FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 3367/2016

In the matter between:

MANGAUNG METROLOLITAN MUNICIPALITY Applicant

and

KEHELETWE ASAEL TSOEI 1st Respondent
LEHLOHONOLO ASAEL TSOEI 2nd Respondent

CORAM: HEFER, AJ

JUDGMENT: HEFER, AJ

HEARD ON: 17 and 24 NOVEMBER 2016

DELIVERED ON: 15 DECEMBER 2016

INTRODUCTION

[1] The applicant is engaged in a project for the upgrading of the existing asphalt roads and storm water system in Bochabela, Bloemfontein. This project is understandably important as the existing asphalt roads are in poor condition, peppered with potholes as well as edge breaks. Furthermore, what is of importance for purposes of the present application, there is no existing form of storm water drainage in the area, which leads to flooding of the properties bordering these roads when it rains.

[2] A firm of Engineers, WSP, was appointed to see to the upgrading, construction and repairs which includes the development of a formal storm water drainage system.

[3] During June 2015, whilst conducting surveys for the purpose of the construction and repairs referred to, it was found that the respondents' property, which consists of a residential property, was encroaching upon the road reserve, of which the applicant is the registered owner.

[4] At this stage, it is convenient to describe the encroachment, of which photographs were appended to the founding- as well as replying affidavits, as follows:

[i] The respondents' residence situated on the property consists of a medium to large size double story house.

[ii] In front of the house there is an enclosed paved area, the dimensions of which are irrelevant for purposes of the present application.

[iii] The enclosed area referred to, is closed off by devils fork fencing on the sides and a concrete fence and electric operated gate in the front.

[5] It is evident from the photographs that the devils fork fencing on the sides extend beyond the erf boundaries of the neighbouring houses to an extent of approximately six metres. The effect of the encroachment as described is as follows:

[a] pedestrians who wishes to walk past the respondents' property, are not able to continue on the "pavement", but have to go onto the road surface, past the respondents' property and then up unto the "pavement" after passing the respondents' property; and

[b] the trench which have already been dug out for the storm water drains, only goes up to the concrete fence and stops there due to the concrete wall itself preventing it from continuing on the same path.

Pavement is used in inverted commas because the area concerned is not a formal area. Next to the road there is a slightly higher grass covered area which according to the photograph, appears to be for the use of pedestrians.

[6] According to the applicant, prior to the current encroachment, the concrete and devils fork fencing referred to, extended to a lesser degree onto the applicant's property, in other words, the current fenced of paved area referred to in front of the residence, was smaller during June 2015. The applicant refers to the situation on June 2015 as "the initial encroachment'. At that stage during the design stage, November 2016, the applicant was willing to accommodate the respondents in that the pipeline has to run behind the kerb line which would mean that the pipeline would miss the fence of the property. However, it now appears that when WSP came on site during January 2016, the fence of the respondents' property was moved even further onto the road reserve. The encroachment extended 4.23 metres on the one side and 3.82 metres on the other side.

[7] It is common cause that numerous meetings have taken place between all parties concerned in an attempt to find a solution to the problem. Of importance for purpose of the present application is that it is also common cause that a meeting took place on the 2nd of March 2016 to discuss the matter. During this meeting the applicant was represented by certain officials whilst the respondents represented themselves. According to the Respondents they had "compromised the dispute" during this meeting to the effect that elbows could be inserted so as to circumvent the encroaching area and keep the pipeline on both sides connected to each other. According to the respondents, this option was decided upon as a solution to a further alternative to the demolition as suggested by the officials representing the applicant during the meeting. The applicant in it's founding affidavit already stated that no agreement had been

reached during the March 2016 meeting and also denies the compromise in it's replying affidavit.

[8] For sake of completeness, it needs to be mentioned that the applicant , in it's replying affidavit, further alleged that the use of the elbow connections referred to by the respondents were in any case impractical. Furthermore, in regards to the alleged compromise, the applicant further replied that the relevant officials who represented the applicant during the meeting of March 2016, did not have the necessary authority to conclude any agreement with the respondents as alleged. The respondents in their rejoinder affidavit, then raised the plea of estoppel, namely that the applicant should be estopped from denying the authority of officials referred to.

[9] In their opposing affidavit the respondents state that "the encroachment now consist only of a boundary wall, a garden- and paved area". This in effect indicates that the existence of the encroachment is not disputed. During the hearing of the matter, Mr Grobler on behalf of the respondents, also conceded that the property of the respondents is presently encroaching on the property of the applicant.

[10] The first issue which needs to be decided is whether a compromise was indeed reached between the parties during the meeting held on 2 March 2016. The respondents, in their opposing affidavit, as well as during argument have chosen to rely on a compromise in particular and not solely on an agreement.

The very essence and motive of a compromise is the uncertainty and doubt of the parties as to their respective rights. (See **Natal Bank v Kuranda** 1907 TH 155 at 167. In **Vena v Port Elizabeth Divisional Council** 1933 EDL Graham, JP said the following at page 87:

> "A compromise takes place where there is a question of doubt and the parties agree not to try it out but to settle it between themselves by a give and take arrangement. – See **Huddersfield Banking Company v Lister** (1896L.R.2 CH.D285), and in **Mozley's Law Dictionary** I find "A compromise" defined as "an adjustment of claims and disputes by mutual concession either without resort to legal proceedings or on the condition of abandonment of such proceedings if already commenced."

[11] A dispute exists when one party maintains one point of view and the other party the contrary or different one, even if one disputant is prepared to listen to further argument. (See **Williams v Benoni Town Council** 1949 (1) SA 507 W. Also **Dictionary to Legal Works and Phrases** Claassen, Vol. 2 –p. D - 46).

[12] According to the respondents, during the meeting held on 2 March 2016, the officials representing the applicant told them that they had two alternatives to the demolition of the fence and encroachment. Although the respondent in their opposing affidavit made an attempt to create the impression that the boundary lines of the property are uncertain and cannot be established, it is not the case of the respondents that during the meeting of the 2nd of March 2016 nor any other meeting, it was disputed that the respondents' property is not encroaching upon the property of the applicant. This is not a case where one party maintains one point of view and the other

party the contrary or a different one as envisaged in the matter of **Williams v Benoni Town Council** (supra), referred to. Whereas it appears that it was common cause between the parties that the area referred to, is indeed encroaching on the property of the applicant, there existed no dispute for purposes of a compromise. At best for respondents, if it be found that an agreement was reached between the parties during the meeting referred to, it can merely be described as a solution to the problem of the respondents' encroachment obstructing the laying of the storm water pipes.

[13] Mr Grobler further argued that the well-known "Plascon Evans Rule" should be applied in matter and that the court should indeed find that an agreement was indeed reached on 2 March 2016, whereas the applicant is completely silent about what exactly transpired during the said meeting, save for stating that no agreement was concluded. It was also suggested that due to the existence of an irresolvable dispute of fact, that the application should be dismissed. This argument was, however, nor pursued during the hearing of the matter. Due to the reasons hereunder, I do not consider it necessary to deal with this point any further.

[14] As stated, according to the respondents, the effect of the compromise would be that elbows were to be inserted so as to circumvent the encroaching area and keep the pipeline on both sides connected to each other. That would mean that the devils fork as well as the concrete fencing will remain in place. This will also have the effect that pedestrians will have to "take a detour around the respondents' property" in the sense that pedestrian will have to get down from the "pavement" when they get to the respondents'

property, lower themselves to the road level and then climb onto the "pavement" again after passing the respondents' property. As stated, it appears that previously the encroachment even extended further to what the respondent's themselves a so-called "gardened-and paved area". This appears currently to be removed due to the construction works in progress. The fact that the property is situated in a rather "simple/ordinary" suburb in comparison to one of the rather upper-class suburbs in Bloemfontein, as suggested during argument, does not make any difference. The fact remains that pedestrians, wherever they are walking, are entitled to walk on a "pavement" where there is no risk of being hit by passing vehicles.

[15] In **Eastwood v Shepstone** 1902 TS 294 at 302 Innes CJ stated:

> "Now this court has the power to treat as void and to refuse in any way to recognise contract and transactions which are against public policy or contrary to good moral. It is a power not to be hastily or rationally exercised; but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitates to declare such an arrangement void."

[16] These principles were endorsed by the Supreme Court of Appeals in **Sasfin (Pty) v Beukes** 1989 (1) SA 1 where Smallberger JA who gave the judgment of the majority of the court stated at 8(c) as follows:

> "Wille in his Principles of South African Law, 7th edition at 324 speaks of an agreement being contrary to public policy if it is opposed to the interests of the state, or of justice, or the public. Interest of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the

> interest of the community, whether they are contrary to law or morality, or counter to social or economic expedience will accordingly on the ground of public policy, not be enforced. (See also **Standard Bank of SA Ltd v Essop** 1997(4) SA 569 and **Botha (now Griesel) and Another v Finance Credit (Pty) Ltd** 1989 (3) SA 773 A at 782."

[18] In this instance it should also be considered that according to the applicant, the encroachment fences in the electric box of Centlec which is not allowed in that employees of the applicant as well as Centlec should have unobstructed access to this box and the first encroachment is on top of the electricity line and on the longer side over the space reserved for telephone lines, ADSL lines, etcetera, which will hamper the rendering of services, installing and maintenance of further services as well. The main concern, however, is the safety of the pedestrians.

[19] Therefore, although the existence of an agreement, or more in particular a compromise is disputed by the Applicant, I find that even if an agreement had been reached between the parties, such agreement will be void and unenforceable due to the fact that it will be contrary to public policy.

[20] In **Trustees, Brian Lackey Trust v Annandale** 2004 (3) SA 281 CPD Griesel J confirmed the principle that a court has a discretion, in certain circumstances, to order damages instead of demolition of encroachment. At page 291 A to B, the following was stated:

> "*It further appeared when reference was made to the existence of such a discretion, it was done in a context of fairness. The court accordingly held that, especially in the field of neighbour law, consideration of*

> *reasonableness and fairness were prominent factors in the exercise of the court's discretion. Based on highly exceptional facts of the case, the court exercised it's discretion in favour of the respondent and against the application for a demolition order."*

In this regard the respondents propose in their opposing affidavit that the trench for the pipeline should simply be dugged underneath the devils fork fence (on both sides), the pipeline subverted so as to run through the area of encroachment and closed up again. The respondents further tendered to purchase the area of encroachment from the applicant. According to the respondents, what they cannot afford is the outright demolition of the wall structure. Given the positioning of the respondents' house, it will mean that they would have to almost forego the entire front fence, which will obviously negatively impact upon the safety features of a house, and diminish it in value both aesthetically and monetarily. This, according to the respondents, will cause them great prejudice.

The respondents, however, lose sight of the fact that the property upon which they are currently is the property of the applicant. The respondents were at no stage, being the initial encroachment stage, as well as currently, entitled to erect any fence or structure on the property of which the applicant is the registered owner. The respondents only have themselves to blame for the current situation. As stated, if the encroachment is not demolished as sought by the applicant, the effect thereof will be that it is contrary to the public interest for various reasons already stated above.

[21] As far as the costs are concerned, Mr Roux on behalf of the applicant argued that the respondents should be penalised by a punitive cost order. I am in agreement with this argument. The respondents not only encroached upon the property of the applicant earlier during November 2015, but even went so far as to extend the encroachment to a larger degree to what we currently found. After several attempts to resolve the problem, the respondents still refuse to demolish the encroachment. In this regard it needs to be mentioned that from what can be ascertained from the photographs in regards to the property, there is no reason why the same fences and boundary wall may not be erected on the boundary lines, therefore closer to the respondents' residence. If that is done, the safety concerns by the respondents will also be addressed. The respondents' reluctance to demolish the encroachment can only be contributed to respondents' attempts to enlarge their property in an improper manner at the expense of the applicant. Furthermore as stated, it inconveniences and endangers pedestrians wishing to pass their property. For those reasons, a punitive cost order in the exercise of my discretion should be awarded.

ORDER

[22] Accordingly the following order is made:

1. The respondents are ordered to remove any and all encroachment of their property onto the road reserve and property of the applicant in front of and/or adjacent to erf [...], M. S., B., Bloemfontein also known as erf 30702, Mangaung Extension […], Bloemfontein, Free State Province;

2. Should the respondents fail or neglect to remove the encroachment within twenty one days after an order herein is granted, the applicant is authorised to, by way of its employees or contractors, remove the encroachment;

3. The respondents will be held liable for any costs in removing the encroachment in terms of paragraph 2 of the order;

4. The applicant, it's employees or contractors are indemnified for any damages caused due to the removal of the encroachment;

5. Respondents are to pay the costs of the application on an attorney/client scale.

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J.J.F. HEFER, AJ

On behalf of the plaintiff:	Adv. L A Roux Instructed by Moraka Attorneys BLOEMFONTEIN
On behalf of the respondents:	Adv. S. G Grobler

Instructed by Kramer Weihmann

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BLOEMFONTEIN