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

Case number: 14211/2022

In the matter between:

NOMNANDI HAZEL MBANE Applicant

and

BABALWA GXENYA First respondent

THE CITY OF CAPE TOWN Second respondent

JUDGMENT DELIVERED ON 2 MAY 2023

VAN ZYL AJ:

Introduction

1. The applicant and the first respondent are neighbours. The applicant is the registered owner of Erf 4517, Langa (also known as 3 Gumbi Close, Langa), and the first respondent is the registered owner of Erf 4518, Langa (5 Gumbi Close, Langa).

2. This is an application for an order declaring that the first respondent's boundary wall between the parties' erven is encroaching upon the applicant's property, and for an order compelling the first respondent to demolish the wall.

3. In *Smith v Basson*[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

[1] 1979 (1) SA 559 (W) at 560G-H.

to him. In recent years the question whether a Court should, in the exercise of its discretion, order compensation instead of demolition, has become a factor to consider in the context of matters such as the present.[2]

4. The first respondent opposes the application. The second respondent has not taken any part in the proceedings.

5. The first respondent admits that the wall encroaches on the applicant's property, but seeks to defend the application by way of what is couched as five points *in limine,* namely:

   5.1 The non-joinder of the developer of the area in which the properties are situated;

   5.2 Estoppel;

   5.3 That there is no cause of action against the first respondent due to the encroachment having been caused by a third party, namely the developer;

   5.4 That the matter is not ripe for adjudication; and

   5.5 That compensation should be granted to the applicant as an alternative remedy to demolition.

6. This Court must accordingly decide whether any of the points raised constitutes a valid defence to the applicant's claims.

The relevant factual background

7. As mentioned, the applicant and first respondent own adjacent properties situated in Langa, namely Erf 4517 (owned by the applicant) and Erf 4518

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[2] See, for example, *Rand Waterraad v Bothma* 1997 (3) SA 120 (O).

(owned by the first respondent). Erf 4518 is to the west of Erf 4517. The properties are physically separated by a vibracrete wall constructed by the developer from whom the respective properties were bought in 2005. In 2018, the first respondent extended the vibracrete wall towards the north and south of her property to link the vibracrete wall with Gumbi Close to the north, and the Remainder of Erf 831 to the south.

8. In July 2020, the applicant commissioned architectural drawings to construct a flatlet on her property's north-western border, as part of an overall renovation of her house. The architects conducting the survey subsequently informed the applicant that the first respondent's boundary wall was encroaching upon the applicant's property. This finding was confirmed by the City of Cape Town ("CoCT") and by two professional land surveyors, appointed by the applicant and by the first respondent respectively. The impact of the encroachment is that it will prevent the applicant from constructing her new flatlet, for which she obtained planning approval from the CoCT in April 2022.

9. All of these facts are undisputed.

10. Numerous attempts to settle the matter amicably have proved fruitless, hence the launch of this application.

<u>The further common cause facts</u>

11. The following facts are also either common cause between the parties or are undisputed on the papers.

12. The applicant bought her property on 3 March 2005. It was registered in her name on 16 May 2005. The first respondent bought her property on 19 April 2005. It was registered in her name on 11 July 2005.

13. Both properties form part of the subdivision of Erf 4333, Langa, which was

subdivided into 52 erven in 2001 by a developer known as Nolan & Bruyns ("the developer").

14. A vibracrete boundary wall was constructed by the developer physically to separate Erf 4517 and Erf 4518 prior to either of the parties purchasing their respective properties. The boundary wall is situated on the western boundary of the applicant's property, and just outside the eastern boundary of the first respondent's property.

15. It appears that the developer had mistakenly erected the wall on the applicant’s property, in conflict with the approved CoCT plans for the construction thereof, as well as the approved Surveyor-General diagram depicting the boundaries of the properties within the subdivisional area.

16. Neither the applicant nor the first respondent was aware that the vibracrete wall encroached upon the applicant's property when they bought their respective properties in 2005.

17. In 2018 the first respondent caused the vibracrete wall to be extended toward the northern and southern corners of her property by adding brick and mortar sections to the respective corners of the wall. No building plan approval was obtained from the CoCT prior to the extension of the boundary wall by the first respondent. This lack of approval is confirmed by the CoCT.

18. The encroachment of the entire wall only came to the parties' knowledge in 2020 when it was identified by the applicant's architects who were attending to drawings for the construction of the proposed flatlet on the western boundary of the applicant's property.

19. The first respondent admits that the entire boundary wall, including the brick and mortar extensions thereof, encroaches onto the applicant's property. The encroachment was independently confirmed by the CoCT, as well as by Messrs Old and Makhavhu, the independent professional land surveyors

appointed by the applicant and first respondent respectively. Mr Old was recommended to the applicant by the CoCT as a professional surveyor that the CoCT had itself used in disputes of this nature. The first respondent was informed of the appointment, and was satisfied with Mr Old's credentials.

20. The CoCT indicated that it will not take any action to correct the encroachment as its policy is to take steps only in respect of encroachments caused by work in progress, as opposed to structures which have already been completed, that is, historical encroachments, such as in the present matter. In the latter case, the CoCT says, the affected owner must approach the High Court for relief.

21. As mentioned, the applicant's architectural drawings for the planned flatlet were approved by the CoCT in April 2022, but construction of the flatlet is not possible while the encroaching boundary wall remains in place.

22. Since 2020, the applicant has directed numerous informal and formal requests to the first respondent to demolish the encroaching wall, and even offered to rebuild the wall in its correct location.

23. The applicant and first respondent also approached to the so-called Backstage Street Committee in an attempt to re.solve the matter amicably. The applicant was willing to participate in the community process up to the point where she··realised that the first respondent had no intention of demolishing the boundary wall. From this point onward, the applicant disengaged from the process.

24. The first respondent initially agreed to settle the encroachment dispute amicably. Since January 2021, however, the first respondent's interaction with the applicant became terse. The first respondent insisted on taking the matter to Court before agreeing to any section of the wall being demolished. This attitude necessitated the institution of this application.

The issues in dispute

25. The following issues are in dispute on the papers.

26. The first respondent claims that the application should be dismissed because of the non-joinder of the developer. This, so the argument goes, is due to the possibility that, at the time the applicant bought the property, the developer could have "*explained and described the land*" to which the applicant was entitled.

27. The first respondent claims that she cannot be held liable to remedy the encroachment, as she was not the direct cause of the encroachment. The original vibracrete boundary wall was not constructed by her, but rather by the developer. As a result, the first respondent alleges that no case is made out for the demolition of the encroaching wall.

28. The first respondent claims that the applicant never intended to buy a property which included the section of land upon which the first respondent's boundary wall encroaches, because she only intended to buy what she saw when looking at the property. As such, the first respondent argues, the applicant is estopped from claiming the demolition of the encroachment. Alternatively, the applicant bought the property under a mistaken impression that its physical boundaries were correctly demarcated. In this regard the first respondent claims that the applicant was negligent and failed to perform due diligence prior to purchasing the property, and as such is estopped from claiming relief. In any event, the applicant has lived on her property without suffering any harm caused by the encroachment.

29. The first respondent claims further that the applicant has a duty to launch a grievance process with CoCT in respect of the encroachment, and because no such process is underway at the CoCT, the first respondent claims that this application is premature.

30. The first respondent argues that compensation, as opposed to demolition, is the correct remedy in the circumstances of this case.

31. The application was initially launched as an urgent application. The first respondent claims that there is no urgency in this application because the encroachment has been present since the applicant purchased the property in 2005. The application was, however, enrolled on the semi-urgent roll and the parties had more than enough time to deliver affidavits and heads of argument. The issue of urgency has accordingly been overtaken by events.

Non-joinder of the developer

32. A party will only be joined to proceedings if such party has a direct and substantial interest in any order this Court might make, or if such order cannot be carried into effect without prejudicing the party. A direct and substantial interest does not imply a mere indirect financial interest, but rather an interest in the right which is the subject matter of the litigation.[3]

33. The right which is the subject matter of this litigation, are the real rights (and responsibilities) of ownership which accrue to the applicant and the first respondent as the owners of, respectively, Erf 4517 and Erf 4518. The original developer of the area has no direct and substantial interest in these rights. The relief claimed by the applicant can, moreover, be implemented without any prejudice to the developer.

34. The first respondent's counsel submitted that the developer should have been joined because it was the party who had caused the problem. Counsel submitted that the developer should have been called upon to explain how the error was made, and should have carried the cost of the litigation. He strenuously opposed the notion, put to him by the Court, that the

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[3] See, for example, *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para [27]; *Bowring NO v Vrededorp Properties CC and another* 2007 (5) SA 391 (SCA) at para [21].

encroachment was the first respondent's problem in the present application, given her status as registered owner of the offending property, and that her dispute with the developer was a matter for another forum.

35. I do not agree with the first respondent's approach in this respect. As neighbour and registered owner of the offending property, her entitlement to use and enjoy her property is restricted by the reciprocal obligation not to do anything that would infringe her neighbour's use and enjoyment of her land. Joining the developer would not have served any purpose.

36. There is therefore no merit in the first respondent's non-joinder argument.

Estoppel

37. The doctrine of estoppel amounts to the following: *"Where a person has by his words or conduct made a blameworthy representation to another person and the latter, believing the representation to be true, acted thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him, the representor may be estopped from denying the truth of the representation..."*[4]

38. In *South African Broadcasting Corporation v Coop and others*[5] the Supreme Court of Appeal, in defining the doctrine of estoppel, held that the estoppel asserter's belief in the alleged representation must be reasonable and that he or she must have acted on such belief to his or her prejudice.

39. It is trite law that the duty to allege and prove the relevant elements of the doctrine of estoppel rests upon the estoppel assertor (in this case, the first respondent). In this regard, the first respondent fails to allege any of the elements of estoppel. She contends, rather, that the applicant should be estopped from claiming encroachment based on her "*intention*" to buy a specific property which (so the argument goes) did not include the area

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4 C. J. Sonnekus *The Law of Estoppel in South Africa* p14.

5 2006 (2) SA 217 (SCA) at para [64].

which was encroached upon by the first respondent's boundary wall, alternatively, based on her alleged negligence and failure to do due diligence prior to purchasing her property.

40. The argument that the applicant only intended to buy what she could see has no merit. She intended to buy, and bought, the erf as described in the relevant Surveyor-General's diagram. As to "due diligence", the applicant would not have ben able to detect the encroachment simply upon looking at the property prior to purchasing it. She had no reason to suspect an encroachment, and the nature of the "due diligence" she was supposed to conduct is unclear.

41. The estoppel argument in the present context is obscure, and counsel for the first respondent was unable to enlighten the Court as to what the representation on the part of the applicant was upon which the first respondent allegedly acted to her detriment.

42. Even if some representation by the applicant is to be read into the first respondent's answering affidavit, then such representation can at best be by way of omission, namely the applicant's silence or failure to take steps in respect of the first respondent's encroaching boundary wall. However, this tenuous argument collapses as the first respondent admits that the applicant and the first respondent both only became aware of the encroachment in 2020, despite the purchase of their respectively properties in 2005. It follows that there could not have been any legal duty[6] on the applicant to disclose the encroachment to the first respondent prior to 2020.

43. The first respondent's liability in respect of the encroachment results from the fact that she bought a property with a boundary wall which encroaches on a neighbouring piece of land. She admits that she bought her property before the applicant bought the adjacent property. Her prejudice in respect of the encroachment was not caused by any representation by the applicant.

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[6] See *Resisto Dairy (Pty) Ltd v Auto Protection Insurance* Co *Ltd* 1963 (1) SA 632 (A) at 642H.

44. The first respondent's reliance on estoppel is thus misplaced.

Historical nature of the encroachment

45. It is trite law 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 effected such alterations. This position is confirmed by, for example, *Cape Town Municipality v Fletcher & Cartwrights Ltd*[7] and *Mondoclox (Pty) Ltd v Branch and another,*[8] where the successors-in-title to a property were compelled to remove encroaching structures constructed by their predecessors-in-title.

46. The first respondent's claim, that no cause of action lies against her due to the fact that the encroachment was caused by the developer, therefore has no merit. As the registered owner of Erf 4158, she is liable to correct the encroachment upon the applicant's property by removing the offending boundary wall.

47. 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 registered owner of Erf 4158, the first respondent is the only party who can be compelled to demolish the boundary wall.

48. The first respondent argues further that the applicant does not come to Court with "clean hands", as she allegedly does not have plans for a garage that was erected on her property some years ago The argument takes the matter no further. Apart from the fact that approved plans do exist, the issue

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7 1936 CPD 347.

8 [2022] ZAECMKHC 118 (15 December 2022).

is irrelevant to the present application.

49. Counsel for the first respondent also made submissions in relation to a possible review application to be instituted against the applicant and the CoCT to have the approval of the applicant's building plans set aside, in particular in relation to a second storey that the applicant wishes to building on her current house. Again, how the intention to institute those proceedings is relevant to the issue of the encroachment of the boundary wall remains unclear, despite counsel's valiant attempts at explaining it to the Court. In any event, the applicant's building plans were approved in April 2022. The 180-day period within which to institute review proceedings under the Promotion of Administrative Justice Act 3 of 2000 "(PAJA") has long since expired.

Reliance on the CoCT's grievance process

50. The first respondent claims that the current application is premature as the applicant allegedly failed to report the encroachment to the CoCT. The first respondent provides no authority for the submmission that this matter cannot be adjudicated prior to any available grievance procedure having been finalised. This is not an application for judicial review where the exhaustion of internal remedies is required in terms of PAJA prior to the institution of review proceedings.

51. It is common cause, in any event, that the applicant did report the encroachment to the CoCT. The CoCT confirmed such encroachment in writing in January 2021. It is also common cause that the CoCT refused to take any steps to correct the encroachment, as its policy is only to act upon an encroachment if it relates to so-called work in progress, as opposed to already completed structures. In the circumstances, the CoCT already informed the parties that it will not take any steps to correct or address the encroachment. Further recourse to the CoCT will be fruitless. There is no grievance procedure available to the parties.

52. This point must therefore also fail.

Compensation as an alternative to demolition

53. In *Trustees of the Brian Lackey Trust v Annandale,*[9] the Court indicated that it would be reluctant to grant a demolition order in circumstances where the innocent party is in fact willing to accept financial compensation. However, the applicant in the present matter never expressed any willingness to accept financial compensation in lieu of demolition, and consistently persisted with her claim of demolition since 2020 when the encroachment was first identified. This is mainly because, while the encroachment exists, the applicant will not be able to extend her property in accordance with her approved plans. As indicated, the land surveyor appointed by the first respondent, Mr Makhavhu, agrees with the land surveyor appointed by the applicant, Mr Old, that the entire wall is built on the applicant's property, and need to be moved.

54. In *Trustees of the Brian Lackey Trust* the Court confirmed that, even though the Court enjoys a wide discretion in respect of the remedy it may grant in respect of encroachment, the starting point for exercising such discretion should be that an owner is ordinarily entitled to claim demolition in respect of an encroaching structure. Moreover, the Court held that the primary remedy in cases of encroachment is an order for the removal of the encroachment.[10]

55. In view of the unjust result which might result from a rigid application of the primary remedy, the Court in *Trustees of the Brian Lackey Trust* weighed up the relative prejudice that the parties would suffer in the case of demolition as opposed to financial compensation. An additional important consideration highlighted by the Court is the natural aversion to order the demolition of economically viable building works (in that case, the complete demolition of the plaintiff's luxury dwelling would have been the only realistic alternative to

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9 [2003] 4 All SA 528 (C) at para [57].

10 At para [45].

an award for damages).[11]

56. The facts of the present matter are different. The first respondent's wall can be rebuilt on her own property. The majority of the extent of the wall consists of vibracrete. On the authority of *Trustees of the Brian Lackey Trust,* the first respondent must establish on the papers that an order for demolition would be sufficiently prejudicial so as to tip the scales in favour of departing from the primary remedy for encroachment (demolition). The first respondent's only allegation in this respect is that she would not be able to park her car in her yard should the wall have to be moved. There is no evidence (such as an indication of the type and size of her vehicle and the available space should the encroachment be removed) supporting this allegation. The first respondent effectively does nothing more than to raise the possibility of financial compensation as a potential alternative to demolition. In the circumstances, no evidentiary basis has been laid to persuade this Court to deviate from demolition as a remedy for the encroachment.

57. In my view, the prejudice to be suffered by the applicant should demolition be refused is greater than the prejudice to be suffered by the first respondent if a demolition order is granted. The first respondent's prejudice lies in the unsubstantiated allegation of the loss of parking space. The applicant stands to lose the increase in the value of her property as a result of her inability to effect the already approved renovations.

58. In any event, as indicated, the extensions to the wall were built without building plan approval and are illegal structures as contemplated in sections 4 and 7 of the National Building Regulations and Building Standards Act 103 of 1977 ("the NBRA"). Counsel for the first respondent (in contradiction to the provisions of the NBRA) submitted that the first respondent was entitled to build first, and only thereafter to submit plans to the CoCT for approval – which, so he said, she has done. When asked what the chances were of the

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[11] At paras [45]-[55].

CoCT approving plans for an admitted encroachment, counsel conceded that they were “zero”.

59. There is no merit in this defence.

Requirements for the grant of a final interdict

60. While the first respondent does not seriously challenge the applicant's claims that the requirements of a final interdict have been satisfied, the first respondent does deny, as indicated earlier, that there is no other adequate remedy available to the applicant in the circumstances.

61. In *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd*[12] it was held that an alternative claim will be considered "adequate" if it is satisfactory in the circumstances, ordinary and reasonable, a legal remedy; and affords the applicant similar protection.

62. Financial compensation, although being a potential alternative remedy, is not an adequate alternative remedy within the definition provided by *Free State Gold Areas* for the purposes of this application This is because compensation for the loss of land encroached upon by the first respondent will not enable the applicant to construct the proposed flatlet on her property. Accordingly, compensation is not a satisfactory remedy in the circumstances, and fails to affords the applicant similar protection to demolition.

Conclusion

63. In all of these circumstances, I am of the view that the applicant has made out a proper case for the relief sought in the notice of motion.

Costs

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12 1961 (2) SA 505 (W).

64. There is no reason to deviate from the general rule that costs follow the event. What is to be considered is the relevant scale of costs.

65. Costs on an attorney and client scale are generally awarded where there is fraudulent, dishonest, or vexatious conduct, or conduct that amounts to an abuse of the Court's process. Such abuse may manifest when a party conducts litigation in an unreasonable manner, to the prejudice of those who are forced to defend their interests.[13]

66. The institution of this application was wholly unnecessary, but was ultimately compelled by the first respondent's strident refusal to provide an undertaking to demolish the wall, despite her concession that the wall is in fact encroaching upon the applicant's property. Her own appointed land surveyor confirmed that the entire boundary wall encroached onto the applicant's property, and advised in December 2022 already that the wall should be removed. The first respondent ignored this advice and persisted in litigating.

67. The first respondent's attitude was also displayed in her instruction to her counsel to oppose the applicant's application for condonation of the late delivery (by a few days) of the applicant's heads of argument. The opposition was without merit (condonation was granted, with costs to be costs in the cause), and done in the face of the fact that the first respondent herself had failed to deliver heads of argument, and failed to make any condonation application in respect of such failure. This was opposition simply for the sake of being difficult. Such conduct is to be deplored.

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[13] See *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another* 1997 (1) SA 157 (A) at 177D: " … *in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this terms in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear (In re Alluvial Creek 1929 CPD 532 at 535)*."

68. The first respondent, moreover, now claims that financial compensation is an alternative remedy for her encroachment upon the applicant's property. No such offer of compensation was ever made to the applicant prior to the institution of this application, despite numerous attempts to settle the matter amicably. Although the applicant maintains that she will not accept compensation instead of demolition, it is unfortunate that this application was required to galvanize the first respondent into admitting to a potential remedy which could have been explored prior to litigation.

69. In the circumstance, I agree with the submission by the applicant's counsel that this matter warrants costs on a punitive scale.

Order

70. In the premises, it is ordered as follows:

70.1 **It is declared that the boundary wall erected between Erf 4517, Langa, and Erf 4518, Langa, encroaches upon the applicant's property, Erf 4517, Langa, between beacon A and beacon D as indicated on the Surveyor-General Diagram No. 3139/2001 attached hereto as "X1", read with the Land Surveyor's Certificate dated January 2021 attached hereto as "X2".**

70.2 **The first respondent or her successors-in-title are directed to demolish the wall within 15 (fifteen) days of the date of this order, failing which the applicant is authorized to demolish the encroachment and to claim the reasonable expenses thereof from the first respondent.**

70.3 **In the event that the applicant has to demolish the encroachment, the applicant shall deliver a written invoice of the reasonable demolition expenses to the first respondent within 10 (ten) days of receipt thereof, and the first respondent**

will pay such expenses within 10 (ten) days of receipt of such invoice from the applicant.

70.4 **The costs of the application, including the costs of the application for condonation, shall be paid by the first respondent on the scale as between attorney and client.**

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P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicant:	R. du Toit, instructed by Dirk Kotze Attorneys
For the respondent:	L. Ngoza, instructed by A. S. Madikizela Attorney