.

[15] There are various cases dealing with these issues and each one has to be decided on its own facts.

[16] It was submitted by Mr. Ender that the relationship between Applicant and First Respondent is acrimonious as Applicant had at one stage locked the gate gaining access to this road and that there is also other litigation pending between the parties.

[17] In the case of Fedgroup Participation Bond Manager (Pty) Ltd v Trustee, Capital Property Trust & another 2015 (5) SA 290 (SCA) it also concerned the encroachment onto

the land of the neighbouring property. The question which had to be decided therein was whether an owner of land could approach a court for an order compelling the owner unto whose property it was encroaching. In this case it referred to various cases where due to the circumstances of each case compensation was granted. In paragraph 30 it refers to an article by professor Boggenpoel where it states:

“Furthermore if the affected landowner does not want to give up his property, the involuntary transfer of property that the court authorises with a transfer order may be problematic in light of section 25 of the Constitution. The order will result in a deprivation of property, which will have to comply with section 25(1). Additionally, if the loss of property in case where the decision is made to leave the encroachment in place and transfer the encroachment upon land to be encroacher amounts to expropriation of property, requirements of section 25(2)(3) of the Constitution would also be applicable.”

In paragraph 33 the judgment continues:

“Our law has always been careful to protect the right of ownership, particularly of immovable property. It is a most important and extensive right. It is thus protected by registration in the Deeds office. Limited real rights in land will also be required to be registered. Silberberg and Schoeman’s Law of Property in dealing with the exclusion of personal rights from the registration process states the following at 65 ‘The exclusionary approach indicates support for the notion that ownership is a pinacol of/or the most important right within/a hierarchy of rights with limited real rights following close at heel. Other rights are understood as being in stages of inferiority to ownership as far as their protection in property law and publishing thereof are concerned.’”

[18] In her replying affidavit Applicant has set out what the loss would be for her if the deprivation of the property which encroaches is left as she sets out the number of trees which cannot be planted as well as the income which could be derived therefrom. First Respondent nowhere in its affidavits gives any indication of what it would costs for the

relocation of the road. It merely disputes the boundary and where the corner posts would be without any indication of the costs thereof and maintaining that the road can remain where it is.

[19] Applicant has never agreed to compensation and has all along maintained that the encroachment must be removed. What is stated in paragraph 24 of the Maraon decision therefore applies.

[20] As I have already indicated the relief which First Respondent is seeking in its counterapplication is also not possible especially in light of what was decided in the case of Fedgroup Participation Bond Managers referred to above. In my view no case for such relief has been made out. The counter application must therefore be dismissed.

[21] Further considering the acrimonious relationship between Applicant and First Respondent it would appear to me that any further servitude which would have to be registered over the property of Applicant would be problematic and further that the calculation of the payment of compensation would develop into a large scale action when there are already, according to Mr. Ender, various actions pending between the parties.

[22] Having considered the submissions, the diagram and report of the surveyor, the relevant case law and the acrimonious relationship between the parties and applying the discretion that I also have I am of the view that to grant compensatory relief would not be appropriate in the circumstances.

The following order is made:

1. Applicant is granted leave to withdraw the application to strike out and is ordered to pay First Respondents costs.

2. I grant an order in terms of paragraphs 1, 2 and 3 of the Notice of Motion.
3. The counterapplication is dismissed with costs.

A handwritten signature in black ink, which appears to be "P C Bezuidenhout J.", is written over a solid black rectangular redaction box. The signature is somewhat stylized and loops around the box.

P C BEZUIDENHOUT J.