

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

Reportable

CASE NO: 11050/2014

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE
DEWEL TRUST

Applicant

And

LINDY SCHLOSZ

Respondent

JUDGMENT: 18 AUGUST 2014

DAVIS J

Introduction

[1] Applicant seeks interim introductory relief on the basis of a disputed oral agreement between the trust and respondent the parties are involved in an acrimonious building dispute in Camps Bay. They are owners of adjacent properties on Blinkwater Road, Camps Bay. The respondent's property is located at 15 Blinkwater Road and lies between the applicant's property at 13 Blinkwater Road and the majesty of an idyllic natural bay which understandably, any property owner in the location would wish to enjoy from his or her home.

[2] Applicants contend that they concluded an oral agreement with the respondent in terms of which respondent undertook to limit the height of the proposed development which she had initiated to a maximum of nine meters.

From available photographs, this would permit the applicant to have a reduced but still significantly desirable view of the bay. It further contends that, as part of this agreement, they agreed to provide the respondent with a letter of no objection in respect of a zoning scheme departure which, at that stage, was required by the respondent. The construction of the proposed development has now reached a point where the height of nine metres may well be exceeded shortly; hence the urgency which applicants claim in respect of them seeking to interdict the respondent from continuing to construct the proposed development, pending the outcome of an action to determine whether an oral contract was concluded between the parties.

[3] The requirements which must be met by the applicants in this case are trite: They must, at least, establish a *prima facie*, even if open to some doubt;

- (1) a well-grounded apprehension of irreparable harm;
- (2) if the interim relief is not granted and the ultimate relief is ordered a balance of convenience in favour of the granting of an interim relief;
- (3) An absence of any other satisfactory remedy.¹

Applicant's prima facie right

[4] In dealing with whether an applicant for an interim interdict enjoys a *prima facie* right, Selikowitz J in **Spur Steak Ranches**, *supra* at 714 E-G noted that the proper approach is to take those facts set out by the applicant together with facts averred by the respondent which the applicants cannot dispute and then, with regard to the inherent probabilities, consider whether the applicant's should, as

¹ **Spur Steak Ranches Ltd v Saddles Steak Ranch** 1996 (3) SA 706 (C) at 714D

opposed to could on these facts, obtain final relief at trial. The learned judge drew a further important distinction, namely in order to establish the requirement for a *prima facie* right, there are two stages with which a court must engage in respect of this enquiry. Thus, even if a *prima facie* right has been found, any doubt which a court might have regarding the nature of this right must be subjected to a further enquiry now a court examines the facts averred by respondent which stand in contradiction to the case brought by applicants, the purpose being to examine whether there is serious doubt thrown on the applicant's case. If there is a mere contradiction or an unconvincing explanation, applicant's right will be protected. But, if there is serious doubt thrown upon applicant's case at this stage of the enquiry, the applicant cannot succeed. See also **Gool v Minister of Justice and another** 1955 (2) SA 682 (C) at 688 (E).

[5] Applicant sets out its case thus: During October 2010 the respondent approached Mr Willemse who is a trustee of applicant, to discuss a planning application which she was to submit to the City of Cape Town relating to her property of 15 Blinkwater Road. According to Mr Willemse, the planning application involved a departure from the Cape Town Zoning Scheme and the respondent accordingly required a letter of no objection from the applicants. The respondent provided Mr Willemse with a copy of architectural plans detailing a residential building which she intended to constructing at 15 Blinkwater Road. The plans revealed that the proposed development would utilise the maximum space permitted by the zoning scheme. It would be constructed with the smallest possible set back from the street boundary (4.5 m) and would be built to the maximum possible height of ten metres, in terms of the previous zoning scheme.

[6] Mr Willemse avers that, if the development would be constructed pursuant to these plans, the views from 13 Blinkwater Road would be seriously compromised. On this basis Mr Willemse contends that the applicants were not prepared to provide a letter of no objection to the respondent. He claims that he then met the respondent at 13 Blinkwater during November 2010. It is common cause that this meeting did not take place in November 2010 but rather took place on 31 January 2011. The correction made by respondent to the date of the meeting in her opposing affidavit was accepted by applicant. According to applicant, Mr Arthur Wyeth, a construction supervisor, attended this meeting because it was intended that he assist in the measuring of distances and holding of profiles in order to demonstrate practically the impact that the proposed development would have on the views from 13 Blinkwater Road.

[7] A discussion took place both with regard to the development structure and to whether the respondent was not prepared to increase the set back. Mr Willemse states in his affidavit that respondent was not prepared to increase the setback but was prepared to restrict the height of the proposed development to nine metres above ground level. She considered this as a sufficient concession to meet the objections of applicants.

[8] Mr Willemse then says the following:

‘I expressed my gratitude to the respondent for the concession that she had made. The meeting thereafter concluded with final request from me that she give further thought to the other request, for a setback, although I had no real expectation that she would make that further concession.

As a consequence, the applicants, represented by me, and the respondent, acting personally, concluded an oral agreement in terms of which the applicants agreed to provide a letter of no objection, and the respondent agreed to limit the height of the proposed development to 9 meters above ground level (“the agreement”), alternatively, and in any event, on the basis of the discussion set out above, the parties tacitly agreed on the same terms.

Shortly thereafter, wishing to preserve such concession that I had obtained and, as stated above, having no real expectation that the respondent would concede to the setback request, I hand delivered the applicant’s letter of no objection to the respondent’s letterbox at 29 Sedgemoor Road, Camps Bay. I verily believe that the respondent submitted the said letter to the City.’

[9] To this respondent answers as follows: She recalled that there was a meeting in January 2011. She did not require any departure from the City of Cape Town and did not “a letter of no objection”. The building plans fell squarely with the limits of her rights in terms of the relevant zoning scheme and these plans were approved on 26 June 2012, without having to obtain consent from any of the neighbours.

[10] She recounts that, at the January 2011 meeting, Mr Willemse asked that she move ‘my building back. I said that it would not be possible as my plot is small, also wanted to make the most of the view’. In her affidavit she further denies an agreement regarding the height of the roof. In support of this averment she

referred to an affidavit from Mr Sean Skelton, who described himself as 'the architectural technologist who designed the respondent's house'. Mr Skelton says that the first time that he heard about the alleged 'nine metre restriction' was in June 2014 when Mr Willemse called him with a request that he come to his house to examine the impact that the respondent's roof would have on applicant's house.

[11] To the averment from applicant that he 'hand delivered the applicant's letter of no objection to the respondent's letter box' respondent answers 'I did not need a letter from the applicants, did not receive any such letter, I did not submit any such letter to the City- who did not require it.'

[12] Mr Irish, who appeared together with Mr Traverso on behalf of the applicants, referred to an exchange of affidavits which took place on 31 January 2011 between Mr Willemse and respondent and which, in Mr Irish's view, was as close to a contemporaneous document as existed. Of relevance are the following passages taken from this email exchange. Respondent writes to Mr Willemse as follows:

'I was truly shocked the way you spoke to me at our meeting on 31 January, 2011. You accused me of being likened to other unscrupulous developers in the area namely "Thomas Gea". That I had not considered you in my planning and that we all are building to the maximum and that I had not shown you any of my plans for 15 Blinkwater.

To answer you, I have only just completed them, I took them to you 4 months ago. You asked if I could come back to accommodate your view. I have done so and are now in line with the legal building line but you still want me to come back.'

[13] To this applicant's responds:

'I'm surprised at this e-mail – I thought that we understood each other's' position at the end of the meeting and left on an amicable note. I certainly didn't linked you to Thomas Geh, or "other unscrupulous developers" (in fact, I didn't mention the latter) but expressed extreme disappointment that you used the full extent of the Zoning Scheme without any consideration for me, as your neighbour – much as Geh tends to do.

To say that the plans, which you showed me late last year, have been modified to accommodate me is disingenuous – those were patently illegal and couldn't have been approved by the City in the first place. You were forced to bring the street façade back to the 4,5 m by law and my request to further setback the top floor (as the only concession) has been ignored.

Rather than turn this into something that causes bad vibes, let me make a suggestion: If you are prepared to accommodate me and still require the from façade to be kept in a vertical plane, then it is possible to bring the whole façade back by about 1,2 m – 1,5 m and I will pay for any extra/over costs involved in the excavation. It will make no difference to the basement and ground floors (it will improve your access to the garage) and require a small amount of re jiggling to the first floor. Then we have achieved a win-win situation.

Insofar as the departure is concerned, I'll let you have the signed form asap.'

[14] Mr Rosenberg, who appeared on behalf of the respondent, also relied on these emails of 31 January 2011. He emphasised that the respondent's email had

indicated that the meeting was acrimonious. Given her description, it was therefore hardly likely that any undertakings were given by the respondent, that is that, in so hostile a climate, the respondent would not have made what Mr Willemse contended to be a significant concession regarding a height restriction. Further, had an agreement existed it could have been expected that there would have been a reference to it in Mr Willemse's email.

[15] Mr Rosenberg also placed considerable emphasis upon an email generated by Mr Willemse on 31 March 2014. In this email, he seeks to address the concerns regarding the proposed construction. He writes: 'when we met at my house last year (There is no certainty whether there was a meeting in 2013) you assured me that the height of the building would be 9 m on the front façade which would be set back at a minimum of 4.5 of the street boundary'. There is no mention in this email of an agreement which had been concluded in early 2011; the high watermark of the letter is a reference to 'an assurance'. The same omission of a reference to an agreement is to be found in an email generated by Mr Willemse on 21 April 2014.

[16] By contrast, Mr Irish referred to two further affidavits to bolster applicant's case. In the first place, there was an affidavit deposed to by Mr Wyeth, whom it was common cause, had attended the meeting of 31 January 2011 at which the alleged oral agreement had been concluded. The key paragraph Mr Wyeth's affidavit is the following: 'I was present at the meeting between Willemse and the respondent during November 2010 (in reality January 2011) and I confirm that

paragraphs 20-25 of the founding affidavit correctly record the contents of the discussion that took place at that meeting’.

[17] The contents of the meeting as set out by Mr Willemse in paragraphs 20-25 of the founding affidavit contain a clear averment that an oral agreement had been concluded. Furthermore, an affidavit deposed to by Mr Thomas Brummer, a town planner, informed the court that he was instructed by applicants to visit the offices of the Cape Town City Council in order to inspect the City’s file with regard to respondent’s property and, in particular, to ascertain whether she required a departure and had applied for one. He investigated this matter on 25 July 2014. It appears that a setback departure application was submitted by respondent to the City on 14 December 2010. A departure fee had been paid on 14 December 2010. At that stage Mr Brummer confirms that the respondent did require a departure from the Zoning Scheme Regulations to develop her properties and that she had applied for one. He further informs the court that, in terms of a further document of 28 February 2011, it was clear ‘that the respondent decided to “design out” the element of the building plans requiring the departure application in her building plans were amended so that the departure was no longer required.’

[18] To determine a chronology which is common cause between the parties has proved extremely difficult. It appears to be clear that, as of October 2010, a discussion took place between the parties with regard to the planning application which the respondent wished to submit to the City of Cape Town relating to 15 Blinkwater Road. See paragraph 7 of the founding affidavit read together with respondent’s email of 31 January 2011. It is further common cause that a meeting

took place 31 January 2011 to further discussion the matter of respondent's development at 15 Blinkwater Road. The contents of this meeting are contested. However, applicant's version that, at some point, the respondent submitted the departure application to the City must be correct, because there is absolutely no reason to disregard the affidavit of Mr Brummer. That of course calls seriously into doubt the claim of respondent: 'I did not require any departure from the City of Cape Town and therefore did not need any letter of objection'. (para 21 of the answering affidavit)

[19] It can therefore be accepted that on 14 December 2010 respondent did submit a setback departure application in respect of her property. It is true that at some point and certainly as at 28 February 2011, she had changed her mind and this change obviated the need for such an application. Of what I cannot be certain, on these papers, is whether when the applicant avers that he was required to send respondent a letter of no objection, pursuant to the meeting of 31 January 2011, whether by then the respondent had changed her mind which negated the necessity for an application and hence a letter of no objection. This factual problem becomes important because, if the departure application was still alive at this point, a letter of no objection would have been extremely useful to the respondent. That sequence would make sense of the line in Mr Brummer's email of 31 January 2011: 'insofar as a departure is concerned I let you have the signed form a.s.a.p.'

[20] As Mr Irish correctly observed, it could not be that more than 3 years before litigation engulfed the parties, Mr Willemse was sufficiently astute to predict this

eventuality and had tailored an email of 31 January 2011 accordingly. I am also not certain as to what is meant in respondent's email 'you asked if I could come back to accommodate your view I have done so and are now in line with the legal building line but you still want me to come back.' This passage is suggestive of some form of agreement that may well have been entered into between the parties, the subsequent acrimony notwithstanding.

[21] Given that Mr Wyeth is also on affidavit confirming the contents of an agreement, it appeared that, based on the test as I have outlined it, there are contradictions and there are unconvincing explanations provided by the applicant. But, on the papers read holistically, I cannot conclude that there is a sufficiently serious doubt about applicant's averments that it will not be able to succeed if these facts are proved at trial. For these reasons therefore, I am satisfied that the applicant has shown a *prima facie* right necessary to justify the relief it has sought.

Balance of convenience

[22] The second requirement, as set out earlier, for an interim interdict is a well-grounded apprehension of irreparable harm if the interim relief is not granted. The third requisite which to a considerable extent is linked thereto concerns the balance of convenience in favour of the granting of interim relief. This requires a weighing of the prejudice which will be suffered by the applicant if the interim interdict is refused and the final relief is ultimately granted against the prejudice to the respondent, interim if relief is granted and final relief is refused. It is this issue on which there was significant contestation between the parties. For this reason, the

resolution of this question, given the finding of a *prima facie* right appears to me to be dispositive of this application.

[23] The founding affidavit deposed to by Mr Willemse is somewhat skeletal in this regard. He says the following:

‘I have advised that a court would have regard to the extent of the construction when considering whether to make a demolition order. Accordingly, should the respondent complete the proposed development before the matter is heard, there is a possibility that the applicants would only be awarded a damages claim.

In light of the unique views from 13 Blinkwater, a damages claim would be cold comfort to the applicants, quite apart from the inevitable forensic difficulty of proving the value of the loss.

In the premises, I submit that the applicants will not be afforded substantial redress if the matter is heard in due course.’

[24] By contrast, the respondent contends that applicant will suffer little damage, in that no evidence whatsoever was provided as to the alleged loss of market value raised by the applicants. Further, respondent contends that, should an interim interdict be granted, it would take at least 8 months (optimistically) for the proposed action to be heard. This time period does not take account of any appeals subsequent thereto but even a 8 month delay in finalising the building work would trigger costs of R 1.196 m together with the fact that she and her husband could require accommodation at approximately R 25 000 per month. This would add an extra R 200 000 onto their costs. They could not stay in their current

accommodation for much longer “because it is in an advanced state of disrepair and they need to move out shortly to start with major renovations.”

[25] It is settled law that a property owner does not have a right to an existing unobstructed view from his or her property. See for example **Dorland and another v Smits** 2002 (5) SA 374 at 383. The sole right upon which applicant has relied for relief depends upon an oral agreement. If there is an agreement, as is properly proved at trial, respondent’s construction to a height of 10 metres would have breached a right enjoyed by the applicant.

[26] In the ordinary course the applicant would be entitled to specific performance. But, as Griesel J held in **Trustees Brian Lackey Trust v Annandale** 2004 (3) SA 281 (C) at 290-291, a court in determining the nature of the relief which would be appropriate, on the assumption that respondent continued her building and that applicant was successful at trial, would be a wide and equitable discretion, based both on considerations of fairness and reasonableness as to whether damages rather than an order of demolition of the structure should be granted.

[27] Mr Rosenberg sought to distinguish this finding from the present dispute. He contended that the **Annandale** case did not involve specific performance in contract but rather raised the issue of liability for encroachment in the context of neighbour law. In that case, the question before the court was whether a massive encroachment, inadvertently erected by the plaintiff on land belonging to the defendant, ought to be demolished. It was in the particular circumstances of this

dispute that the court held that a subsequent court would have a wide discretion to determine the appropriate remedy.

[28] Mr Rosenberg contended that the position is different with regard to cases for specific performance within the contractual sphere; that is the discretion to withhold specific performance is far more limited and a claim for specific performance is obviously not to be advanced tactically as a pretext of extracting greater compensation.

[29] Encroachment cases, in his view, decided in the context of neighbour law present a set of different considerations. Apart from this proposition Mr Rosenberg referred to Van der Merwe *et al* Contract General Principles (4th ed) at 330 where the learned authors submit that, in general, a contractant is entitled to an order for specific performance, unless specific performance is impossible or if the debtor is insolvent. A careful examination of the *dictum* of Hefer JA in **Benson v SA Mutual Life Assurance Society** 1986 (1) SA 776 (A) at 782-783 upon which the authors rely requires a qualification of this submission:

‘Once that is realised, it seems clear, both logically and as a matter of principle, that any curtailment of the Court’s discretion inevitably entails an erosion of the plaintiff’s right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff’s right in some way or another. The degree to which it is affected depends, of course, on the nature and extent of the rule; theoretically, I suppose, there may be a rule which regulates the exercise of the discretion without actually curtailing it but, apart from the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically

speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion.

This does not mean that the discretion is in all respect completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex parte Neethling* (*supra* at 335)). It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy. Furthermore, the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all.’

[30] It cannot, without more, be inferred from this *dictum* that a court will only refuse specific performance where performance has become impossible or where the debtor is insolvent. It therefore follows that approach adopted by Griesel J in the **Annandale** case would be applicable to a case which has the nature of the present dispute, albeit grounded in contract law, rather than encroachment in the context of neighbour law.

[31] In my view therefore the approach that should be adopted to the determination of balance of convenience can be summarised thus: there will inevitably be inconvenience caused to one or other party if an order which is sought by an applicant is either granted or refused. The issue effectively involves a balancing exercise, namely to what extent in exercising its discretion, does a court consider that the inconvenience to the one party outweigh that caused to the other?

[32] This decision should be based as far as possible on principle, obviously viewed from the prism of the facts of the dispute. In this context Mr Irish contended that the manner in which this court should approach this enquiry is to commence with the assumption that if final relief was sought at this stage (that is the trial had taken place at this stage of the building construction) specific performance would have been granted. If the house however was completed in 8 months' time, it would be less likely that specific performance would be granted because of the nature of the construction and the discretion which would be available to a court in such circumstances.

[33] In my view, this is certainly a more than plausible manner in which to evaluate the competing claims of inconvenience. Further as Dlodlo J said in **Camps Bay Residents and Ratepayers Association v Augoustides** 2009 (6) SA 190 (WCC) at para 20 in dealing with an application for an interim interdict pending a review of building approvals which had been granted in respect of the construction:

‘The building work in my understanding of the papers is far from finished. The building activities can therefore still be stopped so as to embark on a legal process

to verify the legality thereof. In my view there is in this case more than enough justification that I should hold that the applicants have made out a compelling case.'

This emphasis on legality has a further consequence when the distinction between an order of specific performance and the grant of an interdict is taken into account. Lambiris *Orders of Specific Performance and Restitution in integrum in South African law* (1989) at 22 – 23:

'The objective of an order of specific performance is the actual performance of the terms of contractual undertakings. By contrast, the granting of a (final) interdict has the objective of protecting a person's legal rights against unlawful interference by another. These are distinctly different objectives. Because of this the granting of an interdict involves different considerations from those governing orders of specific performance. Additionally, an order of specific performance is available only to enforce particular types of legal obligation, that is, contractual obligations (whether "positive" or "negative") whereas, by contrast, an interdict is available to protect a different, and wider, range of legal rights.'

As the consideration in this kind of application concerns the protection of rights (albeit *prima facie*), this observation forms a sound justification for the relief to be granted. It is designed to ensure that the continuation of the building in breach of the applicant's *prima facie* right should stop.

[34] In this case, on the strength of the law as set in **Spur Steak Ranches Ltd**, *supra* at 714, I have found that the applicant has made out a case that its *prima facie* right is deserving of protection. This implies that the continuation of building activities which are taking place, at present, will be in breach of, what I have described as a *prima facie* contractual right.

[35] For these reasons, it is therefore appropriate that the relief sought in the notice of motion should be granted.

[36] The following order is made:

1. Pending the final determination for an action for an order declaring that the applicant's and respondent have concluded an oral agreement in terms of which the respondent undertook to restrict the height of the building presently being constructed on Erf 2515 Camps Bay, situated at 15 Blinkwater Road Camps Bay to 9 metres above the existing finished ground level, the respondent is interdicted from constructing or continuing to construct any portions of the building that are higher than 9 metres above the existing finished ground level.
2. The action shall be instituted within 15 days from the granting of this order.
3. Respondent is ordered to pay the costs of this application including the costs of two counsel.

DAVIS J

CORAM	:	DAVIS J
JUDGMENT BY	:	DAVIS J
FOR THE APPELLANT	:	ADV D IRISH SC & ADV N TRAVERSO
INSTRUCTED BY	:	SLABBERT VENTER YANOUTSOS INC.
FOR THE RESPONDENT	:	ADV S ROSENBERG
INSTRUCTED BY	:	WV ATTORNEYS
DATE OF HEARINGS	:	08 AUGUST 2014
DATE OF JUDGMENT	:	18 AUGUST 2014