

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 023727/2024

DATE: 22-03-2024

<p><b>DELETE WHICHEVER IS NOT APPLICABLE</b> (1) <b>REPORTABLE: YES / NO.</b> (2) <b>OF INTEREST TO OTHER JUDGES: YES / NO.</b> (3) <b>REVISED.</b> <b>DATE</b> <b>SIGNATURE</b></p>
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10 In the matter between

TTJ PROPERTIES CC

Plaintiff

and

ELMOFLEX PTY LIMITED

Defendant

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**J U D G M E N T**

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**CRUTCHFIELD, J:**

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20 This application came before me in the urgent on Thursday 7 March 2024. I undertook to give judgment on Tuesday 12 March 2023, which judgment had to be postponed due to my falling ill unexpectedly and very suddenly on 9 March 2023. As a result, this is the first available opportunity to deliver this judgment. The same in fact applies to the previous

matter in which I have just handed down judgment.

[1] The applicant, TTJ Properties CC, sought relief against the respondent, Elmoflex (Pty) Limited for relief essentially in the following terms;

1.1 That the respondent restore to the applicant *ante omnia* the applicant's joint possession of the common boundary wall between the parties respective immovable properties by restoring the wall to its location prior to 27 February  
10 2024;

[2] Pending the finalisation of the legal proceedings for foreshadowed in the founding papers in which the applicant will seek an order declaring that it is acquired ownership of a portion of the respondent's property measuring 1166 square metres through an acquisitive prescription, together with ancillary relief, the respondent be interdicted and restrained from:

2.1 demolishing, removing or relocating the common boundary wall between the parties' adjoining property situated along Boeing Road  
20 East, Bedfordview, Gauteng;

2.2 interfering with the applicant's use and possession of the disputed area of land measuring 1166 square metres situated on the applicant's side of the common boundary wall

and which the applicants contends have become part of its property through an acquisitive prescription ("the disputed area of land"), as well as the applicant's use and possession of any improvements on the disputed area of land;

2.3 instantiating or permitting any of its contractors or labourers to enter upon any part of the applicant's property including the disputed area  
10 of land and various relief ancillary thereto.

[3] Subsequent to the issue of the application, the applicant delivered an interlocutory application for various amendments to the notice of motion including for the renumbering of various paragraphs of the existing notice of motion, the addition of a new paragraph 3 that the respondent be ordered to *ante omnia* restore to the applicant the free and undisturbed possession of the piece of land as depicted on the diagram attached here to marked "NOM1" by the letters and figures FZE321F measuring 1166  
20 square metres ("the disputed area of land") together with the storeroom with in the aforesaid area sketched in free hand into the aforesaid diagram for identification purposes;

3.1 by adding new paragraphs 4.4 and 4.5:

3.2 4.4 that the respondent be interdicted and restrained from continuing any further

demolition or relocation of those parts of the boundary wall that had not yet been demolished since 27 February 2024 especially at the point where the common boundary wall meets internal wall one on the applicant's property as depicted in annexure "NOM1" hereto;

10 3.3 sub 4.5 demolishing or interfering with any portion of the scaffolding or support structures of the Samsung Billboard, especially in the area around point E in the diagram contained in annexure NOM1 hereto;

3.4 by amending the figure "3" in the existing prayer 4 (now prayer 5.1) to the figure "4" and by adding the following new prayer 5.2:

20 3.5 5.2 that the applicant be directed to prosecute the proceedings contemplated in prayer 5.1 to finality within a period of one year from the date of the instituted thereof or within such longer period as the court may on good course permit failing which the interim interdict in terms of prayer 4 will laps.

[4] The applicant in effect, claimed a *mandament van spolie* together with an interim interdict to restrain the respondent from spoliating the applicant in its possession of the common boundary wall between the immovable

properties of the applicant and the respondent respectively together with the applicant's possession and use of the disputed area of land, which the applicant alleged had been in the applicant's peaceful and undisturbed possession since during or about 2 April 1992, being a period in excess of 30 years approximately.

[5] The respondent opposed the application.

[6] The ...[indistinct 38:52] for the issue of the application and its urgency was that the respondent  
10 commenced demolishing the common boundary wall on or about 27 February 2024 in order to relocate allegedly, the common boundary wall ("the wall") so that the respondent's immovable property incorporated the disputed area of land measuring 1166 square metres into the respondent's property.

[7] The urgent relief was sought pending finalisation of proceedings to be issued by the applicant declaring that the applicant had acquired ownership of the disputed piece of land through an acquisitive prescription and related relief.  
20 The applicant delivered the interlocutory application for an amendment through the notice of motion in that the applicant launched the application whilst the respondent was in the process of demolishing the wall. Immediately prior to the application being heard before me, the respondent who had allegedly continued with the work in the

interim, had relocated the wall such that the applicant had lost possession of the disputed area of land. Thus, the applicant's need to amend the notice of motion to provide for the restoration of the disputed area of land to the applicant's possession as sought by the applicant.

[8] The respondent, in the course of its answering papers, did not undertake that it would not take further steps in respect of the wall and the disputed area of land and as a result the applicant sought the interdictory relief referred to in the notice of motion seeking the amendment to the existing notice of motion in the application uploaded on CaseLines at page 08-2.

[9] The respondent allege that the applicant did not justify the short notice given to it to deliver answering papers, that the application was not urgent and that the respondent was the registered owner of the disputed area of land. As a result, the respondent contended that given it was the registered owner of the disputed area of land and that the wall in fact stood on its registered piece of immovable property, the respondent was well within its rights to demolish and move the wall from where it stood historically prior to 27 February 2024.

[10] As to the urgency of the application, the fact that the respondent continued to take steps in respect of the common boundary wall such that the disputed area of land

had been moved effectively to fall within the respondent's immovable property as and when the application came before me, justified the applicant approaching this court urgently.

[11] Accordingly, the respondent alleged in respect of the substantive merits of the application that its actions were lawful and there had not been any unlawful interference by the respondent with any rights of the applicants. Accordingly, the respondent sought that the application be  
10 dismissed with costs.

[12] In order for the applicant to find success in the application, it had to show peaceful and undisturbed possession of the disputed area of land and its share of the wall between the applicant and the respondent's respective immovable properties. Furthermore, that the respondent unlawfully deprived the applicant of that possession. See in this regard *Nino Bonino versus De Lange* 1906 (T)S 120 at 122.

[13] The merits or otherwise of the applicant's possession  
20 and the respondents' right to dispossess the applicant, if any, are not ...[indistinct 46:06] in spoliation proceedings. No person may take the law into his or her own hands and dispossess another without the authorisation of a court order. A court tasked with determining spoliation will not inquire into the merits of the dispute but will grant an order

restoring possession to the party in peaceful possession prior to the dispossession once the requirements are proven and without inquiring into the merits of the dispute.

[14] The respondent did not dispute that it took steps to move the wall from its established historical position prior to 27 February 2024. The applicant alleged that subsequent to the respondent being notified of these proceedings it hasten its move of the wall so as and when the application came before me the applicant had lost possession of the disputed  
10 area of land as a result of the respondent's repositioning of the wall. For that reason, the applicant found itself obliged to seek the amendment to the notice of motion in that the notice of motion as it originally existed does not fit the existing factual matrix of the application at the time that the application was argued before me. In the circumstances, it is appropriate for me to grant the application for the amendment to the notice of motion in the event that I find in favour of the applicant.

[15] The respondent's opposition to the application was  
20 that its conduct in moving the wall was lawful as the wall in fact stood on the respondent's property. Accordingly, the respondent's alleged interference with the applicant's alleged possession of its share of the wall and the disputed area of land was not unlawful.

[16] The respondent alleged in its heads of argument that



the disputed area of land was situated on the property of the respondent accepting for the purposes of this judgment that that is in fact correct, the *mandament van spolie*, however serves to protect the factual position as it existed immediately prior to the respondent's dispossession of the applicant's possession of the common boundary wall and the disputed area of land prior to the respondent's dispossession of the applicant thereof.

[17] The applicant demonstrated with reference to a series  
10 of photographs and historical correspondence that the disputed area of land and the wall were accepted by the parties historically as being in the possession of the applicant and the applicant over the years, had utilised and had access to the disputed area of land and the wall.

[18] The applicant demonstrated the position prior to 27 February 2024 as well as post 27 February 2024, with reference to a series of photographs uploaded on CaseLines. The photographs (CaseLines 10-22) by way of example, reflected where the wall stood at the date of  
20 hearing before me and reflected the open trench where the wall had stood historically prior to the respondent moving the wall.

[19] A structure referred to by the applicant as "storeroom two" stood, at the date of the hearing before me, on the respondent's property pursuant to the relocation of the wall

from its historical position prior to 27 February 2024. Prior to the relocation of the wall, storeroom two stood on what was considered and accepted to be the applicant's property.

[20] The photograph uploaded at CaseLines 10-4 reflected the support structures of a billboard. The wall running left to right across the photograph was referred to by the applicant as internal wall two running across the width of the applicant's property prior to 27 February 2024. The wall running down the right of the photograph at CaseLines 10-4  
10 had been reposition pursuant to the respondent's relocation of the wall.

[21] The photograph uploaded at CaseLines 10-5 reflected the position at the time that the application was heard before me. The newly repositioned wall stopped against the base of the Samsung Billboard. The southern boundary wall was visible in the background of that photograph. The photograph uploaded at CaseLines page 10-11 was taken the day prior to the hearing. It reflected the repositioned wall subsequent to 27 February 2024 and that the  
20 respondent's steps in respect of the wall had caused various openings and potentially prejudicing the applicant's security, as a result of the various openings in the wall. The remains or traces of the wall from its historical position prior to 27 February 2024 were visible in various of the photographs.

[22] It was easily apparent from the photographs that the

applicant was in possession of the wall as well as the  
disputed area of land prior to the respondent moving the  
wall and thereby dispossessing the applicant of the wall as  
well as the disputed area of land. The respondent had no  
right to demolish and relocate the wall from its historical  
position prior to 27 February 2024 and dispossess the  
applicant of the disputed area of land in the process,  
notwithstanding the respondent's allegation that the wall  
and the disputed area of land were located on the  
10 respondent's property.

[23] The respondent did not have a court order authorising  
the respondent's conduct in relocating the wall and nor did  
the respondent ...[indistinct 55:35] pursuant to the  
agreement of the applicant to do so. Accordingly, the  
respondent's conduct in relocating the wall was unlawful  
and the applicant proved before me that it was in peaceful  
possession of its share of the wall as well as the disputed  
area of land prior to the respondent relocation the wall,  
unlawfully with effect from 27 February 2024.

20 [24] In the circumstances described above, the applicant  
is entitled to the relief sought by it in terms of the amended  
notice of motion. The applicant is entitled to the  
interdictory relief as the respondent's undertaking extended  
only pending judgment of the application. The applicant  
and the respondent's counsel agreed between them during

the course of the proceedings before me as to the wording of any order that is to be granted in the event that I found in favour of the applicant as I have done. In the circumstances, the following order is granted:

10 24.1 The respondent *ante omnia* is order to restore the applicant's joint possession of the common boundary wall between the parties' respective immovable properties as lawfully depicted in annexure FA6 to the founding papers by restoring the wall to the location it was in prior to 27 February 2024;

20 24.2 The respondent is order *ante omnia* to restore to the applicant free and undisturbed possession of the disputed area of land as depicted on the diagram attached hereto marked NOM1 by the letters and figures FZE321F measuring 1166 square metres ("the disputed area of land"), together with the storeroom within the aforesaid area sketched in free hand into the aforesaid diagram for identification purposes;

24.3 Pending finalisation of the legal proceedings foreshadowed in the founding papers in which the applicant will seek an order declaring that it has acquired ownership of a portion of the

respondent's property measuring 1166 square metres through an acquisitive prescription, together with ancillary relief, the respondent is interdicted and restrained from:

- 24.3.1 demolishing, removing or relocating the common boundary wall between the parties' adjoining properties situated along Boeing Road East, Bedfordview, Gauteng;
- 10 24.3.2 interfering with the applicant's use and possession of the disputed area of land measuring 1166 square metres situated on the applicant's side of the common boundary wall in which the applicant contends had become part of its property through a acquisitive prescription ("the disputed area of land"), as well as the applicant's use and possession of any improvements on the disputed area of land.
- 20 24.3.3 instructing or permitting any of his contractors or labourers to enter upon any part of the applicant's property including the disputed area of land;
- 24.3.4 continuing any further demolition or

relocation of those parts of the boundary wall that have not yet been demolished since 27 February 2024 especially at the point where the common boundary wall meets internal wall one on the applicant's property as depicted in annexure NOM1 hereto;

10           24.3.5           demolishing or interfering with any portion of the scaffolding or support structures of the Samsung Billboard, especially in the area around point E in the diagram contained in annexure NOM1 hereto;

          24.3.6           the applicant is directed to institute the proceedings contemplated in paragraph 3 above within a period of 30 days from the date of this order being 22 March 2024, failing which the interim interdict in terms of prayer 4 will lapse;

20           24.3.7           the applicant is directed to pursue the proceedings contemplated in prayer 5.1 to the stage where the applicant can apply for a trial date within a period of one year from the date of the institution thereof, or within such longer period as a

court on good cause may permit, failing which the interim interdict in terms of prayer 4 will lapse;

24.3.8 the respondent is ordered to pay the costs of the application on a scale as between attorney and client.

I hand down the judgment.

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**CRUTCHFIELD, J**

**JUDGE OF THE HIGH COURT**

**DATE:** .....