

SOUTH AFRICA / JUDGMENT

Seshoene v Masogo and Others

(707/2014)

[2024] ZALMPPHC 105 (30 August 2024)

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COURT

Limpopo High Court, Polokwane

BEFORE

GC Muller

CASE / FILE NUMBER

707/2014

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

LIMPOPO DIVISION,
POLOKWANE

CASE NO: 707/2014

(1)

REPORTABLE: YES/NO

(2)

INTEREST TO THE JUDGES: YES/NO

(3)

REVISED

DATE: 30 August 2024

SIGNATURE:

In the matter between: MOKGADI ANNISA
SESHOENE
APPLICANT
And
NAPE PHINEAS
MASOGO
FIRST RESPONDENT
MAHLODI WILHEMINA
MASOGO
SECOND RESPONDENT
THE LOCAL MUNICIPALITY OF
POLOKWANE
THIRD RESPONDENT

JUDGMENT

MULLER J:

“The pound of flesh, which I demand of him,

Is dearly bought; ‘tis mine, and I will have it.”[1]

[1] These words provide an apt description what the purpose of this application is. The applicant is the owner of Erf 1[...].[2] The respondents[3] are the owners of an adjacent property described as Erf 1[...].[4] A garage erected by the respondents is encroaching the property of the applicant. The applicant instituted motion proceedings for a declaratory order that the said garage unjustifiably and unlawfully encroach her property and, in addition, for an order that the respondents be ordered to demolish the encroachment and restore the surface area of the encroachment to its original state as prior to the erection of the immovable structure. The respondents seek dismissal of the relief claimed.

[2] As far back as 4 December 2017 Sikhwari AJ ordered that oral evidence be presented on the following two issues:

(a) “Whether the respondent (sic) were notified in December 2005 that the foundation of the garage were not to the specification of building plan resulting in an

encroachment in the applicants property; and

(b) Whether the respondents indicated the boundary line between the applicant’s property and the respondent’s property.”

[3] Regrettably, ten years have lapsed since institution of the application in 2014. It is unclear why it took so long for this application to reach finalization. It was agreed between the parties at the hearing that heads of argument be delivered and that the court delivers a judgment without additional oral argument. The respective heads of argument were delivered and filed.[5]

- [4] It is common cause that the respondents had already been in occupation of erf 1[...] when the applicant purchased and took occupation of erf 1[...]. It is the version of the applicant, on the papers, that the respondents during 2012 erected an immovable structure which is utilized as a garage for a motor vehicle. When applicant suspected that part of the structure encroached her property she obtained the services of a land surveyor to survey her property to determine if the structure is encroaching her property. She reported the situation to the Polokwane Municipality after she was unable to engage the respondents.[6]
- [5] It is undisputed that the municipality served the respondents with a final notice dated 16 August 2012 in terms whereof they were informed that the structure and its foundation exceeded the boundary line in contravention of section 4 (Part A) of the National Buildings Regulations and Building Standards Act.[7] The notice required the respondents to demolish the portion of the structure that exceeded the boundary and to remove the building material.
- [6] The notice was ignored by the respondents. When the municipality took no steps to enforce the notice the applicant constructed a boundary wall which obstructed access to the garage of the respondents. The respondents instituted spoliation proceedings.[8] The applicant immediately demolished the wall on advice of her legal representative. He addressed a letter of demand to the attorneys of the respondents to demolish their structure. No response was received.
- [7] The respondents in an opposing affidavit acknowledged that 42cm of the garage they erected encroached on the property of the applicant the cause of which was the erection of a boundary wall by the applicant between the two properties in 2003 whereby the applicant determined the boundary between the properties. The respondents assert that the applicant refused to discuss the issue or to accept compensation. The respondents tendered to purchase the land encroached for a market related price in December 2012 without success as the applicant is adamant that the structure be demolished. The respondents say that they will suffer more prejudice and inconvenience than the applicant should a demolition order be granted.
- [8] In reply the applicant stated that when she moved into her property the respondents indicated to her where the boundary was between the properties. She erected the boundary wall there on the assumption that it was the true boundary line between the properties. When she decided to make additions to her property she submitted plans to the municipality. It only then became apparent that the improvements cannot be implemented because of a discrepancy between the plans and the size of her property. She then acquired services of a land surveyor who established the true boundary between them. The plans submitted by the respondents to erect a garage was not approved by the municipality.
- [9] The applicant testified in relation to the issues referred to evidence by Sikhwari AJ. She stated that she purchased the property in 2003. Her stand was overgrown with bushes. On the boundary between her erf and the property of the respondents stood a tin shack which

faced towards the property of the respondents which was used by them as a spaza shop. The area was cleared where the shack stood. She decided to put up a fence known as a “stop nonsense”[9] between their properties in 2003. She explained that the fence was “leaning against the shack”. I understood her to mean that the fence was erected up against the shack. When she was able to obtain a loan to erect a garage in 2012 she discovered after she obtained the services of a land surveyor who established that that the boundary wall she erected was inside her property with the result that not enough space remained in her property to build the garage and that the garage of the respondents was partially erected inside her property.

- [10] She removed the fence between the two properties in 2013 and commenced with the construction of a new boundary wall on the real boundary line but was ordered to remove it. She complied. A photograph handed in as exhibit depicts bricks that are stacked in a row on the boundary where the wall should have been erected.
- [11] It was suggested to the applicant in cross-examination that trouble started because the wall was erected in 2003 where she assumed the boundary was. The applicant replied that she was ignorant of the correct position of the boundary and acted upon acceptance that the boundary was where the area cleared by the respondents ended.
- [12] The manager: building inspections from the municipality testified that according to an entry in the records of the municipality dated 19 December 2006 a foundation inspection for the erection of a garage on erf 1[...] was conducted but was not approved due its encroachment on the property of the applicant. No further inspections were conducted and no occupation certificate was issue. The records also showed that a letter dated 4 January 2013 was addressed to attorneys Makwela and Mabotja in Polokwane, who were the legal representatives of the respondents at the time in which it was confirmed that notices

in terms of the provisions of the NBSA were issued to the respondents. Attention was also drawn that building plans submitted by the respondents for a garage to be erected on the boundary line were approved on 5 October 2005. A foundation inspection was carried out on 19 December 2005 and the results were negative as the foundation did not accord with the approved plans and that no occupation certificate was issued for the building. The Surveyor-General diagram was also attached to the letter which indicated the extent of the property of the respondents for which the plans were approved. The respondents were urged in the letter to rectify/demolish the building.

- [13] The first respondent testified that they moved into their property in
2002. The applicant moved in in 2003 and erected a pre-cast wall between them that same year without discussing it with them. They decided to build a garage in 2003 but only commenced with the works in 2006 after their plans were approved in 2005. The garage was completed in 2007. The applicant informed him in 2012 that the garage encroached her property. He was never informed by his erstwhile attorneys of the letter from the municipality addressed to them.

- [14] He averred that a building inspector came to inspect the foundation when the builders were preparing the foundation of the garage. The walls of the garage were then put up. He was then informed that an inspection will follow to approve the walls. When he came from work one day the builders were busy putting up the supports for the roof. He assumed and accepted that inspections were carried out and that everything was in order. No occupation certificate was issued to him.
- [15] The second respondent denied that she showed to the applicant where the boundary was between their respective properties.
- [16] It is important to point out immediately that the provisions of the NBSA are not applicable to this case despite it be common cause that at least one notice was issued to the respondents in terms of section 4 of the NBSA. Section 21 of the NBSA provides:
- “Notwithstanding anything contrary contained in any law relating to magistrates’ courts, a magistrate shall have jurisdiction, on the application of any local authority or the Minister, to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorising 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 this Act or any other approval or authorisation granted thereunder.”*
- [17] Neither the municipality nor the Minister applied for an order in terms of the NBSA. In addition, the case of the applicant is premised on the common law. The principles of the common law were espoused by the Supreme Court of Appeal in *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee, Capital Property Trust*[10] that:
- “... in Roman-Dutch law the point of departure was the same as in Roman law, namely that if anybody suffered as a result of something belonging to his neighbour overhanging or encroaching on his property, he could force the neighbour to remove it.”*[11]
- [18] In *BSB International Link CC v Readam South Africa (Pty) Ltd and Another*[12] the same court, with reference to encroaching structures, reaffirmed the common law position and reiterated that a court is vested with a discretion:
- “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 ...Despite the above rule the court can, in its discretion, in order to reach an equitable and reasonable solution, order that the payment of compensation rather than removal of the structure.”*[13]
- [19] An order for removal of the encroachment in this sense may include an order for partial demolition of the encroachment if such an order can satisfactorily address the encroachment and if it is practically possible to do so. Experts evidence may be required to indicate that the integrity and safety of the structure will not be compromised.[14] Neither the respondents nor the applicant made out a case for partial removal based on expert evidence, should the court consider an order for demolition.

[20] A court may also in the exercise of its discretion order transfer of the encroached land provided that the owner of the encroached land consents to the transfer.[15] No demand was made in the present matter by the applicant for transfer of the encroached land to the respondents.

[21] When a court considers payment of compensation as a reasonable and equitable solution rather than demolition of the encroachment it must consider the provisions of section 25(1) of the Constitution which provides that:

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

property.”

[22] It is necessary because the owner of the encroached land will effectively be deprived of his/her ownership of the encroached land by a law of general application.[16]

The respondents in the heads of argument submitted that an order for compensation should be issued. Attention was drawn to a photograph which depicts both properties. It is argued that the applicant will be able to erect a carport that will meet her needs as a means to alleviate the problem caused by the encroachment. The outcome of this solution will be that the entire length of the boundary between the respective parties will remain where it was erroneously determined and where the applicant erected the no nonsense boundary wall.

[23] The respondents take the applicant to task in the heads because she “scrupulously” elicited the assistance of the municipality to issue a notice in terms of the NBSA. The attacked is without foundation. The case of the applicant is premised on her undisputed common law right of ownership. No obligation rested on the applicant to afford the respondents prior notice of her complaint to the municipality. It is common cause that the foundation encroached on the property of the applicant since 2006. Criticism, in my view, can justifiably be directed at the municipality who has failed to act in terms of the NBSA notice when the respondents failed to take steps to remove the encroachment identified in the notice.

[24] However, in these proceedings, the relevance of the notice is limited to proof that the respondents were alerted on 16 August 2012 that the encroachment is unlawful and that they were required to remove the encroachment. A letter was also addressed to the attorneys of the respondents, at the relevant time, in terms whereof the respondents were informed what the nature of the encroachment is and that they were requested to address and rectify the encroachment. It ill behoves the respondents to contend that they have no knowledge of their obligation to take steps to remove the encroachment.

[25] The reference in the letter to the attorneys of the respondents to more than one notice given to the respondents is not supported by the contents of the file produced by the municipality.

There is no clear evidence in possession of the municipality that the respondents were notified more than once that the foundation partially encroached the property of the applicant. The least that is said about the lack of steps taken by municipality, the better.

[26] There is no doubt that the garage was erected at least six years prior to the discovery of its encroachment on the property of the applicant when she wanted to erect a garage on her property. Be that it may, it is common cause that the respondents acquired knowledge by means of the notice that the garage unlawfully encroached the property of the applicant. The respondents failed to engage with the municipality to rectify the unlawful encroachment. Instead, both the notice and the letter were ignored by them. The parties after 10 years have lapsed are still no closer to a negotiated solution. Importantly, the erven of the parties are each 280 square metres in extent. There are, due to the size of the properties, not much room to develop or make additions to the properties. The respondents enjoyed the benefit and use of a portion of the property of the applicant to her detriment. She is unable to develop her property and make additions to its fullest potential. A garage, no doubt, will enhance the use of the property and will increase the value and its marketability.

[27] No evidence was presented by the respondents that partial removal of the encroachment is impossible or not practicable nor was evidence adduced what the costs might be for removal or partial removal of the garage. It seems that the respondents are of the view that the applicant is spiteful to insist upon removal of the encroachment despite the unreasonableness of the encroachment on her property. It was explained in *De Charmoy v Day Star Hatchery (Pty) Ltd*[17] that:

“The principle in our law is this: Although an owner may normally do as he pleases on his own land, his neighbor has a right of enjoyment of his own land. If one of the neighbours uses his land in such a way that material interference with the other’s rights of enjoyment results, the latter is entitled to relief.”[18]

[28] Removal and re-building of the garage or even its partial removal will no doubt be a costly and cumbersome exercise for the respondents. The applicant is entitled to enjoy full ownership of her property and to put up a garage in her property as much as the respondents. She has taken down the wall which she has erected unlawfully between them at her costs, as ordered. The lengthy period which has lapsed since the application was issued, is regrettable, but should be attributed to the litigants themselves who allowed the application to drag on for so many years.

- [29] The applicant prefers a garage above a carport. This court cannot force the applicant to put up a carport instead of a garage simply because the respondents erected a garage that encroaches on her property and is unwilling to remove the encroachment. Payment of compensation will only perpetuate the unlawful conduct of the respondents and cannot be considered to be a just and equitable solution.
- [30] The order applied did not make provision for partial demolition. The order is modified to allow the respondents to remove the encroachment if it can be achieved by partial demolition provided that is safe and will not compromise the integrity of the structure. It is considered that a period of 14 days to remove the encroachment is unreasonable. A period of a month is reasonable to afford the respondents time undertake the necessary work.
- [31] The applicant is successful. No argument was presented in relation to the costs of the application. There is no reason why the costs should not follow the result.

ORDER

1. It is declared that the first and second respondents unjustifiably and unlawfully constructed an immovable structure on Erf 1[...] of Pietersburg Extension 65 Registration Division LS Northern Province in extent 280 square metres, the property of the applicant, by way of an encroachment of an immovable structure built by them on Erf 1[...] Pietersburg Extension 65 Registration Division LS Northern Province in extent 280 square metres and as indicated on Annexure “KS3” of the founding affidavit.
2. The first and the second respondents are ordered to demolish or partly demolish the structure described in paragraph 1 above, provided that a suitably qualified engineer has certified that the partial demolition of the structure will not compromise the structural integrity of the said structure or adjacent buildings, and to remove all building rubble and to restore the surface of the area of the encroachment where the structure was erected to the state of the area prior to the erection of the structure.
3. In the event of the first and second respondents failing to adhere to the order in paragraph 2 above within 1 (one) month after the date of this order, that the Sheriff for the district of Polokwane is ordered to demolish the immovable structure of the respondents on the property of the applicant described in paragraph 1 above and to remove all building rubble and to restore the surface of the area on the property of the applicant where the structure was erected to the state it was in prior to the erection of the structure.
4. In the event that the Sheriff having to demolish the structure as ordered in paragraph 3 above, the sheriff is ordered to attach and sell in execution so much property of the first and second respondents so to enable the Sheriff to provide for the costs to demolish the structure mentioned in paragraph 1 and to account to the first and second respondents for such sale in execution and the costs relating to the demolition of the said structure.
5. The respondents are ordered to pay the costs of the application.

GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. For the Plaintiff

: AC DIAMOND

2. For the Respondents

: JT GROBLER

3. Date of the hearing

: 31 JULY 2024

4. Date judgment is delivered

: 30 AUGUST 2024

[1] Shakespeare W The Merchant of Venice Act IV, SC 1.

[2] Described in the deed of transfer as Erf 1[...] Pietersburg Extension 65 Township, Registration Division LS Northern Province in extent: 280 (two hundred and eighty) square metres.

[3] The first and second respondent. Hereinafter referred to as “the respondents”.

[4] Described in the deed of transfer as Erf 1[...] Pietersburg Extension 65 Township, Registration Division LS Northern Province in extent: 280 (two hundred and eighty) square metres.

[5] The heads of argument of the applicant were filed late without any explanation which is reminiscent of manner in which the litigation

was conducted.

[6] The Polokwane Municipality is the third respondent. (Hereinafter called “the municipality”).

[7] Act 103 of 1977. (Hereinafter called “NBSA”).

[8] Case no 454/13.

[9] Concrete slabs.

[10] 2015

(5) SA 290 (SCA).

[11] Par 29.

[12] 2016

(4) SA 83 (SCA).

[13] Par 24 quoting with approval from CG van der Merwe Things 27 LAWSA (2nd ed) para158.

[14] BSB International Link CC v Readam South Africa (Pty) Ltd and Another supra par 29 and 39.

[15] Fedgroup Participation Bond Managers (Pty) Ltd v Trustee Capital Property Trust supra par 30-35.

[16] Du Plessis and Others v De Klerk and Others

[1996] ZACC 10; 1996

(3) SA 850 (CC) par 44; The President of the Republic of South Africa v Hugo 1997

(4) SA 1 (CC) par 96; S v Thebus and Another [2003] ZACC 12; 2003

(6) SA 505 (CC) par 65.

[17] 1967

(4) SA 188 (D)

[18] 19F-G.

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Prepared on 12 October 2026 · Esheria