REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG

CASE NO: 1352 /2022

DATE: 24 January 2024

DELETE WHICHEVER IS NOT APPLICABLE
1. Reportable: Yes / No
2. Of Interest to Other Judges: Yes / No
3. Revised
DATE: SIGNATURE:

In the matter between:

Fiona Tracy Glover **Applicant**

and

Kwelati Chelemu: **First Respondent**

Khwethiwe Chelemu **Second Respondent**

JUDGMENT

Johann Gautschi AJ

1. This is an application by the applicant as the registered owner of **356B** Aureole Avenue, North Riding Agricultural Holdings, which is Portion 161 (a portion of portion 132) of the Farm Olievenhoutpoort No. 196-IQ, Province of Gauteng, for registration of a servitude of right of way over the neighbouring property, **356A** which is Portion 162, owned by the respondents. The respondents are married and are joint (50% each) registered owners of Portion 162.

2. The background to this application is as follows. The applicant purchased portion 161 in October 2017 from Isabel Barnard ("Barnard") and transfer to the applicants was concluded on or about 19 January 2017. After receiving registration of transfer, the applicant and her partner moved into the property and received the house plans from Barnard from which they then noticed that the plans were not an accurate description of the development of the property up to that stage. The Professional Architectural Technologist who they then employed to redo the plans pointed out to them that, at variance with the Surveyor General's drawing, the 45° angled existing boundary wall adjacent to their house, which allowed access to their Panhandle driveway which would otherwise have been obstructed by the location of the kitchen of their house, cut across and encroached upon that corner of their neighbours' property, Portion 162. That encroachment area was subsequently determined by a Professional Land Surveyor employed by the applicant to be 61 m^2.

3. In her founding affidavit the applicant explains that upon making further enquiries the applicant learned from Mandylou Parnall ("Parnall"), the previous owner of the respondents' property, Portion 162; that Barnard had concluded a verbal agreement her in terms of which Parnall "*gave ownership*" of the "*encroached area*" to Barnard and in exchange Barnard would erect the entire communal boundary wall at her own

exclusive cost; that the verbal agreement was actioned, but never documented and the "*encroached area*" was never registered on the title deed of portion 162 as a right of way servitude in favour of portion 161. The "confirmatory affidavit" of Parnall said to be attached to the founding affidavit is not signed. In her replying affidavit the applicant attached a brief handwritten affidavit which had been deposed to by Parnall some time earlier on 24 February 2019, explaining that Parnall had since relocated and was then permanently residing in the United Kingdom and that a confirmatory affidavit could not be obtained from her.

4. Parnall's 2019 affidavit states: "*When I resided at 358A from Dec 2004 till August 2013 the owner of the adjacent property to the attached plan sold the portion indicated by the hatched area to the then owners of 356B in return for them erecting the communal boundary wall. When I sold this property the wall was erected and the hatched area part of 356B was no longer part of 356A*".

5. The founding affidavit continues to explain that during May 2019 the applicant approached the first respondent with a request that he sign a power of attorney for registration of a servitude of right of way to formalise the informal agreement between the previous owners of the respective properties. She states that the first respondent "*became aggressive, accused us of having stolen the land and demanded compensation from us. The First Respondent also denied having knowledge of the agreement between the previous owners, as alleged by Parnall. The Second Respondent however, advised us that she was aware of the agreement as alleged by Parnall, that she regarded the "encroached area" as part of our property and that she (as 50% owner) would agree to the registration of a right of servitude as requested*". It was that "*unreasonable behaviour*" of the first respondent which the applicant says "*forced*" her to launch this application for registration of the envisaged right of way servitude.

6. The applicant attached an estate agent's valuation report which valued the "*encroached area*" at R25,000 in comparison to estimating "*the value of building the wall could have cost approximately R117,000 and the current value might be an average of R52,000*".

7. The applicant concluded by submitting that I should exercise my judicial discretion having regard to the following:

> *"27.1 I was not aware of encroachment and I purchased portion 161 and by that time, the boundary wall had already been erected. I cannot be blamed for the encroachment and the effects thereof, and I should therefore not have to suffer any unreasonable consequences;*
>
> *27.2 The Respondents were made aware of the encroachment and the circumstances of the oral agreement between the previous owners when they purchased portion 162 during May 2013;*
>
> *27.3 The previous owner of my property (Barnard) erected the boundary wall totally at her own cost, as per the agreement with Parnall, but in the process, it also increased the value of portion 162, thereby compensating Parnall for the encroachment, as agreed;*
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> *27.4 The value of the boundary wall (between R52,000.00 and R117,000.00) far exceeds the value of the encroached land (R25,000.00), and it would be unreasonable to expect me to demolish the boundary wall, lose access to my driveway and have to demolish my kitchen;*
>
> *27.5 Parnall, the previous owner of portion 162, had already been compensated for the encroachment by the increase in value of the property due to the erection of the communal boundary. That increase in value has been passed on to the Respondent;*
>
> *27.6 I stand to suffer severe financial loss if the servitude is not registered in which case I will not be able to access the driveway to my property and in addition, I will have to demolish the whole of the kitchen;*

27.7 The registration of the servitude, as sought in the notice of motion, will serve to safeguard the rights of not only myself and the Respondents, but also future purchasers of our respective properties.

27.8 The "encroached area" clearly does not negatively affect the Respondents as it would have been expected of them to apply to Court for the demolition of the boundary wall long ago, if it did."

8. In opposing the relief sought the respondents only filed an answering affidavit by the first respondent. He submitted that the oral agreement was of no force or effect by reason of section 2 of the Alienation of Land Act 68 of 1981, objected to having to donate a piece of his property against his will and submitted that the applicant had ample opportunity to engage with him and negotiate transfer of ownership at a cost instead of simply expecting him to donate the piece of property to her and that servitude registered on the applicant's terms would cause him to suffer financial loss.

9. He also included a counter-application contending that

"4 The issue of encroachment is one that ought to be decided by the court on whether the boundary wall encroaching on my property or to either be demolished or replace the injunctive relief with compensation i.e. an order of damages instead of the removal of the encroaching structure.

5 I am advised that the appropriate proceedings when the claim sounding and monies concern should be instituted in a trial court. It is common cause that an issue of damages in an unliquidated claim which can only be decided on oral evidence from experts who can testify on the value of the portion of land the Applicant seeks to expropriate.

6 The Applicant instituted motion proceedings was being well aware of the court's wide discretion towards damages instead of demolition of the encroachment of my property.

7 As matters stand, my property measures at 9416 m² and currently valued at R6,500,000.00

8 In the light of my inability to request an order of a claim sounding in money from the above Honourable Court, I humbly pray the matter should either be dismissed or referred to a trial court in terms of Rule 6 (5) (g) as granting the Applicant an order in terms of its Notice of Motion would be unjust and prejudicial to me and the second Respondent.

9 Should the Court direct that the matter be disposed on motion proceedings, I humbly request that I be granted leave to supplement the counter application for damages claim against the Applicant should the court elect to uphold the Applicant's claim not to demolish the encroachment boundary wall so as to ensure the outcome is not disproportionately prejudicial."

10. The respondents later, on 18 October 2023, filed a supplementary answering affidavit stating as follows:

"4 I am filing this affidavit in support of my assertion that the amount offered by the Applicant is far below market value and that I should not be compelled to sell my property at a price which are not comfortable in selling attached.

5 On 1 September 2023, Jade Waller performed a property valuation of the portion of land in dispute and came to an amount of 24,000.

6 The valuation I meant to understand was calculated based on the following factors:

6.1 The total size of the property is 9416 m²;

6.2 The total value of the land is R4 129 000.00;

6.3 The affected area affected (sic) is 66.4 m²; and

6.4 The value per square metre is R360.00;

6.5 The value of the affected area is rounded to R24,000.00

Attached hereto marked "SA 1" is a copy of the valuation.

7 Notwithstanding the above valuation, I'm not willing to sell a portion of my property to the Applicant especially for a price imposed on me by her.

8 In the circumstances I submit that I am not inclined to sell the portion of my property to the Applicant simply because there is an application before the Honourable Court."

11. At the commencement of the hearing I drew attention to the judgment in Fedgroup Participation Bond Managers (PTY) LTD v Trustee, Capital Property Trust 2015 (5) SA 290 (SCA) in which it is held that an encroaching is not, in the absence of an application or action being brought by the owner of the land for removal order, entitled to approach a court for an order compelling the owner to transfer the encroached-upon land against the tender of compensation.

12. In argument on behalf of the applicant was urged to nevertheless exercise my discretion to grant the relief sought.

13. In my view this application should never have been brought having regard to the Fedgroup judgment of which neither party was aware and the likely disputes of fact and involvement of experts as to appropriate compensation. In the result I am of the view that the application should be dismissed.

14. Given the nature and extent of factual disputes involved in the disputed valuation which will require expert evidence, this is in any event manifestly a matter which is not appropriate for an application or a referral to oral evidence. Consequently, I am of the view that also the counter application should be dismissed.

15. Given that neither party was aware of the Fedgroup judgment and that it is likely to be difficult to identify and allocate which costs ought to be attributed to the main application as opposed to the counter-application, I am of the view that I should

make no order as to costs which will in effect mean that each party will have to bear its own costs.

16. During argument I was requested to make a ruling in relation to the wasted costs occasioned by an earlier postponement of this matter which was requested by respondents to enable them to file a supplementary affidavit. Counsel for the respondents acknowledged that the respondents had sought an indulgence and was not able to make any submissions as to why the respondent should not be ordered to pay the wasted costs occasioned by that postponement. Consequently, the respondent should be ordered to pay the wasted costs of that postponement.

17. Accordingly, I make the following order

ORDER:

1. The Applicant's application is dismissed and no order as to costs is made so that each party will bear his/her own costs.
2. The Respondents' counter-application is dismissed and no order as to costs is made so that each party will bear his/her own costs.
3. The respondents are ordered to pay the wasted costs occasioned by the postponement granted to the respondents to file a supplementary affidavit.

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Johann Gautschi AJ

24 January 2024

Date of judgment: 24 January 2024

Date of hearing: 24 October 2023

Counsel for Applicant: Adv Tersius Steyn

Attorneys for Plaintiff: ODBB Attorneys

Counsel for Respondents: Adv WA Bava

Attorneys for Respondents: Nogaga Attorneys