

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D6707/21

In the matter between:

VIVENDRAN PILLAY

FIRST APPLICANT

INDRANI PILLAY

SECOND APPLICANT

and

JONATHAN MOONSAMY

FIRST RESPONDENT

MELANIE MOONSAMY

SECOND RESPONDENT

ORDER

The following order is issued:

1. The application for the removal of the structure which encroaches onto the applicants' property: Erf [...]k C[...], Registration Division FU, KwaZulu-Natal (also known as [...] A[...] Road Sunford, Phoenix) from the respondents' next-door property, Erf [...] C[...], also known as [...] A[...] Road, Sunford, Phoenix, is granted.

2. The first and second respondents are ordered to remove the encroachment within 60 days of the date of service of this order.
 3. The first and second respondents are ordered to pay the costs of this application, jointly and severally, the one to pay the other to be absolved at scale A.
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JUDGEMENT

DAVIS AJ

Introduction

[1] The applicants and the respondents are neighbours. The applicants are the registered owners of Erf [...]k C[...], Registration Division FU, KwaZulu-Natal (also known as [...] A[...] Road Sunford, Phoenix). The respondents are the registered owners of the next-door property, Erf [...] C[...], also known as [...] A[...] Road, Sunford, Phoenix.

[2] This is an application for an order at the request of the applicants' declaring that the respondents' boundary roof between the parties' erven is encroaching upon the applicants' property, if granted the removal of such encroachment within 30 days of the date of this order and that the respondents tender costs for this application.

[3] In *Mbane v Gxeny*¹ it was held that a mandatory interdict is available to a neighbour to compel the removal of an encroachment. This derives from the common law duty which a landowner owes to his adjoining landowner. The court described this duty as an obligation not to deprive a neighbour of possession or wrongfully to exclude him from the possession of what belongs to him. In recent years the question whether a court should, in the exercise of its discretion, order

¹ [2023] ZAWCHC 91 at para.9; See also *Smith v Basson* 1979 (1) SA 559 (W)..

compensation instead of demolition. This is an issue to consider in the context of matters such as the present.²

[4] The respondents oppose the application.

Applicants submissions

[5] The applicants maintain that the respondents' roof encroaches onto his property, the resulting nuisance has impacted upon the use and enjoyment of his property. When they became aware that the roof encroached upon their property they were advised by the municipality that their remedy lay in civil law.³

[6] Consequently the applicants appointed a professional land- surveyor to inspect the property and it was confirmed that the respondents' property, did indeed encroach onto the applicants' property.⁴ Although the applicants' allege that, in addition to the roof the respondents' boundary wall contributes to two further encroachments on their property , however, at this stage in the hearing this assertion is no longer relevant. Instead the issue that remains to be determined by this court is that of the alleged encroaching roof of the respondents' property and, should such be proven, to compel the removal of such encroachment.

Respondents submissions

[7] The respondents' land surveyor had noted that the survey instruments used by the applicants' land surveyors had what she referred to as a 'source of error' which led to a possible incorrect measurement that might then not constitute an encroachment. However this allegation was not supported by any measurements taken by the respondents' land surveyor proving otherwise⁵

[8] The respondents' land surveyor indicates that the survey instruments have what she refers to as 'sources of error' and then based on these assumptions of

² See, *Rand Waterraad v Bothma* 1997 (3) SA 120 (O). See also *Smith v Basson* *ibid*.

³ See letter from the municipality in the applicant's indexed bundle at 21-22.

⁴ See report provided by the applicants' land surveyor, V.R Govender, applicants' indexed bundle at 23 and 47-51.

⁵ See report provided by the respondents' land surveyor, R Ginya, respondents' indexed bundle at 47-48.

error concludes that the encroachment of centimetres, cannot, without ambiguity, be considered an encroachment⁶. This is an opinion based on an assumption of possible error in the survey equipment of the applicants' surveyor. It not backed up by any measurements taken by the respondents' surveyor.

[9] The supplementary report provided by the applicants' land surveyor reflects the roof encroachment measures 78cm ⁷ With their being no proper challenge to the report of the surveyor of the applicants, the applicants' argue that there is no real bona-fide dispute of fact.

[10] The applicants' aver and maintain that they have a right to the use and enjoyment of the property without the inconvenience caused by the encroachment of the respondents' roof. They should be entitled to use and enjoy their property without unreasonable limitations. The land surveyor re-surveyed the property and confirmed that the roof encroachment spans 78cm and definitely constitutes, in law, an encroachment.

[11] The respondents' did not respond to the supplementary report and maintain that there is no encroachment. Instead their argument is that there is a dispute of fact pertaining to the existence of an encroachment. Therefore the matter needed to resolved by referring the matter for oral evidence to be led.

Dispute of Fact

[12] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* ⁸it is confirmed that the rule pertaining to a dispute of fact may be dealt with in application proceedings without hearing oral evidence to resolve the dispute. In motion proceedings, a final order may be granted if the facts stated by the respondents, together with admitted facts in the applicants' affidavits, justify the order.

⁶ See report provided by the respondents' land surveyor, R Ginya, respondents' indexed bundle at page 48.

⁷ See supplementary report provided by the applicants' land surveyor, V.R Govender, applicants' indexed bundle at 72-74.

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[13] In general, the rule is that in proceedings where disputes of fact have arisen on affidavits, a final order, whether an interdict or some other form of relief, maybe granted if the facts averred in the Applicant's affidavits, which have been admitted by the Respondent together with facts alleged by the Respondent, justify such an order.⁹

[14] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*,¹⁰ the court held as follows:

'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'¹¹

⁹ *Plascon-Evans Paints* above fn 7 at 368.

¹⁰ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).

¹¹ *Ibid* para 13.

[15] While the first respondent alleges that there is a dispute of fact in existence, the Applicants' correctly so, submits that the First Respondent has not raised a real, genuine, or *bona fide* dispute. Only one expert report actually dealt first hand with the issue of whether or not there was an actual encroachment.

[16] On a proper application of the test, pursuant to the *Plascon-Evans* rule,¹² I am satisfied that there is no *bona fide* dispute of fact; there is in my view, no doubt that the measured encroachment of the roof is 78 square centimetres. The denial of the respondents does not engage with the underlying factual background of the opinion of the applicants' land surveyor and does not engage with the issue in dispute meaningfully. On this aspect, I am satisfied on a proper application of the rule that there is no factual dispute. There is a roof encroachment of 78 square centimetres..

Historical nature of the encroachment

[17] The roof was erected in or around the end of 2007 and plans were approved for this structure. There were no complaints from 2007 until 2017. The roof was built in accordance with approved plans and therefore the respondents submit they cannot be held responsible for the encroachment.

[18] It is trite law¹³ that the registered owner of immovable property enjoys all the rights, responsibilities and liabilities accruing to such property. As such, the benefit of historical improvements to the property, by its previous owners, would accrue to its current owner. Similarly, the liabilities resulting from historical alterations to the property will accrue to its current owner, regardless of who had affected such alterations. This position is confirmed by *Cape Town Municipality v Fletcher & Cartwrights Ltd*¹⁴ and *Mondoclox (Pty) Ltd v Branch and Another*,¹⁵ where the successors-in-title to a property were compelled to remove encroaching structures constructed by their predecessors-in-title.

[19] The respondents failed to avail themselves of the invitation to file further answering papers in which they could have addressed this issue or any unexpected

¹² *Plascon-Evans Paints* above fn 7.

¹³ *Philips v South African National Parks Board 2* (4933/07) ZAECGHC 27 (22 April 2010)

¹⁴ *Cape Town Municipality v Fletcher & Cartwrights Ltd* 1936 CPD 347 at 350

¹⁵ *Mondoclox (Pty) Ltd v Branch and Another* [2022] ZAECMKHC 118 at para.35.

or new information in the replying affidavit. However, they failed to provide any corroboration or evidence to substantiate their claim that the boundary lines were incorrect. I am satisfied that on the admitted factual background that the respondents' roof has encroached upon the property of the applicants and despite the averment that it was built on approved plans, the respondents, in terms of law, remain responsible for the encroachment.

[20] The respondents' claim that no cause of action lies against them due to the fact that the encroachment was caused by the approved plans construction and therefore has no merit. The applicants have proved the existence of a real right.

Remedy

[21] As the registered owner they are liable to correct the encroachment upon the applicant's property. It is in any event clear that no action or process against a third party would provide the applicant with the relief necessary to correct the encroachment. As the registered owners, the respondents are the only party who can be compelled to demolish the boundary wall.

[22] As was stated in *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust*,¹⁶ South African Law has always carefully protected the right of ownership, especially of immovable property, as a most important and extensive right.

[23] In *Phillips v South African National Parks Board*¹⁷ the Court held:

'It is indisputable that an encroachment of the nature in issue in the instant case constitutes an interference with applicant's property rights such as to constitute a deprivation in terms of the provisions of section 25 of the Constitution. It follows that, in exercising its discretion the court will accept, as a starting point, that the owner is entitled to claim a demolition order in respect of the encroaching structure. The primary remedy is therefore an order for removal of the structure...'¹⁸

¹⁶ *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust* [2015] ZASCA 103; 2015 (5) SA 290 (SCA); [2015] 3 All SA 523 (SCA).

¹⁷ *Phillips v South African National Parks Board* [2010] ZAECGHC 27.

¹⁸ *Ibid* para 24.

[24] Ordinarily with encroachment, the court has a discretion to either order the removal of the encroachment or to award damages and compensation.¹⁹ In such instances, the deciding factor is the disproportionality or otherwise between the removal of the encroachment as against the damage or inconvenience suffered by the aggrieved landowner.²⁰

[25] When compensation rather than demolition or removal is ordered, it is usually done on the basis of policy considerations such as an unreasonable delay on the part of the landowner, or on the basis of what might be viewed as acquiescence, and prejudice²¹. In this instance, as soon as the applicants became aware of the encroachment they sought its removal. The respondents refused to abide by the applicants' request for removal and offered no substantial offer to address the problem. No party made any meaningful submissions that damages would be a better route.

[26] It is clear from the contents of the application that the respondents are indeed in breach of the law. For the court to allow them to keep the structures as is, would be to perpetuate the wrongfulness of the respondents' and thus resulting in a dangerous precedent in that it would negate the very purpose of orderly urban living and building that respect property boundaries.

[27] On a first reading of the papers I believed that the issue of damages was not considered sufficiently. On reflection, after hearing counsel for the parties, it is clear that compensation or damages is simply not viable and the only way to resolve the harm caused by the encroachment would be for its removal.

[28] The encroachment does have a negative impact on the applicants' use and enjoyment of their property therefore, it is my view that, in these circumstances, the application to compel the removal of such encroachment, resulting from the respondents' property, should be granted. However it is believed that a 30 day

¹⁹ *Thulo v Madolo and Another* [2023] ZAFSHC 426 para 7.

²⁰ *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C).

²¹ *Trustees of the Brian Lackey Trust v Annandale* (3848/02) [2003] ZAWCHC 52; [2003] ALL SA 528 (C) at para.28

timeframe is inadequate and therefore unreasonable. Instead the respondents' should be afforded 60 days to remove the encroachment from the date of this order and should be ordered to tender the costs of this application is too short a period for the removal.

Order

[29] I make the following order:

1. The application for the removal of the structure which encroaches onto the applicants' property: Erf [...]k C[...], Registration Division FU, KwaZulu-Natal. (also known as [...] A[...] Road Sunford, Phoenix) from the respondents' next-door property, Erf [...] C[...], also known as [...] A[...] Road, Sunford, Phoenix, is granted.
2. The first and second respondents are ordered to remove the encroachment within 60 days of the date of service of this order.
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DAVIS AJ

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