

SOUTH AFRICA / JUDGMENT

Boss Foods CC v Ingo Rehders Properties and Another (24934/13) [2014] ZAGPJHC 236 (26 May 2014) [2014] ZAGPJHC 236

COURT

South Gauteng High Court, Johannesburg

BEFORE

Siwendu

CASE / FILE NUMBER

24934/13

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24934/13

DATE: 26 MAY 2014

In the matter between:

BOSS FOODS CC.....Applicant

And

INGO REHDEES PROPERTIES.....First Respondent

CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY.....Second Respondent

J U D G M E N T

SIWENDU, AJ:

INTRODUCTION

- [1] The applicant, Boss Foods CC, is the registered owner of Erf 329 Crown Mines Extension 18 which is 4001 m² in extent and is situated next to Erf 328 which is owned by the first respondent. The applicant had bought the property for a sum of five million five hundred thousand rand (R5.5m) and took transfer of the property on 12 October 2012.[1] Mohamed Afzaal Abba ("Abba"), a practicing attorney with Peers Attorneys attended to the transfer of the property from Yukon Trust to the applicant.
- [2] The first respondent's property is made up of three properties, namely, Erven 326, 327 and 328 respectively. It has constructed an industrial development in the form of warehousing on the property[2].
- [3] The applicant seeks an order directing the first respondent to demolish and remove any and all encroachments unlawfully erected by it on Erf 329 Crown Mines, Extension 18, and failing compliance, an order directing the Sheriff of the Court to be authorized to procure the demolition and removal of said the encroachments. The applicant also seeks to interdict the first respondent from continuing with any unlawful construction of any buildings and/or structures which encroach onto the applicant's property, as well as an order directing the first respondent to observe all town planning requirements in respect of its property. No relief is sought against the second respondent except to the extent, and in the event that it elects to oppose the relief sought by the applicant.
- [4] On 3 October 2013, the applicant instituted an application for an urgent interim interdict against the first respondent seeking an order to halt any further construction activities on the applicant's property pending the determination of the main application between the parties. This application was served on the first respondent's attorneys on 2 October 2013 but it seems to have been settled between the parties.
- [5] Following the filing and service of the first respondent's replying affidavit in August 2013, the first respondent filed a counter application on 13 February 2014. For the sake of convenience I will retain the citation of the parties as they appear in the main application. In respect of this counter application, the first respondent seeks an order directing the applicant to do all things necessary and to sign all documents necessary to facilitate, allow and apply for the subdivision of Erf 329 to create as a separate property that portion of Erf 329 upon which the buildings erected on Erf 328 are encroaching. The first respondent also seeks an order directing the applicant to sign all documents necessary to facilitate, effect and allow the transfer of the newly created portion of Erf 329 which is to be passed to the first respondent. In the alternative, and in the event that the subdivision is impossible, the applicant is to be ordered to grant a servitude for encroachment purposes over Erf 329 in favour of Erf 328 of approximately 90 m² and sign all documents required to effect the notarial deed of servitude.
- [6] The first respondent is to be directed to bear all costs pertaining to the subdivision and the transfer of the newly created portion,

alternatively the costs of the execution and registration of the notarial deed of servitude.

- [7] Against the transfer of the newly created portion of the said Erf 329, alternatively registration of the notarial deed of servitude, the first respondent is to be ordered to pay to the applicant compensation for the newly created portion of Erf 329 or alternatively, for the servitude in the amount determined by the court together with a pro-rata amount of all rates and taxes paid by the applicant to the second respondent from 1 October 2012 until the date of transfer, in the same ratio to the whole amount as the area of the newly created portion bears to the entire extent of Erf 329.
- [8] The counter application was not argued at the hearing of the application, it being agreed that its success depended on my findings in the main application. I deal with the orders sought in the counter application later in the judgment.
- [9] At the commencement of the hearing, three sets of building plans were submitted to the court together with two coloured Google Map extracts depicting the first respondent's property, namely Erf 328 Crown Mines Extension 18, which is to the west of the applicant's property, namely Erf 329. The second Google Map extract depicts warehousing structures constructed on the first respondent's property, Erf 328. These warehousing structures traverse the boundary of Erf 328, (the first respondent's property) and Erf 329, the applicant's property.
- [10] The building plans handed into court, are plans or copies of the plans lodged by the first respondent with the second respondent, the City of Johannesburg Metropolitan Municipality ("the local authority"). The first building plan depicts the area to the east of the plan adjoining the applicant's property but does not show the encroachment area that is the subject of this application. It extends to the cadastral boundary of the first respondent's property and depicts all the structures erected on the first respondent's property.
- [11] The second building plan handed into court is in respect of the hot and cold water layout plan. It bears the local authority's stamp of approval dated 9 May 2013. The firewall showing the edge and end of the building is at the cadastral boundary of Erf 328. On examination of the face of this plan, the building structures end at the cadastral boundary of the first respondent's property, Erf 328.
- [12] The third plan submitted to the court depicts the parking layout. It shows an encroachment on the eastern side of the first respondent's property and bears the encryption: "encroachment to be verified on site by registered land surveyor". In this sense, it is different from the plans referred to in paragraphs [10] and [11] *supra*. This plan bears the second respondent's stamp which shows that it was approved on 9 May 2013.
- [13] The plans confirm that properties in Crown Mines Extension 18 fall within the boundaries of the Johannesburg Town Planning Scheme, 1979 as amended and as envisaged by the Town Planning Ordinance, 1986 (Ordinance 15 of 1986).

[14] The applicant alleges that the buildings of the first respondent were erected unlawfully inside the applicant's property and without

approved building plans.[3] In this regard, a survey diagram by a professional land surveyor, GJ van Rijsewijk dated June 2013 annexed to the application papers states that the encroachment is 99 m² in extent.[4] The applicant alleges that the boundaries of the applicant's property were brought to the first respondent's attention in November 2012, prior to the construction of the encroaching buildings.[5] The applicant submits that the prejudice to the applicant is that an industrial development has been built taking up a substantial portion of the applicant's property. The applicant submits further that the area that has been encroached upon is

valuable land in terms of potential rental returns to the applicant which, but for the encroachment, could be in perpetuity.

FACTUAL MATRIX AND SUBMISSIONS

[15] On or about 4 September 2012 the first respondent through Ancro Building Projects ("Ancro") enlisted Kalahari Survey Solution ("Kalahari") to conduct a relocation survey to re-establish the original cadastral boundary as pegged and reflected in the General Plan of the Surveyor General's office. The Kalahari survey confirmed that the property boundaries were accurately reflected. It is not clear from the applicant's pleadings what precipitated the survey, but it seems that the first respondent did have a dispute with the previous owner relating to a portion of land allegedly stolen from him.

[16] On 25 October 2012, a site meeting was held on the first respondent's property between one E Ghoo, a representative of the first

respondent and the contractors, A Crous and I Crous. In a letter dated 6 November 2012 from Ancro to the first respondent, it is

confirmed by Andre Crous that :

"Contractor showed owner the pegs on the development compared to next door neighbour as pegged by surveyor, Kalahari. Discussion on getting permission from the neighbouring property to move boundary on the 5th November 2012. Ghoo gave the contractor Ancro the instruction to move the boundary pegs. The owner agreed to pay the contractor an extra R175, 000.00 plus VAT to move the building to a new position".

[17] The applicant disputes that there was a discrepancy relating to the boundary line of the respective properties as Kalahari (referred to above), employed at the instance of the first respondent, had confirmed as early as 4 September 2012 or at the latest on the first respondent's own version, on 25 October 2012, that the first respondent was aware of the boundary lines between the properties as well as the fact that the pegs accurately reflected the original cadastral boundaries as they appear in the general plan of the Surveyor General's office.

- [18] The first respondent submits that during or around the first week of November 2012 or thereabout, Abba acting on behalf of the first respondent, called Ziyaad Hajee ("Ziyaad"), the brother of the sole member of the applicant, Zubayr Hajee ("Zubayr") to request permission to move the boundary of the first respondent's property partially onto the applicant's property in order to close a "possible passageway" to prevent squatters from accessing and passing through the properties.[6] The first respondent alleges that Ziyaad telephonically granted consent by stating, "it will not be a problem". In the first respondent's view, Ziyaad was duly authorised to represent the applicant and according to the first respondent granted consent. The first respondent submits that this original consent would have resulted in an encroachment of 170 m2 of the applicant's property, however, a lesser amount of land which is 98 m2 in extent was taken. The applicant denies that it ever gave consent and instead alleges theft of its property[7] by the first respondent.
- [19] Significantly the letter dated 6 November 2013, which on the first respondent's version confirms the necessity to move the pegs or boundaries, makes no reference to any need to close the passageway or the squatter problems.
- [20] In its replying affidavit to the main application, the applicant admits that Ziyaad had a conversation with Abba who made vague references to a half a metre wide wall that the first respondent wished to close by building up to the existing boundary wall. It alleges that[8] Ziyaad had made it clear that Zubayr would have to give his ultimate approval and that, "it should not be a problem".
- [21] The applicant contends that Ziyaad was not and is not a member of the applicant or the owner of the property and that Abba, having attended to the transfer of Erf 329 from The Yukon Trust to the applicant, was aware of the internal workings and affairs of the applicant, and in particular, Ziyaad's standing vis-à-vis the close corporation. This is not disputed by the first respondent.
- [22] The applicant alleges that three subsequent calls and conversations not referred to by the first respondent in its papers were made by Abba.[9] It is alleged that the second call related to certain documents Abba wanted Ziyaad to sign allowing the building against the applicant's wall.[10] A meeting ensued with Mr Carim, at Zubayr's request, and at this meeting allegations that the previous owner of the applicant's property had stolen two metres of Carim's property and that he sought compensation for the same surfaced.[11] This had been disputed by the owner.
- [23] There are two versions before me as to the exact date of construction of the encroaching buildings on the applicant's property. The applicant contends that construction by way of digging and pouring foundations on the property commenced in December 2012 or there about.[12] The first respondent states that it commenced with digging foundations in November 2012. Walls were built up in January 2013. The first respondent contends that construction commenced earlier; as of March 2013, considerable progress had been made. [13]

- [24] On seeing this encroachment, a call was allegedly made by Ziyaad to Abba who was advised to inform the first respondent that 'they' would not tolerate any encroachments.[14] A third call was made in January 2013 when walls were constructed and Abba was reported to have washed his hands of the matter.. The applicant alleges that it called various meetings which the first respondent had refused to attend.[15]
- [25] During January 2013, the applicant approached the second respondent, the local authority; and established that no building plans had been submitted in respect of the construction. The applicant contends that it had required and expected the local authority to enforce the Town Planning Scheme as well as the National Building Regulations and Building Standards Act 103 of 1977 as the building plans had not yet been approved. The applicant submits that, in its capacity as the appropriate body to deal with the alleged unlawful conduct of the first respondent, the second respondent could apply for a demolition order in terms of the National Building Regulations, as these regulations do not leave room for ordinary citizens to apply for such relief. Ordinary citizens must approach the court when a local authority fails to act. The plans were finally approved in June 2013.[16]
- [26] The local authority issued a cessation order, dated 31 January 2013, in terms of the National Building Regulations and Building Standards Act 103 of 1977.[17] There does not seem to have been any further action by the local authority thereafter and it is not clear why this is so. The second respondent does not oppose the application and there is no version before me to explain why it failed to take appropriate action subsequent to the cessation notice.
- [27] I was directed to various letters exchanged between the applicant and the first respondent as evidence of the applicant's attempts to halt construction and procure removal and reinstatement of its property, namely letters dated: 5 March 2013, 19 March 2013 and 11 June 2013.[18]
- [28] Compensation in the amount of R1 000 per m² was subsequently offered by the first respondent to the applicant. The applicant alleges that it was the first time that the first respondent sought to investigate an amicable resolution of this matter. The offer of compensation was rejected by the applicant. It alleges that it became apparent to it that the local authority was not going to come to its assistance. The applicant had no option but to bring the current application. The first respondent contends that the applicant was unreasonable in not accepting the offer of compensation.

PRELIMINARY ISSUES

- [29] At the hearing of the main application, a number of preliminary points were raised by the first respondent. The first relates to an alleged dispute of fact namely, that there was consent to the encroachment by the applicant. Mr Wasserman SC conceded that this apparent dispute of fact is not one that would make it impossible for me to determine the matter. He submitted that the dispute of fact persisted until the replying affidavit was filed and I will find, in the replying affidavit, that when the phone call allegedly granting consent was made by Abba, Ziyaad said "it should not be a problem".

- [30] It is difficult to find the factual and legal basis for the validity of such consent. The applicant alleges that when Ziyaad uttered these words, they related to some vague reference at the time to the need by the first respondent to close a two metre gap between the properties. The applicant submits that it had envisaged further discussion of the matter and approval from Zubayr. In my view, this is consistent with the applicant's contention that it did not grant consent. It is in line with the view of a further discussion on the matter and is consistent with the applicant's view to seek the consent of Zubayr. The exact extent of the encroachment, and the terms thereof, would have been a material issue to be agreed by the applicant and the first respondent. Such consent would have been properly granted by the sole member of the close corporation. The facts relating to who had ultimate authority over the business affairs of the applicant were not disputed, albeit that all parties agreed that the two brothers worked together. The first respondent was represented by Abba in procuring such consent and he ought to have known in his capacity as an attorney that a waiver by the applicant of a right to its property would need to be unequivocal and granted by the party legally capable of granting it, if not in writing. The refusal by the applicant to sign the documents presented by Abba is to me a clear indication of the lack of consent. The first respondent proceeded nevertheless when such a refusal ought to have raised in it a warning bell either that there was no such consent or that it was mistaken about the existence thereof. It seems that it was only after the cessation notice was issued that it halted its construction which according to Wasserman SC, was already at an advanced stage.
- [31] The second point raised was that there had been no confirmatory affidavit by Ziyaad attesting to the facts pleaded in the founding affidavit. Mitchell, Counsel for the applicant, submitted that this was attributable to initial instructions when affidavits were drafted. In argument however, the first respondent did not persist with this point.
- [32] The third point relates to whether I should take into account new facts not pleaded in the founding affidavit but found in the replying affidavit. It was submitted on behalf of the first respondent that the version in the founding papers was skewed because it is a different version from the one in the replying affidavit. It was submitted further that the court should not to give much credence to this new version in the replying affidavit because it was developed in order to obviate a finding on the issue of consent.
- [33] In my view a material point that hinges on my acceptance or rejection of the replying affidavit relates not so much to the consent which has been disposed of in the evaluation of the preliminary issues, but to the allegations of non-compliance by the first respondent with the National Building Regulations and Town Planning Scheme. During argument, Wasserman SC submitted that the allegations relating to the failure to comply with Building Regulations and the Town Planning Scheme was made in the replying affidavit and not in the founding papers and I should reject such allegations.

[34] I do not agree with this submission for two reasons. Paragraph 3.1 of the applicant's founding affidavit clearly states that the buildings were erected without any approved building plans.[19] In its response, the first respondent simply denies and/or challenges the "correctness of the basis of the application" but not the allegations of fact against it.[20] Secondly, in the recent decision in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and Others* 2013 (2) SA 204 SCA at 212B–D, Mhlantla JA provides sufficient guidance on such matters, namely, that the rule that all necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matters in a replying affidavit in exceptional circumstances. A distinction is to be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In my view, the applicant's replying affidavit constituted a substantiation of the allegations of non-compliance with the National Building Regulations and Town Planning Scheme. It does not constitute a new matter. Had the first respondent felt prejudiced by these allegations or that something new or unexpected had emerged from the applicant's replying affidavit rendering it grossly unfair to adjudicate the matter on this basis, it was open for it to seek the leave of this court to file further affidavits[21] or apply to this court to have the alleged new matter struck out. The first respondent elected to file a counter application instead. This argument is rejected together with the first respondent's submission that supreme inconsistency with Town Planning Scheme is not the case before me. In the light of my determination above I now deal with the main issues in the matter.

THE ISSUE

- [35] The primary issue before the court is whether or not, based on the facts of this case, I should grant the ejectment of the first respondent and order the demolition of the encroaching structures and/or buildings on the applicant's property based on the principles of neighbour law.
- [36] In the event that I do not grant the ejectment and demolition order, whether or not I can exercise my discretion on the facts of this case and order compensatory relief instead.
- [37] In the event that I grant compensatory relief, whether doing so would amount to arbitrary deprivation of the applicant's rights in terms of Section 25(1) of the Constitution.

THE LEGAL POSITION

- [38] I am indebted to both counsel for directing me to some of the relevant literature and authorities[22] in this matter.
- [39] There is no doubt that unlike the law dealing with nuisance, the effects of the permanent physical intrusion posed by an encroachment interferes, diminishes and deprives the owner of its real right to full and undisturbed enjoyment of their property. On the face of it, the

demand for removal seems consistent with the sacrosanct nature of the right of ownership. [23] Encroachment leaves little room for reciprocal or mutual tolerance ordinarily expected between neighbours. Its unlawfulness relates to the disturbance of the right to full enjoyment of one's property.

- [40] Wasserman SC approached the matter primarily as a neighbour law dispute, the effect of which is to confine it to the sphere of private law. When approached from a neighbour law point of view, then, I am enjoined to seek to achieve harmony between the parties. Neighbour law also pre-supposes conflicting ownership interests. There is an expectation of a degree of tolerance between neighbours based on the reasonableness of the infringement. On the other hand, Mitchell, for the applicant, relies on private law, public law and the provisions of the Constitution.
- [41] In this regard Wasserman SC submitted that the strict principle that applies to sale of land requiring that the sale of land be effected by way of written contract does not apply, and, the only principle that applies is that stemming from *Adam v Abdullah* 1903 (2) NLR 158 at 60 namely that, an owner is taken to have given consent if he does not object to the encroachment. In the same breath, he contended that a letter of consent or a verbal concession from Ziyaad would not have made any difference as there is no requirement for consent in law. Written consent is not a cause of action that is required. This submission was made notwithstanding that he admits in argument that encroachment occurs either by accident or by consent. Equally, Wasserman SC (based on the first respondent's contention that there was consent) submitted that the court ought to frown upon an owner who gives consent and later retracts it.
- [42] I have difficulty with this submission and must reject it given my earlier finding on the preliminary points raised, as well as the undisputed conduct of the applicant which is inconsistent with the alleged consent. Upon the facts of this case, the argument that there would have been "no difference" is mutually destructive if not counter-intuitive to the first respondent's case. While consent may not be a strict legal requirement in neighbour law disputes, it would be a relevant, if not a material consideration when the court weighs the equities on the facts of this case. The surrounding circumstances leading to the encroachment and the conduct of the parties are relevant considerations in deciding an appropriate remedy.
- [43] In the face of the undisputed fact that Abba knew of Zayeed's standing vis-à-vis the applicant, an unequivocal and written consent would have tipped the equities in favour of the first respondent creating firmer ground to plead estoppel and dissuade any negative inference on the first respondent's conduct, which seems tantamount to unlawful annexation of the neighbouring land for its commercial profiteering needs. Written consent obviates a party turning around and refuting an agreement, and had it been so, I would have justifiably frowned upon such conduct.

[44] The circumstances under which the court can order removal of an encroaching structure (the so-called default remedy or restorative

remedy) or exercise its discretion and award compensation instead, seems to have preoccupied academic writers[24] who indicate a state of flux in the legal development of this area of law. The decision in *Randwaterraad v Bothma En 'n Ander* 1997 (3) SA 120 (O) at 138 confirms the court's discretion in such matters and to this extent I am persuaded by this decision and the subsequent ones referred to below.

[45] The first respondent relies on the decision in *Randwaterraad* to support the contention that removal of an encroaching structure is not an automatic remedy notwithstanding the extensive nature of the real right of ownership. However the distinguishing factor in the *Randwaterraad* case is that the encroachment complained of was allowed to stand for a period of time. This can be viewed as tantamount to acquiescence

and indicative of the insignificant impact the encroachment had on the rights of the owner (138 to 139), an important consideration in weighing up the considerations of equity and fairness. It cannot be said that the applicant rested on its laurels in this case. The applicant contends that it relied on the local authority to do the work it should be doing and when the local authority failed to do so, it launched the proceedings.

[46] Mr Wasserman SC conceded that objectively, there is a substantial encroachment on the applicant's property. In view of this, it was contended that it would be extremely costly and harmful should I direct the first respondent to destroy and demolish valuable

improvements. It was submitted that the courts while not condoning this kind of approach, opt for a resolution that preserves the

improvements.

[47] In this regard, Wasserman SC relies on the decision of *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) dealing with a substantial encroachment. A building inspector discovered that the construction straddled the defendant's property covering approximately eighty percent (80%) of the defendant's land when the intention was that construction should have been over the plaintiff's two Erven. Confirming that the court retains its discretion, the court denounced the view that its

discretion is limited to cases where encroachment was minor or insignificant (at 291F-G). It weighed the equities to determine

the most just and equitable outcome taking into account the proportionate benefits to be derived from removal or the cost of removal and held that in appropriate circumstances it has a wide discretion albeit not unfettered to award damages instead of ordering a demolition. The court held further that while the exercise of such a discretion should be aimed at preventing an injustice, the

order of the court should not produce an unjust result, and that legal and public policy considerations are a main consideration

(291H–292A and 292B/C-E/F). The question of the value of the building and/or construction had been raised as a consideration in weighing the equities and relative prejudice between parties. The decision in Trustees, Brian Lackey Trust relied on the decision by Solomon JA in *Hornby v Municipality of Roodepoort-Maraiburg* 1918 AD 278 at 296 and confirms an apparent aversion by the courts to order the destruction of valuable buildings and notes obiter dictum (at – 38 that:

“a factor that weighs particularly heavily with me in evaluating the relative degrees of prejudice is the fact that there is a natural aversion on the part of the courts to order the destruction of economically valuable building works”.

- [48] The court severed the potential relationship of neighbourhood, ordering payment of compensation to be agreed by the parties or by the court. I address the question of public policy and legal considerations as well as the alleged aversion to order demolition of valuable buildings later in the judgment. However, in so far as the application of this decision to the facts of this case, Trustees, Brian Lackey Trust is distinguishable in that both parties were unaware of the true state of affairs until it was drawn to their attention by the building inspector. In my view the inadvertent nature of the encroachment was a material consideration supporting the court's approach to seek a just and equitable outcome.
- [49] I do not understand the applicant's argument to dispute the court's discretion other than to contend that this encroachment was done capriciously, and is not one "in the air" and not in the nature of encroachment referred to at common law, as it is not a minor encroachment. It must be accepted that based on the authorities cited above the court has such a discretion in certain circumstances and, in line with the decision in Trustees, Brian Lackey Trust, such a discretion is not limited to minor encroachments as contended by Mitchell.
- [50] It was not disputed that the encroachment constitutes a substantial structure erected deep along the boundary of the applicant's property in circumstances where the first respondent knew where the applicant's cadastral boundary was located. I am persuaded by Mitchell's submission that in the event that the applicant wishes to sell the property, the encroachment is a significant factor in terms of the land to be sold and what it is to be sold for. It is not a trivial inconvenience and compensation would not give back to the applicant the full extent of the use and value of the property in annuity income it could have realised. As a consequence, and in the face of a failure of a convincing argument relative to consent or some form of acquiescence by the applicant, the conduct of the first respondent weighs against the exercise of the court's discretion not to grant the demolition order sought.
- [51] Had this matter been solely determinable on the basis of neighbour law as submitted, I would have had no hesitation in finding against the first respondent based on its conduct. Upon the facts of this case, only a form of justus error on the first respondent's part would have persuaded me to exercise the court's discretion against a demolition order. No justus error exists for the unlawful conduct. The first respondent had prior knowledge of the

boundaries to the two properties. There are no conflicting ownership claims relating to Erf 329 to be resolved which would have justified the exercise of the court's discretion to seek an equitable remedy between them. There was no lengthy effluxion of time which could have led to an inference that the land encroached upon is insignificant to the applicant. There were no facts advanced or any other circumstances pleaded that would tip the balance of the scales in the first respondent's favour leading me to exercise my discretion to order compensation. The applicant and first respondent are clearly businesses with resources to seek advice and have the necessary business savvy to act within the boundaries of the law. The encroachment is not only unlawful but the surrounding circumstances leading to the dispute together with the conduct of the first respondent borders on annexation of the applicant's land. Consequently, at common law, a demolition order would have been, and is, appropriate.

- [52] I now turn to the argument relating to the effects of Section 25(1) of the Constitution which Mitchell relies on as a further ground in support of the demolition order. Section 25(1) provides that :

“No one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property”.

This provision also affects the orders sought by the first respondent in its counter application.

- [53] I am duty bound to endorse the provisions of the Constitution as an embodiment of the human obligation to do justice and act within its spirit and purport. So, in my view, where appropriate and applicable, the private sector and private law ought not to be immune or insulated from the Constitutional values and standards. In fact, all sectors of life must be infused by them.
- [54] Mr Mitchell advocates a purist and absolute approach to the interpretation of the Section 25(1) provision and the right provided therein and submits that the two distinguishing factors the court must take into account in relation to the Constitution are that it changes all prior common law and literature from Grotius (Roman-Dutch Law) from 1903. The basic principle, it was submitted, is that one should not have to tolerate a neighbour building on one's land. While he concedes that the court retains its discretion, he correctly submits as a second factor that arbitrary deprivations are no longer tolerable in terms of the Constitution.
- [55] The purist and absolute approach to the provision is not supported by the plain reading of the Constitutional provision and the authorities. The Constitutional provision must be read in conjunction with Section 36, the limitations clause thereof. Further, the Supreme Court of Appeal in *Linvestment CC v Hammersely and Another* 2008 SA 283 (3) SCA has already signaled, correctly, that the rights in Section 25 are not absolute.

- [56] In my view, the relevant and material consideration not taken into account by Mitchell is that, if the applicant is to be deprived of its property, then that deprivation can only occur in terms of a law of general application. Secondly, such deprivation may not be arbitrary. In this regard, such deprivation would not be arbitrary unless the law of general application is in itself inconsistent with the Constitution.
- [57] It must be accepted by virtue of the decision in *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC) at 64–65 that common law is the law of general application. It was not argued that the current common law position which preserves the exercise of the court's discretion to grant compensation in appropriate circumstance is in itself unconstitutional or inconsistent with Section 25 and in what respects it is so. In fact, the weighting of relevant factors by the court serves as a bulwark against the arbitrariness envisaged in Section 25(1). Adjudication at common law entails the very process of justification that would have been required prior to the limitation of the rights envisaged in Section 25(1). The applicant's view must be rejected as the provision does not preclude the court's discretion and the decision does not result in the arbitrary deprivation of the rights of the party concerned in terms of the law of general application.
- [58] In this case, an order for demolition would be, and is, appropriate as a result of the unjustified conduct of the first respondent. The applicant's Constitutional right to its property and the protection it enjoys against arbitrary deprivation thereof would have been and is upheld. As a consequence, I have already found that upon the facts of this matter, there would have been no justification for the limitation of the applicant's rights of enjoyment to its property. Its Constitutional rights remain intact.
- [59] I have already alluded to the order sought by the first respondent in respect of the counter application. In the first order, the first respondent effectively seeks an order of transfer of the property to it, a matter separate from the court's exercise of its discretion in terms of the law of general application. Upon the facts of this case, the order sought is tantamount to a forced transfer for lack of the applicant's consent.
- [60] In my view, the injunctive nature of relief sought at common law does not necessarily encompass a forced order of transfer of the land where litigants are not willing parties. Where compensation is awarded, it is designed to address the diminution of the owner's right to use and enjoyment of the property and not its alienation. While practical considerations may arise in relation to future transfers and sale of the property, that cannot detract from the fact that the overarching right of ownership has different components within it. As a consequence, ordering the transfer of the property would be tantamount to an expropriation by means of a court order. Such a position is not sanctioned by any law of general application I am aware of. In fact, it would result in a breach of Section 25(2)(a) of the Constitution. Secondly, assuming that at common law, compensation instead of demolition had been ordered in this case, such an order of transfer would have only been possible if there was a public purpose or public interest linked to it.

[61] I now turn to the submissions dealing with the non-compliance with the National Building Regulations and the Town Planning Scheme. The Town Planning Ordinance and Scheme, leaves no room for uncertainty as to the process, the requirements for submission and approval of building plans. The peremptory language used makes clear the prohibition envisaged. The consequence is that non-compliance renders the building of the structure an illegal structure as opposed to a mere encroachment. The provisions of the Town Planning Scheme relied upon by the applicant, namely the Johannesburg Town Planning Scheme, 1979, Section 4 reads:

“(1) Section 4 Building Plans and other Particulars

The erection, alteration or conversion of building plans shall not be commenced until the City Council has approved of such building plans, specifications or other particulars as are required in terms of the scheme, the by-laws or regulations in respect of the erection, alteration or conversion of such buildings ...

(2) Section 67 Offences

Any person who –

- (a) Contravenes or fails to comply with any provision of this scheme or
- (b) Contravenes or fails to complyor
- (c) Contravenes or fails to comply with any condition set out in terms of any provision of this scheme; or
- (d) Knowingly make a false statement in connection with any provisions of this scheme

Shall be guilty of an offence.” [my emphasis]

[62] In the face of the undisputed fact that the buildings were constructed without approved plans and on enquiry from the court, whether or not upon the facts of this case, considerations of equity and fairness should be trumped by the compelling requirement for legality, Wasserman SC argued that the applicant confuses the issue, the case does not concern whether or not there were valid building plans. It was submitted that I should not take into account that the structure is inconsistent with town planning laws as no case was made that they are inconsistent albeit that he conceded that there is a conflict between the approved plan and the erected structure.

[63] The cessation notice issued in January 2013 together with building plans clearly shows that the construction was undertaken without approval. At the very least, they were in the process of approval. The applicant alleges a discrepancy between what was submitted to the local authority and what in reality transpired on the ground. I need not make a finding on this, as upon the facts available it is clear that approval of the plans was not granted prior to construction, and based on the first respondent's submission, had the encroachment been demonstrated in the plans, it would not have been approved in any event. A further

consideration is that, on the first respondent's version, half the wall had been built by the first respondent prior to final approval.

[64] The only basis upon which the legality of the building structure on the applicant's property is disputed is not based upon the facts

objectively presented by the applicant. It is based on the technical but erroneous view that it is not the case before me, and that such a case was only made in the replying affidavit. The first respondent's approach was that all cases involving encroachment were done without approved building plans. In my view, knowingly building and/or encroaching without approved building plans

constitutes an offence in terms of the Town Planning Scheme and cannot be condoned or sanctioned as doing so would be against public

policy and *contra boni more*. It is in this respect that I must endorse the qualification to the exercise of the court's discretion in Trustees, Brian Lackey Trust dealt with in paragraph

[47] *supra* in so far as it confirms this principle. The court cannot ignore the jurisdictional facts relating to non-compliance.

[65] I have taken regard of the recent decision of the Supreme Court of Appeal in *Lester v Ndlambe Municipality* (514/12) [2013] ZASCA 95 which confirms this long standing position on the question of legality in that, once a building structure is shown to be illegal in the sense that it is constructed without prior approval of the local authority as required by the National Building Regulations and Building Standards Act 103 of 1977, the court will be constrained in the exercise of its discretion and must uphold the principle of legality.

[66] It seems to me that while the common law remedy remains available to an aggrieved litigant, where there has been a clear breach of applicable laws, the common law position must yield to applicable and enacted laws. Therefore, legality is a fetter to the exercise of the court's discretion. Even if I am incorrect in my determination of this matter at common law, and as in the *Lester v Ndlambe Municipality* decision, this matter cannot be determined on the basis of fairness, equity and/or the interest of justice nor weigh the relative prejudice to the parties as contended by the first respondent. This decision is authority for the position that legality outweighs all other considerations and must be upheld as the paramount foundation for the rule of law. The importance of this principle necessitates that the value of the building structure can be no bar to an order for demolition. That this is the public law remedy is in my view no bar to an aggrieved party approaching the court for such a remedy.

[67] The alternative order sought by the first respondent in respect of the counter application which seeks the creation of the servitude over the encroached land would not have been competent by virtue of my findings in this main application.

[68] I have taken into account that but for the first respondent's unlawful actions and its failure to comply with the Town Planning Scheme, a failure which constitutes an offence, the applicant would not have been required to institute the interim application and the current proceedings to protect its rights. Equally, the applicant was forced to respond to the counter application instituted by the first respondent to defend the right to its property.

[69] In the result I make the following order:

- (a) The first respondent is directed to demolish and remove all encroachments unlawfully erected by it on the applicant's property Erf 329 Crown Mines, Extension 18.
- (b) The demolition must be effected within 30 days of the order to allow the first respondent sufficient time to arrange its affairs.
- (c) In the event that the first respondent fails to execute the orders in paragraphs (a) and (b), the Sheriff is to be authorized to procure the demolition and removal.
- (d) The first respondent is interdicted from continuing with any further unlawful construction that encroaches on the applicant's property and that is not in accordance with the Town Planning requirements.
- (e) The first respondent is directed to pay
 - i. the costs of this application;
 - ii. the costs of the interlocutory application; and
 - iii. the costs of the counter application.

SIWENDU

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

24934/2013

HEARD ON: 10 MARCH 2014

FOR THE APPLICANT: ADV MITCHELL SC

INSTRUCTED BY: MESSRS WADE ATTORNEYS

FOR THE 1st RESPONDENT: ADV WASSERMAN SC

INSTRUCTED BY: GEO ISSEROW & TL FRIEDMAN INC

DATE OF JUDGMENT: 26 MAY 2014

1.1.1 [1] Annexure ZH2, page 47, Annexure to the Applicant's Affidavit

1.1.2 [2] Paragraph 5.12 of the Applicant's Affidavit; and Annexure ZH3 to the Applicant's Affidavit

1.1.3 [3] Paragraph 3.1 of the Applicant's Affidavit

- 1.1.4 [4] Annexure ZH7 of the Applicant's Affidavit
- 1.1.5 [5] Paragraph 5.19.3 of the Applicant's Affidavit
- 1.1.6 [6] Paragraph 10.8 to 10.10 of the First Respondent's Replying Affidavit
- 1.1.7 [7] Paragraph 2.2 of the First Respondent's Replying Affidavit
- 1.1.8 [8] Paragraphs 2.21 and 2.22 of the Applicant's Replying Affidavit
- 1.1.9 [9] Paragraph 2.24 of the Applicant's Replying Affidavit
- 1.1.10 [10] Paragraph 2.24 of the Applicant's Replying Affidavit
- 1.1.11 [11] Paragraphs 2.26 of the Applicant's Replying Affidavit
- 1.1.12 [12] Paragraphs 5.6, 5.7 and 5.8 of the Applicant's Founding Affidavit
- 1.1.13 [13] Paragraph 23.2 and 23.3 of the First Respondent's Replying Affidavit
- 1.1.14 [14] Paragraph 2.32 of the Applicant's Replying Affidavit
- 1.1.15 [15] Paragraph 11.2 of the Applicant's Replying Affidavit
- 1.1.16 [16] Paragraph 5.11 and 5.12 of the Applicant's Founding Affidavit; and paragraph 46 of the Applicant's Heads of Argument
- 1.1.17 [17] Applicant's Founding Affidavit at Annexure ZH9
- 1.1.18 [18] Paragraph 5.14 of the Applicant's Founding Affidavit and annexures
- 1.1.19 [19] See also paragraph 4.6; and 5.12 Contravention of the National Building Regulations and Building Standards Act 103 of 1977.
- 1.1.20 [20] Paragraph 7 of Respondent's Replying Affidavit
- 1.1.21 [21] Hano Trading CC v JR 209 Investments (Pty) Ltd 2013 (1) SA 161 (SCA)
- 1.1.22 [22] The Law of Neighbours AJ van der Walt; Trustees, Brian Lackey Trust v Annadale 2004 (3) SA 281 (C); Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd and Another 1971
- (2) SA 397 (W) and Linvestment CC amongst others
- 1.1.23 [23] Milton (1969) Acta Juridica 241
- 1.1.24 [24] Milton
- (1969) Acta Juridica; and Van Der Walt, Neighbour Law

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Prepared on 12 October 2026 · Esheria