

REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: 2013/19206

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

Date: 02/03/2016 Signature [Handwritten Signature]

In the matter between

CHRISTINA FRIEDERIKE CC

Applicant

And

QUARTET BODY CORPORATE

First Respondent

BARTZ LUNETTA

Second Respondent

SIEBRITS WARREN

Third Respondent

J U D G M E N T

MOSIKATSANA AJ

Introduction:

[1] In the main, this is an application for a final interdict directing the first, second and third respondents to:

- 1.1 Remove at their own cost and within thirty days of the order sought being granted, a wetlands pool filtration system and accessories from the roof common to sections one and two of the sectional title scheme Quartet;
- 1.2 restore as part of the common property for the benefit of all members of the first respondent, the parking arrear appropriated by the second and third respondents for their exclusive use under the double carport;
- 1.3 bear the costs of this application on the attorney and client scale.

[2] The first, second and third respondent strenuously resist the applicant's claim. They filed a counter-application in which they seek an order directing the applicant to:

- 2.1 repair or remove a 'defective' skylight at the applicant's unit which allegedly causes water inflow into the lounge of the second and third respondents' unit;
- 2.2 demolish and remove an enclosure of the upstairs flower box at the applicant's unit which was allegedly constructed without proper authorisation;
- 2.3 restore a dividing brick wall between units one and two, to a height of six feet; and

- 2.4 remove the flower bed and restore the pavers in the driveway leading to the parking bays on the common property situate outside the first and second units.

[3] The applicant is the owner of unit two in a sectional title complex with only four units. The first respondent is the body corporate of the sectional title complex. The second and third respondents (respondents) are married in community of property. They are owners of unit one which is adjacent to the applicant's unit.

[4] The first respondent does not oppose the main application. It will abide by any decision of the court.

[5] Both the applicant and the second and third respondents arguably effected improvements on their respective units in the sectional title complex without seeking or obtaining proper authorisation from the body corporate and arguably in contravention of the laws regulating the effectuation of such improvements which are the subject of this dispute.

Applicant's Contention

[6] In support of its three pronged claim the applicant asserts:

[6.1] with respect to its claim for the removal of the second and third respondents' wetland pool filtration system that:

6.1.1 The overflow from the wetland pool causes a water leak in its upstairs bedroom, which permeates to the bar area below, causing damage;

6.1.2 the roof cannot be fully waterproofed while the wetland pool filtration system is situated on the roof;

6.1.3 the outside surface of the flat, concrete roof slab is common property that is subject to the control of the body corporate and that the wetland pool filtration unit was installed without the permission of the body corporate.

[6.1.4] The applicant also states in paragraph 26 of its replying affidavit that '[t]he issue is not whether the wetland pool filtration unit is the cause of the water leak manifesting in my unit but whether its very presence prevents effective repair of the clearly *apparent leak*.' (Emphasis mine). Similar averments are made in paragraphs 37.4 and 40.1.

[6.1.5] The applicant further states that the waterproofing that has been done by the second and third respondents after installing the wetland pool filtration unit has not cured the effects of the leakage and the accompanying damage and damp smell in the applicant's unit.

[6.2] The applicant has abandoned its second claim regarding the restoration of the parking area in view of the fact that there is proof that there was a meeting of the body corporate on 30 January 2008 at which the first respondent allocated the parking bays to the second and third respondents.

Respondents' Contention:

[7] The second and third respondents deny the applicant's claim that the wetland pool filtration unit is the cause of the leak in the applicant's apartment.

[8] The respondents in their counter-application make the following assertions with respect to the four claims outlined in paragraph 2 of this judgment:

[8.1.] With respect to the respondents' counter claim for the removal of the skylight. respondents assert that:

[8.1.1] their consent or approval for the erection of the skylight was never sought and obtained and that the construction of the skylight is accordingly in contravention of section 44(1) of the *Sectional Titles Act* 95 of 1986 read with Article 68(1)(ii) of Annexure 8 of the Regulations under the Act;

[8.1.2] water which flows down the exterior walls of the applicant's unit and water falling on the skylight is trapped between the unit's wall and the skylight and it seeps through the brickwork into the second and third respondents' downstairs lounge which is proximate to the skylight;

[8.1.3] the applicant's suggestion that an expert be appointed to investigate the cause of the damp in the respondents' unit would be fruitless as no facts have been advanced to contradict the respondents' assertions.

[8.2] Respecting the claim for the demolition and removal of the 'illegally' constructed enclosure of the applicant's upstairs flower box, the respondents argue that :

[8.2.1] the construction is in violation of the bylaws as no permission was sought and obtained and no plans were presented for the concrete slab roof nor was any inspection done;

[8.2.2] as owner of their unit, they have an interest in the by-laws being complied with and in the structural integrity of the structure.

[8.3] Regarding the second and third respondents' third claim for the restoration of the dividing wall separating their units the respondents assert that:

[8.3.1] the applicant did not obtain the body corporate or the municipality's permission to raise the wall and in doing so it violated the relevant s 44 of the Act and the Regulations;

[8.3.2] the wall was raised without casting new foundation and there is no certainty that the present foundations are adequate for the additional weight on the wall;

[8.3.3] no steel reinforcement was used to secure the wall and for these reasons, it is not certain that the wall will not collapse, thereby posing a real danger to those nearby.

[8.3.4] in addition to the danger that the wall poses, the higher wall blocks out the morning sun which comes from the East (i.e. the applicant's side).

[8.4] As concerns the fourth claim for the removal of the flower bed and restoration of the pavers in the driveway leading to parking bays on the common property situate outside units one and two it is asserted that:

[8.4.1] the applicant effected the changes without the consent of the body corporate;

[8.4.2] they are not in keeping with the overall aesthetics of the complex and the respondents' right to harmonious and congruous aesthetics to the

complex have accordingly been infringed and that they are entitled to the relief sought.

Issue for Determination

[9] The following issue which arises from the foregoing facts is to be determined by the court and that is whether a case has been made for the granting of permanent mandatory relief against the respondents in the main action and against the applicant in the counter application.

Determination of the Issues

[10] It is manifest that a permanent interdict is a drastic remedy which is not granted lightly. A person must initially exhaust other remedies at their disposal before seeking an interdict. The court has discretion whether or not to grant an interdict. The discretion must be exercised judiciously. When exercising its discretion the court is required to balance the relative convenience and prejudice caused to either party. The court's discretion to grant a permanent interdict is limited in that the court does not have a discretion to grant an interdict unless all the requirements for the granting of an interdict are satisfied.

[11] Before a permanent interdict can be granted, the party seeking the interdict must demonstrate that they have a clear right that is protectable by interdict; that an injury or infringement of the clear right has actually been committed or that it is reasonably apprehended; and that there is no alternative remedy. The applicant has to discharge its burden of proof on a preponderance of probabilities and if there is a dispute of fact, the test laid out in *Plascon-Evans* 1984 (3) SA 623 (A) rule applies.

Application of the requirements for granting an interdict to applicant's claim:

[12] Applying the above criteria for the granting of a permanent interdict to the applicant's claim as outlined in paragraphs 1 and 5 of this judgment, it is indisputable that the applicant has a clear right to the maintenance of the integrity of its unit. However, the applicant has not discharged at the appropriate scale its burden of proof that the injury or violation of its clear right arising from the water seeping through the walls into its unit, is caused by water leaking from the wetlands filtration unit. If anything, the applicant is ambivalent about the cause of the seepage into its unit.

[13] For instance the applicant states in paragraph 26 of its replying affidavit that '[t]he issue is not whether the wetland pool filtration unit is the cause of the water leak manifesting in my unit but whether its very presence prevents effective repair of the clearly apparent leak.' In my view that is the issue. I cannot readily grant an interdict against the respondents unless it has been demonstrated on balance that they caused the injury or violation of the clear right.

[14] Further, the applicant has not demonstrated that it has exhausted other remedies such as seeking enforcement of the internal rules by the body corporate or pursuing an action for damages.

Application of the requirements for granting interdict to respondents counterclaim

[15] Respondents have satisfied the court that they have a clear right to preserve the integrity of their unit. However, the respondents have not demonstrated on balance that the alleged violations of their clear right ought to be protected or enforced through a permanent interdict. The alleged injury or violations of the clear right in my

view ought to have been enforced by having recourse to the body corporate for the enforcement of its bylaws, or by reporting the alleged infractions of the municipal bylaws to the municipality bylaw enforcement unit or even the municipality building inspectorate.

[16] With respect to the respondents third claim for the restoration of the brick wall to its previous height, I find the suggestion that the wall at its current height blocks the respondents' enjoyment of the morning sun quite perplexing as the sun radiates from a much higher level.

[17] I also find the suggestion contained in the respondents fourth claim that this court must enforce through interdict the respondents' '...right to harmonious and congruous aesthetics to the complex...' I know of no such right either under the common law, statute or the Constitution. I therefore cannot enforce it by granting an interdict.

The Order:

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

[18.1] The applicant's main claim as set out in paragraph 1 of this judgment is dismissed

[18.2] The second and third respondents' counter claim is dismissed.

[18.3] Each party is ordered to pay its own costs


TL MOSIKATSANA AJ

APPEARANCES:

Applicant's Attorney

Fluxmans Attorneys

Applicant's Counsel

C Sadler

Second and Third Respondents' Attorneys

Mendelow-Jacobs

Second and Third Respondents' Counsel

A Williamson

DATE OF HEARING

26 February 2014

DATE OF JUDGMENT

02 March 2016