

SOUTH AFRICA / JUDGMENT

Cachalia v Lehwright Proprietary Limited (Makgoba JP, Phatudi J, Tshidada AJ) [2020] ZALMPPHC 14 (26 March 2020)

[2020] ZALMPPHC 14

COURT

Limpopo High Court, Polokwane

BEFORE

Makgoba, Phatudi, Tshidada

CASE / FILE NUMBER

HCA 02/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

APPEAL

CASE NO: HCA 02/2019

COURT

A QUO CASE NO: 2084/2016

In

the matter between:

YUSUF CACHALIA

APPELLANT

and

LEHWRIGHT

PROPRIETARY

LIMITED

RESPONDENT

(Registration

Number: 2004/006065/07)

JUDGMENT

MAKGOBA JP

- [1] This is an appeal against the judgment and order of a single Judge of this Division (Mokgohloa DJP, as she then was) ordering that the Appellant (the neighbour of the Respondent) shall demolish a pigeon loft which he constructed on his property which is adjacent to the Respondent, and to stop keeping pigeons on the property in a manner that creates a nuisance. The appeal is with leave of the Court a quo.
- [2] The Appellant is the registered owner of a property described as Erf 4460, Mokopane ("Erf 4460"). This property is adjacent to the Respondent's property and the pigeon loft erected on Appellant's property is the subject of the dispute in this matter. The property was bought as a vacant stand in February 2011. The Appellant is also the owner of Erf 4459, Mokopane ("Erf 4459") adjacent to Erf 4460 on which the pigeon loft is erected. This property, Erf 4459 is a residential property and the Appellant and his family are residing on same. The property was bought in August 2012.
- [3] The Respondent is the owner of a property described as Erf 4461, Mokopane ("Erf 4461"). The Respondent erected a residential house on the property and Mr and Mrs Lehman are residents there. The property was bought in March 2009.
- [4] The Court a quo granted the following order which is appealed against:
1. The defendant is directed to demolish the pigeon lofts where they currently stand.
 2. The defendant is directed to stop keeping pigeons in a manner which creates a nuisance for the plaintiff.
 3. Costs of suit on attorney and client scale and such costs to include costs in the interim application, experts' fees and costs consequent to the employment of two Counsel.

Pleadings

- [5] The Respondent (as the Plaintiff in the Court a quo) alleged the following in its particulars of claim:

“ 7.

The Defendant built a pigeon loft on Erf 4460, in extent 116 square meters, less than 1 meter from the common boundary line with the property of the Plaintiff, in contravention of the approved building plans and the site plan and further in contravention of the special consent applied for by the Defendant from the Mogalakwena Local Municipality, which consent further lapsed due to the non-fulfilment of the conditions and requirements of the Mogalakwena Local Municipality."

8.

"The Defendant occupied the pigeon lofts with pigeons on a large and extended scale and thereby creates a persistent and continued nuisance for the sound and smell and health risk emanating therefrom."

[6] The Appellant (as the Defendant in the Court a quo) pleaded as follows to the above allegations in the particulars of claim:

" 6.

PARAGRAPH 7 THEREOF

6.1. The defendant admits having built a pigeon loft on Erf 4460, in extent 116 m², less than 1 m from the common boundary line with the property of the Plaintiff.

6.2. The balance of the allegations is denied

6.3. Defendant pleads that it erected the pigeon loft in strict compliance with the approved building plans and site plan and in strict compliance with the special consent of the Mogalakwena Local Municipality and denies that the consent lapsed due to the fulfilment of the conditions and requirements of the Mogalakwena Local Municipality.

7.

PARAGRAPH 8 THEREOF

7.1. The Defendant admits having occupied pigeon loft with pigeons. The Defendant denies that the occupation is on a large and extended

scale. The Defendant pleads that the occupation is on a small scale given the facilities developed.

7.2. Defendant denies that a persistent and continued nuisance is created for the Plaintiff and denies that unacceptable sound and smell risk emanate from the pigeon loft."

Issues

[7] As it appears from the pleadings stated above, the Appellant admits having built the pigeon loft less than 1 meter from the common

boundary line with the property of the Respondent. Save for this admission the Appellant denies all the allegations and pleaded that he erected the pigeon loft in strict compliance with all legislative and legal requirements. He further denied that a persistent and continued nuisance is created for the Respondent and denied that unacceptable sound, smell and health risk emanate from the pigeon loft.

[8] The issues to be determined in the proceedings before the Court a quo and in this appeal are:

(a) Whether the Appellant constructed the pigeon loft in compliance with legislative and legal requirements including the Town Planning Scheme and

- (b) Whether the pigeon loft and the keeping of the pigeons create a persistent and continued nuisance for the Respondent.

Common Cause Facts

What follows are facts which are common cause and not seriously disputed.

[9]

9.1. The Respondent was informed by its employee, one Nasima Gangat, that the Appellant intended to construct a pigeon loft on Erf 4460. The information was received by Mr Lehman, the director of the Respondent company. On

7 October 2014 Mr Lehman addressed an email to the Appellant concerning the intended construction of the pigeon loft. He stated

that pigeons give off an odour and make noise. He stated further that the prevailing wind in that area is from the north- west and that the pigeons are going to be right in his face. He asked that the pigeon loft be erected as far as possible from his boundary walls so as to minimise the effects.

9.2. The Appellant responded to Mr Lehman's email and stated among others:

"A racing pigeon fancier lives just a few doors away from you! I am certainly going to be pursuing my noble hobby without infringing the rights of others, least of all the rights of my neighbours who have a right to an existence free as possible from any nuisance"

Furthermore the Appellant stated:

"I also note your suggestion that the loft be built away from your boundary wall. It was my intention to erect a double-storey structure on the south-west corner of the plot, but after receiving your email and picture of your view of the mountain, I have decided against doing so as it would spoil our view of a very scenic part of the great Waterberg Mountain Range.

[10] The Appellant started making enquiries at Mogalakwena Local Municipality regarding the requirements for the construction of a pigeon loft. He loosened with one Mr Solani Ntshani. The Appellant was advised that he should

- (i) apply for special consent to do so and (ii) complete a form titled: Application for Consent Use in Terms of the Greater Potgietersrus Town Planning Scheme 1997 and that (iii) all the neighbours bordering Erf 4460 had to sign the consent form. He was further advised to fix a notice on the front gate of Erf 4460 indicating that he was lodging an application for a special use consent of the property and that anyone who wishes to object should do so within 28 days. The Appellant completed the form and obtained the necessary documentation. He took the consent form to his neighbour Mr Lehman, who signed it on 10 November 2014. He also affixed the prescribed notice on the front gate of Erf 4460. On same date, 10 November 2014, the Appellant submitted the required consent form and paid an amount of R 583.00 to the Municipality. Attached to the consent form were some correspondences and a site development plan. From the annexures it appeared that (i) the R 583.00 was paid in respect

of the special / written consent (ii) a site development plan attached stated that the proposed loft was to be constructed approximately 2 meters from the boundary line.

[11] On 12 December 2014 the local municipality gave conditional approval of the application for a special consent for the construction of a racing-pigeon loft subject to certain conditions.

The relevant conditions being that:

11.1. The building line can only be relaxed from 2 meters to 1 meter and a high wall be erected in the direction where the building is to be relaxed.

11.2. No title condition shall be transgressed.

11.3. The primary use of the Erf shall remain residential.

11.4. The applicant shall after approval by the local municipality be obliged to, on an annual basis, in a month during which the applicant was notified of the approval, submit an affidavit in confirmation of inter alia the fact that the conditions pertaining to such approval and use are fully complied with.

11.5. The applicant had to inform the council within 30 days in writing whether he accepts the above conditions and intends to proceed with his proposed activities or not, failing which it will result in the cancellation of the consent granted to him.

[12] On 19 May 2015 the Appellant submitted the building plan indicating that a building was to be erected on the south eastern border of Erf 4460. The building were as per site development plans, and no relaxation of the building line was sought. Mr Pieterse, the Divisional Head: Building, at Mogalakwena Local Municipality, entered a query relating to the building plans submitted stating that the building was not a residential unit. On 29 May 2015 and 4 June 2015 Mr Pieterse addressed a letter to the Appellant stating that the building plans could not be approved because of some incomplete information and urged the Appellant to rectify and re-submit.

On 1 July 2015 Mr Pieterse signed off the building plans. Soon thereafter, and on 2 July 2015, the municipality's technical services addressed a letter to the Appellant informing him that the building plans were approved. The letter stated further that (i) an Occupational Certificate should be obtained before the building can be occupied and (ii) no deviation from approved plans is allowed without consulting with the building inspectors. Construction of the pigeon loft commenced during August

2015. It appeared from the municipality's file that a note was entered on 27 August 2015 by building inspectors indicating that the contractor has changed the dimensions of the building line on the east to 1 meter instead of 2 meters as per the building plans.

[13] In the meantime and when construction of the loft commenced, Mr Lehman was overseas. He noticed upon his return that construction of the loft had started. On 24 August 2015 he forwarded an email to the Appellant stating that he was concerned with the position of the loft on the Erf. He stated that it seemed that the Appellant was building the loft as far as

possible from the Appellant's house. Mr Lehman received no response from the Appellant. On 27 November 2015 Mr Lehman addressed another email to the Appellant requesting the Appellant not to insult him and build the loft under his nose. He complained that the building was an eyesore and referred to health hazards as a primary concern. The Appellant did not respond. A meeting was held on 4 or 5 December 2015 between

the parties in an attempt to resolve Mr Lehman's concerns.

- [14] On 1 March 2016 a zoning certificate was issued in respect of Erf 4460 indicating that the Erf can be used as a dwelling house with or without outer buildings and can be used to some other land users which included a special use permitted in terms of a special consent. The pigeons moved in during April 2016. The health inspector issued a report on 4 April 2016. This report related to an inspection of a loft building which was on 9 March 2016 prior to the pigeons moving in.
- [15] On 13 June 2016 the Respondent issued summons and brought an application for interim relief against the Appellant. In its application, the Respondent sought an interim order that the Appellant remove the pigeons from the loft pending the outcome of the main action. On 23 June 2016 the Appellant filed his notice to oppose the application. He filed his answering affidavit on 18 July 2016. It seems the Respondent abandoned its application for an interim relief.
- [16] On 3 April 2017, the Respondent's attorneys addressed a complaint to the municipality to take steps in terms of its bylaws in particular section 16(c) read with section 4(a) regarding the restriction of required distance between the boundary wall, the building line and also to refer the matter to health inspector to investigate any nuisance and health risks that may emanate from the pigeon loft.

The Evidence

- [17] Various witnesses testified for both the Appellant and Respondent at the trial in the Court a quo. Five witnesses testified for the Plaintiff (Respondent herein) and seven witnesses testified for the Defendant (Appellant herein). The Court a quo in my view, considered the evidence with reference to credibility, reliability and probabilities as required in line with case law[1].

I proceed to set out the evidence of each witness and evaluate such evidence as and when I deal with the evidence of each witness.

- [18] Mr JM Lehman testified that he addressed the email to Dr Cachalia (Appellant) on 7 October 2014 after having been informed of the Appellant's intention to erect a pigeon loft. He indicated that the pigeons give an odour and noise, that the prevailing wind was from north-west and that the loft had to be erected as far as possible from the Respondent's boundary line. He considered the Appellant's response to the email and was not informed that the loft would be of such a large extent and next to his boundary wall.

In the spirit of good neighbourliness, he signed the Consent Form.

There was nothing of the relaxation in the Consent Form, and if it was, he would not have consented. This last mentioned aspect was not contested by the Appellant's legal representative during cross-examination.

- [19] Mr Lehman complained about the constant cooing sound of the pigeons (he stated it is intolerable) and smell and the wind blowing over the loft from north- westerly direction. This was enhanced by the U-shape of the loft. He stated that pigeons cause dust. This embarrassed him when he entertained guests. Pigeons were also seen to sit on the ridge of the roof of the structure, and was constantly aware of the pigeons. The pigeons have unrestricted airspace and came over into his house. Pigeon dust constitutes a nuisance. This clearly causes a nuisance and also affected the value of his property negatively. The view to the mountain was spoiled with the unsightly structure of the pigeon loft.
- [20] Most of Mr Lehman's evidence was uncontested. The Court a quo correctly accepted that Mr Lehman was a credible witness, his evidence was reliable and supported by the probabilities.
- [21] Mrs Judy Lehman primarily came to testify about the nuisance. She is the person that spends the most time in the Respondent's house, and the house is her castle. She convincingly animated the cooing sound of the pigeons, spoke about the smell, the pigeon droppings, the feathers all over her garden and the white dust all over her house that she observed and which she and her assistant Annah had to clean. She also spoke about the spoiled view with ugly loft structure, and the impact thereof on their entertainment area.
- [22] According to Mrs Lehman pigeons were on her side of the boundary line and even entered her bedroom. Same could be identified by the tags they carried. She stated that .her ability to entertain guests was compromised. No wonder she in a heated moment, accused Dr Cachalia (the Appellant) of being a selfish person.
- [23] The Court a quo accepted the version of Mrs Lehman as a credible and reliable witness and that the balance of probabilities supported her version. The Court a quo cannot be faulted in this regard.
- [24] Mr HJ Marx, a property valuator, testified about his visits to the subject property on three occasions. The cooing sound was to be heard from almost all over the property. It was non-stop and was very irritating and annoying. He recognised a distinct smell blowing over, which reminded him of his childhood on the farm where as children, had pigeons. He stated that the smell would be as a result of the pigeon droppings or the feather dust.

- [25] Mr Marx stated that he was shocked by the impression of the pigeon loft. From the aesthetical perspective, the pigeon loft was unsightly, it was of an inferior craftsmanship and poor finishes. He came to the conclusion that the Respondent's property value was negatively compromised. This piece of evidence was uncontested in cross-examination or even in any evidence of any expert presented on behalf of the Appellant. His evidence, as an independent expert witness, stands unchallenged.
- [26] Mr Christo Du Toit is an architect. He testified that the area where the Respondent's property is situated, is an upper-class area and the Respondent's house has high class finishes. He heard the cooing sounds the whole day which was unacceptable, and they had to move inside the house during his first visit to the Lehmans. The pigeon dust created a sort of a smoke, haziness coming from the pigeon loft. He questioned Dr Cachalia's conduct in building the structure near the Respondent's property and why it was not built to Dr Cachalia's own home. He also criticised the aesthetics of the pigeon loft, calling it a "monstrosity", especially as different materials were used. The ridging was of a cement material, not level, one wall on the Respondent's side was not plastered, the IBR roof plates are of a thin and cheap quality. All in all it was unacceptable.
- [27] The credibility of this witness was unassailable and the probabilities supported his version. His evidence was correctly accepted by the Court a quo.
- [28] Ms Irene de Villiers testified on behalf of the Respondent and stated that she was previously employed by Mogalakwena Municipality and was involved with issues relating to the promulgation of bylaws. She referred to the current bylaws applicable to the keeping of birds and aviaries and stated that it was prohibited to erect an aviary within 3 meters from the boundary wall. Furthermore, the Municipality letter dated 12 December 2014 (Conditional letter of Approval of Consent to the Special Use) addressed to the Appellant stated among others that the building line can only be relaxed from 2m to 1m and a high wall be erected in the direction where the building is to be relaxed. The building plans stated clearly that any building built along the boundary line must be at least 2m from such boundary line. These conditions and stipulations have to be complied with.
- [29] According to Ms de Villiers any special consent relating to a use, does not change the position that the primary use should remain residential and be occupied for that purpose. In other words the consent for pigeon loft can only be granted if a residential unit is approved. Accordingly, the Town Planning Scheme 1997, did not override the by-laws. Even if consent is given, the by-laws should still be adhered to. To act contrary to the by-laws is unlawful. The credibility of this witness could not be faulted.
- [30] The Appellant, Dr Yusuf Cachalia testified and described himself as a pigeon fancier, who achieved a lot as a hobbyist in the pigeon breeding and racing sector. His ideals were to establish a pigeon loft nearby his residence in order to pursue his hobby. The evidence of the Appellant was mainly on the facts that are common cause as outlined earlier in this judgment. He testified on the process he embarked upon when he applied to the

Mogalakwena Municipality for the consent to build the pigeon loft and ultimately brought the pigeons to the premises. I accordingly proceed to comment on his evidence in order to determine his credibility and the reliability of his evidence.

- [31] Regarding the position where the loft was erected, the Appellant was unable to present an answer to the question why he did not construct the pigeon loft nearer to his own home. He could not explain why he did not respond to the request as per Mr Lehman's e-mail of 7 October 2014, why he did not build the pigeon loft as far as possible from Mr Lehman's boundary. It is common cause that the pigeon loft is built less than 1 meter from the boundary line.
- [32] When the Consent Form was brought by him to Mr Lehman for the latter to sign the Appellant failed to be open and frank to Mr Lehman and tell him what his true intentions were, despite the fact that by that time the Site Development Plan had been drawn. He did not disclose the Site Development Plan to Mr Lehman. Despite the fact that the Site Development Plan and building plans were already lodged but were not allowing the extension to the boundary line for less than 1m, the Appellant instructed the builder to erect the structure on less than 1m from the building line, and without any building plans allowing same.
- [33] The Appellant conceded that even if a structure was properly and legally erected, this did not prevent the neighbour to complain of a nuisance, be that of sound or smell. He steadfastly refused to accept that all the combined factors could be a nuisance, although admitting that other parties who are not pigeon fanciers could have a problem in smelling, cooing and other factors emanating from pigeons. He stated that the loft building was cleaned on a regular basis, however he later conceded that the Lehmans could be smelling the pigeons or their droppings. He conceded that it is possible that the wind can carry the sound and dust in that it can go out. He also conceded that the Lehmans could smell the pigeons and droppings and endure smells. The cooing to him was like music in his ears, and the smell attractive to him, but on a question by the Court he conceded that he cannot dispute that it could bother other people.
- [34] My overall assessment of the Appellant as a witness is that his candour and demeanor were argumentative and evasive and not easily prepared to concede the obvious. He lacked the necessary credibility and his evidence was unreliable.
- [35] Mr Louis Johannes Pieterse testified on behalf of the Appellant. He was employed as divisional head, buildings at Mogalakwena Municipality. He testified that in terms of the National Building Regulations and Standards Act, 1977 the building inspector has to recommend the plans and the building control officer had to sign same off on behalf of Municipality. It came out during cross-examination that Mr Pieterse was neither the building control officer nor was he authorised to sign off the plans on behalf of the Municipality. This then meant that the building plans and the deviations were never approved by the duly authorised building control officer. In as much as Mr Pieterse

purported to sign off those plans such recommendation for approval is in my view, null and void.

- [36] Mr Pieterse testified further that the site development plan and the first building plans had no relaxation of the boundary line. He stated that the building plans were only changed later to accommodate the relaxation of the building plans. This according to him was called deviation. He conceded that he asked for deviation on 27 June 2016. He conceded that without a recommendation by the building control officer the requirements for approval of building plans were not satisfied.
- [37] It came out from the evidence of Mr Pieterse that the building plans and even the deviations were never recommended by the building control officer or anyone acting on behalf of the Municipality. Mr Piterse, by signing the control sheet on the Municipality's file as "the building control officer" has done so clearly knowing that he was not the "building control officer" and accordingly intentionally misrepresented himself to hold such position, and he was in fact not authorised to sign any building plans or deviation plans at all.
- [38] The Appellant called Dr Ockert Botha, a pigeon fancier, to testify as an expert and express a professional opinion with regard to the transmission of diseases from animals to human beings. Dr Botha testified that the health risk of a pigeon loft is minimal and that none of the organisms which Mr Lehman pointed out pose any significant threat to human beings. Despite being called as an expert regarding the diseases the pigeons may transmit to human beings, Dr Botha went further to testify about the quality of the Appellant's loft which he observed for the first time on the morning of the day he was to testify. According to him the Appellant spent a lot of money on the perfect pigeon loft structure which according to him, is second to none in South Africa and that only the Prince of Saudi Arabia has a better pigeon loft to that of the Appellant.
- [39] The evidence of Dr Botha was largely irrelevant to the case before the Court a quo. His evidence was one sided and could not qualify as that of an expert witness. No wonder Counsel for the Respondent labelled Dr Botha as "the hired gun". Of significance in this case Dr Botha nevertheless conceded that pigeons can be a nuisance to some people and smells, sounds and other factors can be offensive and disturbing to other people who do not like pigeons.
- [40] Mr Eugene Barnard, a professional architect, testified on behalf of the Appellant. He had compiled a report wherein he described the structure of the pigeon loft, considered the regulatory constraints applicable to the design of the structure, evaluate the design and commented on the potential impact of the structure. According to him the loft building is well-constructed and finished to a reasonable standard.

- [41] Under cross-examination Mr Barnard was referred to the roof structure of the loft as depicted on photos 13 and 14 of Bundle A. He was referred in particular to the different materials used on the roof and ridges of the loft. His comments were that the roof view as depicted on these photos is not neat and is disturbing. He would not have designed the plan like that. He also commented on the unplastered wall on the Respondent side and stated that this was not acceptable.
- [42] The evidence of this witness seems to corroborate the evidence of Christo Du Tait, the architect who testified on behalf of the Respondent, to the effect that the loft building presented an unsightly view.
- [43] Mr Yeenan is the drafter of the site development plan and the building plans. In his testimony he said that he told the Appellant to put in "and relaxation of the building line from 2m to 1m". However he could not give the date when he so directed the Appellant. His evidence was of no assistance to the Appellant.
- [44] Mrs Mamakoko of the Municipality's Health Department testified that she inspected the loft: when she previously inspected in the loft, the pigeons were not in it. She simply walked through the loft and stated that she found it clean. Her second visit was on 4 June 2018 when the pigeons had already arrived. The Appellant received her and she did another inspection. Her conclusion was the same as the first inspection.
- [45] Mr Kekana, an employee of the Appellant testified. He stated that he cleans the loft four times a week. He then gathers droppings and disposes them at the dumping site. According to him, the condition inside the loft is clean and the smell is not unbearable. He estimated the number of pigeons to be between 400 to 450.
- [46] Mr Ntshani, the Town Planner, testified on behalf of the Appellant. He stated that the Municipality received the Appellant's application for a special consent to construct a pigeon loft on a residential stand 4460. The application was submitted together with a site development plan. Once satisfied that there was no objection raised after 28 days, and that the Appellant's neighbour at Erf 4461 had consented to the relaxation of a building line from 2m to 1m, they approved the application. Under cross-examination Mr Ntshani conceded the town planning department should, in the consideration of a town planning application (construction of a pigeon loft) also look at and consider the by-laws. He however stated that he was not aware of the existence of a by-law dealing with pigeon and aviary restricting the building line to boundary line. He nevertheless accepted that such by-laws were in existence as same were brought to their attention after the application was approved. According to him if they were aware of the existence of this by-laws, they would have considered them.

- [47] Mr Ntshani was asked whether the Appellant had responded to the Municipality letter dated 12 December 2014 (the conditional consent letter) calling upon the Appellant to respond within 30 days in writing whether he accepts the conditions set out in the letter. He responded that the Appellant did respond. He was however not able to state when did the Appellant respond and could not even present a copy of such response from the Municipality records or file.
- [48] Mr Ntshani was referred to a copy of the Consent Form signed by Mr Lehman which was contained in the Municipality file. The Court a quo correctly noted that it is clear from the copy of the form that the relaxation clause appeared to have been written or inserted using a different pen from the rest of the Consent Form. In fact the relaxation clause is in original writing whilst the other words immediately preceding the clause are photocopied. It showed a possible forgery. When confronted with this, Mr Ntshani refused to acknowledge the obvious discrepancy in the writing. It became clear that the Consent Form was tampered with after the photocopy was made. Mr Ntshani then conceded that an application for relaxation of the building line should have been done on a separate form and not be simply added on the already signed Consent Form which already contained the signature of Mr Lehman.
- [49] The Court a quo correctly rejected Mr Ntshani's evidence dealing with the application for relaxation of the building line and his version relating to the granting of the consent to relaxation, which according to him appeared in the letter dated 12 December 2014. Mr Ntshani's evidence lacked credibility, he was not objective in that he tried to protect and favour the Appellant.
- [50] Having set out the evidence led on behalf of the Appellant and the Respondent hereinabove, my assessment and conclusion is that the Court a quo correctly preferred and accepted the version of the Respondent over that of the Appellant. The Court a quo was faced with two mutually destructive versions and did carefully apply the principles set out in the Stellenbosch Farmers' Winery case, *supra*.

This Court's powers to interfere on appeal with the findings of fact of a trial Court is limited[2].

The trial Court had a better opportunity to observe the conduct and demeanor of each witness during the trial.

In the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong[3].

In *S v Moyane and Others* 2008 (1) SACR 543 (SCA) at 548b it was held:

"Bearing in mind the advantage that in trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony".

Whether the Appellant constructed the pigeon loft in compliance with legislative and other legal requirements.

[51] The construction of the pigeon loft has to be in accordance with and in compliance with legislative and other legal requirements which include the Town Planning Scheme. Special consent had to be applied for and granted by the Municipality. Building plans and site plans and the relaxation thereof need to be approved by the Municipality.

It is the Respondent's case that the pigeon loft has not been constructed in compliance with the legislative and other legal requirements in that the Appellant built the pigeon loft on Erf 4460, in extent 116 square meters less than 1 meter from the common boundary line with the property of the Respondent; Furthermore it is the Respondent's case that the building plans and site plans were never approved by the Municipality through the recommendation of the building control officer. That the special consent applied for by

the Appellant from the Municipality had lapsed due to non- fulfilment of the conditions and requirements of the Mogalakwena

Local Municipality as set out in their letter dated 12 December 2014. It is the Respondent's case that the Appellant never complied with or accepted the conditions as set out in the said letter.

[52] The Appellant admitted that the pigeon loft was built less than 1 meter from the common boundary line. This is a clear contravention of the legislative provisions including the Town Planning Scheme. In particular the Appellant has contravened the provisions of section 7 of the National Building Regulations and Building Standards Act 103 of 1977 (NBSA). A sanction for such contravention is to be found in section 21 of this Act where an order for the demolition of the structure is prescribed. This aspect will be dealt with in detail later in this judgment.

[53] Mr Lehman denied having consented to the relaxation of a building line. He testified that the Appellant approached him to sign a Consent Form which he signed. According to him he signed the form indicating that he did not have an objection to the pigeon loft being constructed on Erf 4460. He however did not know the extent of the pigeon loft that was to be constructed nor that it was to be constructed on the south-east side of his house and that no site development plan was attached to the document he signed. He stated that he signed the Consent Form in the spirit of good neighbourliness. He emphatically stated that the portion relating to the relaxation of the building line from 2m to 1m was not contained in the Consent Form which he signed. It appears therefore that the relaxation clause on the Consent Form was inserted after Mr Lehman had signed the form.

[54] The Respondent had instituted application proceedings for an interim order and the Appellant filed his answering affidavit thereto. Regarding the signing of the Consent Form, Mr Lehman stated in the Respondent's interim application that:

" 21.

Attached hereto as Annexure "F" is a copy of the Application for consent use in terms of the Greater Potgietersrus Town Planning Scheme, 1997. I note with great concern what appears to be two distinct handwritings and pens used in paragraph 3 of part 2.

22.

I, as the director of the Applicant, did sign the application form as adjacent owner, which consent by myself was conditional and specifically subject thereto that the Respondent does not build the pigeon loft, in a manner of speaking, right under my nose. I attach hereto as Annexure "G" a letter by myself addressed to the Respondent, indicating the above conditional consent."

To this the Appellant proffered the following answer:

"I confirm the contents of this paragraph. I fail to see what the two handwritings and different pens have to do with these arguments. I confirm that I completed the application and as is clear from the annexure, it already happened during 2014. I cannot recall the specific circumstances under which it was done but I deny that there is anything strange or notable regarding the aspects mentioned by the Applicant. Attached hereto is Annexure F is a copy of the Application for consent use in terms of the Greater Potgietersrus Town Planning Scheme, 1997. I note with great concern what appears to be two distinct handwritings and pens in paragraph 3 of part 2."

[55] It is significant to note that the Appellant does not deny the existence of the two distinct handwritings and pens used in the form. At the trial the Appellant confirmed the truthfulness of the above statement in his answering affidavit. He however stated that after deposing to the answering affidavit on 14 July 2016, he had a discussion with his architect who reminded him that it was him, the architect, who advised him to insert the words "and the relaxation of building line from 2m to 1m" on the consent form. He stated that he would call his architect to confirm this version. Indeed, Mr Yeeman, the architect, was called to testify. Mr Yeeman confirmed that he advised the Appellant to insert the relaxation clause. He however could not tell when this was done, whether it was before or after Mr Lehman signed the consent form. Counsel for the Respondent submitted that on the strength of Mr Lehman's evidence, and on the preponderance of probabilities the insertion of the relaxation of the building line from 2m to 1m was done after Mr Lehman had signed the consent form and he was never made aware of the insertion. I agree.

[56] It is a further submission by Respondent's Counsel that the probabilities are that the Appellant at that stage committed fraud by inserting in his own handwriting, a supplementary sentence in the Consent Form, misleading and pretending that such consent for the relaxation was given by Mr Lehman. That in the circumstance the Appellant has committed fraud. I am inclined to agree with Counsel in this regard. Accordingly, the Consent Form which included the relaxation of the building line, was tainted with fraud and the purported approval of the deviation is of no consequence. It must be noted that it is common cause that the building (pigeon loft) was never erected in terms of the original building plans and / or the alleged approval thereof.

[57] Apart from the fact that it now appears clear that the Appellant has committed fraud, it also tainted his credibility in this case and his evidence could not be relied upon. The aspect of fraud and how it impacts on the alleged approvals and special consent granted to the Appellant to erect the pigeon loft will be dealt with below.

[58] The principle is that fraud unravels all and the Court will not allow any administrative process to be used by a dishonest person to carry out fraud[4]. Fraud is conduct that vitiates every transaction known to the law. I may emphasise that: "No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transaction[5].

In casu the Appellant's contention that there was a decision by the Municipality recommending and approving the variation plans, which could include the relaxation of the boundary line to 1 meter, is unacceptable, as such decision, if there ever was one, was as a result of fraud committed by the Appellant. I accordingly make a finding that there was no decision made by the Municipality to approve the plans for the Appellant to construct the pigeon loft.

[59] To conclude the question whether the Appellant built the pigeon loft in compliance with legislative and other legal requirements, I arrive at a finding that that was not the case and for the following reasons:

59.1. the Municipality officials did not refer to the applicable bylaws when they purportedly approved the building plans.

59.2. the building plans were not signed off by the building control officer. Mr Pieterse who signed off the building plans was not the building control officer and neither authorised to sign off the plans on behalf of the Municipality.

59.3. the conditions stated in the consent letter dated 12 December 2014 were not adhered to. Therefore the conditional consent granted to the Appellant fell away 30 days after 12 December 2014.

59.4. the building plans or even deviations were never recommended by the building control officer or anyone acting on behalf of the Municipality, and there is no evidence of any approval of the plans in terms of the applicable legislation, namely NBSA.

59.5. the site development plan which was allegedly annexed to the Consent Form did not show that there was a relaxation of the building line in that it showed the building line to be 2 meters from the boundary.

5.6. on his own admission the Appellant built the pigeon loft less than 1 meter from the boundary line in contravention of the NBSA, bylaws and the Town Planning Scheme.

Appellant's Submissions on Appeal

[60] For the first time on appeal the Appellant raised an argument that the relief claimed by the Respondent was bad in law. This point of law was never raised at the trial but raised during the application for leave to appeal and before us in this appeal.

As a general rule, a question of law may be advanced for the first time on appeal, but only if its consideration involves no unfairness to the party against whom it is directed. It is also a general requirement for the raising of a new point on appeal that the point be covered by the pleadings[6].

[61] The point raised by the Appellant on appeal was to the effect that the relief sought was bad in law and that the final order granted was legally untenable. It was argued on behalf of the Appellant that the Court a quo granted a remedy of a consequential nature without granting the primary relief. It was argued that the Court a quo should have first reviewed and set aside the Municipal approval of the plans before it could grant an order for demolition of the pigeon loft.

[62] The Appellant avers that the order granted in favour of the Respondent in prayer 1 thereof that the Appellant be directed to demolish the pigeon lofts, is incompetent because the Respondent did not seek an order reviewing and setting aside the decision to approve the building plans, and because of that the order to demolish could not be granted. The Appellant relies heavily for this proposition on the cases of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) and *Serengenti Rise Industries (Pty) Ltd and Another v Aboobaker NO and Others* 2017

(6) SA 581 (SCA).

[63] The abovementioned cases are not applicable in the present case. Neither of the *Oudekraal* judgment or the *Serengenti* judgment dealt with a situation where the decision of Municipality was vitiated by fraud as in the present case where the relaxation of the building line, which was the basis for the approval of the variation plans was brought about by fraud on the part of the Appellant. Where fraud is involved, as in the present case, every action taken by the Appellant and the Municipality after the Consent Form was handed to the Municipality is void. Even if it be accepted that the plans were properly approved, it is common cause that the building was not built in terms of the variation plans in that it was erected less than 1 meter from the boundary line.

[64] It should be borne in mind that in the present case a finding is made that there was no approval of the plans, the relaxation of the boundary line and the variations or deviations by the Municipality. Consequently there was no decision of the Municipality to be subjected to review proceedings. The pigeon loft was simply erected illegally hence the remedy sought against the Appellant is that of demolition of the structure. There was no need for review proceedings against the Municipality in the present case. The clear facts of this case are that the Appellant has erected the property less than 1 meter from the boundary line, which building is in contravention of the bylaws which specifically prohibit a structure to be

erected within 3 meters from a boundary line.

[65] In the premises, the point of law raised by the Appellant albeit belatedly has no merit and is dismissed. In any event this Court does not condone the late raising of this point of law by the Appellant. The point should have been raised at the trial and be covered in the pleadings. In my view the Respondent is prejudiced by the late raising of this point of law on appeal.

In the Riddles matter referred to above Murphy J held as follows:

"My difficulty with the Respondent only now taking these points, which may or may not be meritorious, is that they appear not to have been raised before or adjudicated by the Magistrate; and hence it is doubtful whether the Appellant has had a proper opportunity to deal with them".

The Court refused to allow the belated point of law in the Riddles matters.

Does the Court have the powers to order a demolition?

[66] Among the orders granted by the Court a quo is the order directing the Appellant to demolish the pigeon lofts where they currently stand. The basis of the order is that the lots are built in contravention of the legislative provisions and / or Town Planning Scheme. The only statutory power of demolition is to be found in s21 of the National Building Regulations and Building Standards Act 103 of 1977 ("NBSA") which provides:

" Order in respect of erection and demolition of buildings.

Notwithstanding anything to the contrary contained in any law relating to Magistrates' Courts, a Magistrate shall have jurisdiction, on the application of local authority or the Minister, to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorizing such local authority to demolish such building if such Magistrate is satisfied that such erection is contrary to or does not comply with the provisions of the Act or any approval or authorization granted thereunder"

[67] In *Lester v Ndlambe Municipality and Another*[7]it was decided that a Court hearing an application in terms of s21 of the NBSA had no latitude not to order the complete demolition of a building once the jurisdictional fact, namely that the building was erected contrary to the NBSA, was established. It was held that the law could not and did not countenance an ongoing illegality which was also a criminal offence. To do so would be to subvert the doctrine of legality and to undermine the rule of law.

[68] It is clear that only a local authority or the Minister has locus standi to bring an application in terms of s21 before a Magistrate. The statutory right to seek the remedies provided for in s21 is clearly

intended to enable local authorities and the Minister to ensure compliance with the provisions of the NBSA in relation to town

planning schemes. Consequently an individual such as the Respondent in casu would not have locus standi to approach the Court in terms of s21 of the NBSA.

[69] That, however, could hardly mean that the Respondent in the present case was without a remedy. At common law the power to order the demolition of a building ordinarily finds application in the case of an encroachment by a building onto a neighbour's property.

In LAWSA Vol 27 (2 ed) para 158 the following is set out"

"When a landowner erects a structure on his or her land he or she must take care that he or she does not encroach on his or her neighbour's land. This rule of neighbour law is not only applicable in cases where the building itself

or its foundations encroach on neighbouring land, but also where roofs, balconies or other projections encroach on the air space above a neighbour's. "In the case of encroaching structures the owner of the land which is encroached upon can approach the Court for an order compelling his or her neighbour to remove the encroachment....."

[70] In BSB International Link CC v Readam South Africa (Pty) Ltd and Another[8]a demolition order albeit partial was granted at the instance of the Applicant. The basis of such an order was the non-compliance with the town planning scheme by the respondent in that case.

Ponnan JA at para [26] had this to say:

"The high court appeared not to appreciate that it was possessed of the kind of discretion alluded to by Graham JP. What tips the scales against BSB is that it was warned that it was acting illegally and in spite of such warning, it deliberately persisted. If anything, it engaged in obfuscatory behaviour to delay finalisation of this litigation whilst pressing ahead with its illegal conduct. Such conduct can hardly be countenanced by a court. To do so will make a mockery of ordered town planning and by extension the law. The order granted by the court a quo which directed that the property be demolished to the extent necessary to ensure compliance with the scheme, can accordingly not be faulted".

[71] In casu, as an adjoining landowner whose rights were adversely affected by the unlawful construction of the pigeon loft building, the Respondent approached the Court a quo for a common law remedy as it was entitled to do so. Accordingly, the demolition order granted by the Court a quo is appropriate and cannot be faulted.

[72] The last issue to be considered in this appeal is whether the pigeon loft and the keeping of the pigeons create a persistent and continued nuisance for the Respondent. The Respondent's version has been accepted by the Court a quo, and correctly so. Even some of the witnesses who testified for the Appellant made some concessions regarding nuisance created by the location of the pigeon loft as well as the keeping of such a large number of pigeons (400 to 450 in number) on Erf 4460.

The Legal Principles: Nuisance

[73] It remains to apply the law to the facts as I consider them to have been established. In the present case the question is whether the conduct of the person causing the alleged nuisance (Appellant) is, in the delictual sense, wrongful in relation to the party complaining of the nuisance (Respondent). In a case of nuisance, the neighbour complains that his right to enjoy the undisturbed use of his property with reasonable comfort and convenience is impaired.

[74] In *Regal v African Superstate (Pty) Ltd*[9] the Court had occasion to consider the position of the law in South Africa in regard to matters which in England are dealt with according to "the law of nuisance". The principle in our law is this: although an owner may normally do as he pleases on his own land, his neighbour has a right to the enjoyment of his own land. If one of neighbouring owners uses his land in such a way that material interference with the other's rights of enjoyment results, the latter is entitled to relief.

[75] In *De Charmoy v Day Star Hatchery (Pty) Ltd*[10] Miller J said:

"the "interference" with the neighbour's right of enjoyment must be material or substantial, for it goes without saying that, especially in contemporary conditions, some inconvenience or annoyance emanating from the use of neighbouring property must needs be endured".

Wrongfulness must be determined with regard to the particular circumstances of the case. The question is whether the harm-causing conduct, assessed in accordance with public policy and the legal convictions of the community, constitutionally understood, is or is not acceptable; in short, whether it is objectively reasonable to impose liability[11].

[76] The harm-causing conduct will be an actionable nuisance if it is unreasonable. All the factors bearing on this value judgment must be balanced, including those conventionally mentioned in the sphere of nuisance - the locality of the properties, the suitability of the defendant's use of its property; the extent and duration of the interference and the times at which it occurs.

In *PGB Boerdery Beleggings (Edms) Bpk & Another v Somerville 62 (Edms) Bpk & Another*[12] the Court approved the propositions that the interference will be unreasonable when it ceases to be a "to-be-expected-in-

the-circumstances" interference and is of a type which does not have to be tolerated under the principle of "give and take, and live and let live"; that this involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred; and that this is achieved, in essence, by comparing the gravity of the harm caused with the utility of the conduct which has caused harm.

See also JRL Milton in Joubert: *The Law of South Africa* Vol 19 at para 189 and Trustees, Two Oceans Aquarium Trust v *Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11-12.

[77] In the present case we have to do with a private nuisance; that is an act or omission or state of affairs that materially inconveniences another in the ordinary comfortable use or enjoyment of the premises. A private nuisance occurs when a neighbour interferes with an owner's use and enjoyment of his land. The owner's interest is violated mostly by the invasion of the land or premises by foul odour, smoke, gas fumes, noise or similar substances. In excessive quantities these substances, impinging upon the sensory organs, induce actual physical discomfort and distress in human occupants of land[13].

[78] In his testimony, Mr Lehman complained about constant cooing sound of the pigeons and smell and the wind blowing over the loft to the north-westerly direction. He stated that his entertainment area is at the back of his house almost opposite the loft and that the constant cooing and smell cause him an embarrassment whenever he has guests around to entertain. Pigeons were seen sitting on the ridge of the roof of the loft. He was constantly aware of the pigeons. The view to the mountain was spoiled with the unsightly structure of the loft. This evidence was not disputed.

Mrs Lehman spends most time in her house. She confirmed the cooing sound, smell, the pigeon droppings, the feathers and dust that she had to clean in the house. Pigeons were on her side of the boundary line and even entered her house and messed her carpets. Her ability to entertain guest was compromised. The property valuator, Mr Marx visited the Lehmans on three occasions. He confirmed hearing the cooing sound whilst in the entertainment area. According to him, the sound was non-stopping, very irritating and annoying. He further recognised a distinct smell blowing over which reminded him of his childhood (on the farm where as children, had pigeons). Mr Marx concluded that the Respondent's property value was negatively compromised.

[79] The factors which have been regarded as material in determining whether the disturbance is of a degree which renders it actionable, include (where the disturbance consists in noise) the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard. The test, moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable is to be decisive, but the reaction of "the reasonable man" - one who according to ordinary standard of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property.

See *De Channey v Day Star Hatchery (Pty) Ltd* supra at 1920-F.

[80] In the light of what I have stated above, I am of the view that the evidence justifies the Respondent's assertion that the erection of the pigeon loft and the keeping of pigeons therein constitute a serious and substantial invasion of the Respondent's rights. The Court a quo's finding in this regard cannot be faulted.

Conclusion

[81] The Court a quo was correct in making a finding that the Appellant did not erect the pigeon loft in compliance with the legislative and other legal

requirements and therefore ordered demolition of the structure. Furthermore the Court a quo's finding that the pigeon loft and the keeping of the pigeon creates a persistent and continued nuisance for the Respondent cannot be faulted.

[82] The appeal is accordingly dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel.

E M MAKGOBA

JUDGE PRESIDENT OF THE

HIGH COURT, LIMPOPO

DIVISION, POLOKWANE

I agree

M PHATUDI

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

T C TSHIDADA

ACTING JUDGE OF THE HIGH

COURT, LIMPOPO DIVISION,

APPEARANCES

Heard on

: 13 March 2020

Judgment

delivered on

: 26 March 2020

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Instructed

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[1] See Stellenbosch Farmers' Winery Group (Pty)Ltd and Another v Martel Et Cie and Others 2003 (1) SA 11 (SCA).

[2] See S v Francis 1991(1) SACR 198 (A) at 204d, RV Dhlumayo and Another 1948 (2) SA 677 (A).

[3] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f.

[4] See Loomcraft Fabrics CC v Nedbank Ltd & Another 1996 (1) All SA 51 (A)

[5] See First Bank Ltd t/a Rand Merchant Bank & Another v Master of the High Court, Cape Town & Others [2013] ZAWCHC 173 (11 November 2013) at para 20-27; Ensor FrankiPipeline (Pty) Ltd & Another v Mopani District Municipality & Others [2014] ZASCA 21 (28 March 2014) at para 25.

[6] See Riddles v Standard Bank of South Africa Ltd 2009 (3) SA 463 (T)

[7] 2015 (6) SA 283 (SCA) [2014] 1 All SA 402

[8] 2016 (4) SA 83 (SCA)

[9] 1963 (1) SA 102 (A)

[10] 1967 (4) SA 188 (D) at 191H - 1928

[11] See Country Cloud Trading CC v MEC, Department of Infrastructure Development (2014) ZASCA 28 ; 2015 (1) SA 1 (CC) paras 20-21; Za v Smith & Another [2015] ZASCA 75 ; 2015 (4) SA 57 4 (SCA) paras 15-16

[12] 2008 (2) SA 428 (SCA)

[13] LAWSA Vol 9 page 122 para 169.

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