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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 2022/4174

Date of hearing: 15 November 2022

Date delivered: 17 November 2022

**REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED**

In the matter between:

VICTOR NTSAKO NKOMONDO

Applicant

and

ELIA MUTWANAMBA

First Respondent

**CITY OF JOHANNESBURG
MUNICIPALITY**

Second Respondent

JUDGMENT

SWANEPOEL AJ:

[1] Applicant and respondent are neighbours, residing respectively at Erfs [...] and [...] Protea North Ext. [...]. Respondent has been residing at the aforementioned address since 1998. Applicant became owner of his property on 7 December 2020.

[2] Approximately a year after moving into his home applicant decided to extend his dwelling by erecting more rooms on the property. During the planning of the extension applicant became aware of the fact that respondent's home encroached some 20 m into his property, occupying approximately 60 m² of applicant's land. Respondent has erected a building comprised of two rooms and a bathroom on the contested land, and he has extended his primary residence so that a part of it encroaches onto applicant's property. The structures are enclosed by a wall erected on applicant's property.

[3] Applicant made demand that respondent should demolish the structures, which respondent has refused to do. Applicant therefore seeks an order that respondent should demolish the structures within 7 days. Second respondent has not participated in this application.

[4] Respondent explains that during 2011 he decided to extend his home, and to erect outside rooms. He consulted the adjoining property owners who all consented to the proposed building, including the then owner of Erf [...], Mr Godfrey Sibiya. Respondent says that Mr Sibiya 'gave' him the land and agreed to the proposed building works. Mr Sibiya supports respondent's version in a confirmatory affidavit. Respondent also says that he enlisted the assistance of a draughtsman to draft plans, and he was assured that there was nothing preventing him from building on the adjacent plot. Quite surprisingly, second respondent approved the building plans.

[5] Respondent argued that he was entitled to occupy the disputed land by virtue of the land having been given to him by Mr Sibiya. However, this is not correct. The donation of the land by Mr Sibiya was not recorded in writing, and is therefore in conflict with section 2 (1) of the Alienation of Land Act, 1981. The donation was therefore invalid and of no force and effect. Applicant is still owner of the land, and, in principle, entitled to being given possession thereof.

[6] In *Brian Lackey Trust v Annandale*¹ the Court was confronted with a very similar set of facts, save that in *Annandale* the encroachment was accidental. It resulted in a multi-million rand home being partially built on the wrong erf. The Court

¹ [2003] 4 ALL SA 528 (C)

pointed out that section 25 (1) of the Constitution² provides that no one may be deprived of property except in terms of law of general application, and no law may permit the arbitrary deprivation of property. Basson J came to the conclusion that a court may, in terms of the common law, refuse to allow the demolition of the encroachment and that it has the discretion to award damages instead. The discretion is not unfettered, but should be exercised judicially. Basson J referred to *Benson v SA Mutual Assurance Society*³ where the discretion to order specific performance was considered, and the Court said:

“this does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, not upon a wrong principle. It is aimed at preventing an injustice- for cases do arise where justice demands that a plaintiff be denied his right to specific performance- and the basic principle is thus that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant..”

[7] I must therefore exercise my discretion in such a way that I recognize applicant’s inherent right to possession of his property, but I balance that with the need to not make an order that is unduly harsh. I turn now to the facts of this particular case. This is not the usual type of encroachment case where the encroacher erects a structure on another person’s land without his consent, or without his knowledge. Respondent had the previous owner’s consent to build on his land, and he regarded his actions to be lawful. Respondent has occupied the encroached land for more than a decade, and he has erected a substantial building thereon, as can be seen from the aerial photographs.

[8] Applicant was not even aware, when he purchased the property, that some of his land was being occupied by the respondent. He was quite happy to purchase the land as he found it. It was only during the preparations to expand the house that he

² Act 108 of 1996

³ 1986 (1) SA 776 (A) at 783 C - F

was told that part of the adjoining land was his. Applicant's insistence on respondent demolishing the encroaching structures strikes me as being somewhat opportunistic.

[9] Although I have not been told what respondent's loss would be should he demolish the structure, I have no doubt that it would be substantial, considering the size of the building depicted on the aerial photograph. His primary home would also be impacted. On the other hand, the prejudice that applicant would suffer would most likely be much less severe, and he can be compensated for his damages.

[10] In these circumstances I believe that it would be just to refuse to order demolition of the structures, but applicant must be compensated for his loss of part of his property. Respondent has tendered compensation in the event that it is held that the encroachment is unlawful. In my view that is the proper order in the circumstances. I propose to make an order along the lines as that made by Basson J in *Annadale*.

[11] I have asked the parties to address me on costs, and respondent's proposal was that each party should pay its own costs. Although applicant has not succeeded in his primary claim, he has had to approach court in order to find a resolution in the matter. In my view he is entitled to his costs.

[12] It is consequently ordered:

[12.1] It is declared that applicant is not entitled to the demolition of the encroachment on Erf [....] Protea North Ext [....], subject to payment by the respondent to the applicant of such damages as the parties may agree or the court may determine to be payable.

[12.2] The parties may supplement these papers in order to address the issue of damages, and may approach court on these supplemented papers if agreement cannot be reached between them.

[12.2] Respondent shall pay the costs of the application.

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

COUNSEL FOR APPLICANT: Mr. E Netshipise

ATTORNEY FOR APPLICANT: Mudau and Netshipise Attorneys

**COUNSEL FOR
FIRST RESPONDENT: Adv R Mufamadi**

**ATTORNEYS FOR
FIRST RESPONDENT: Madikane and Monandi Attorneys**

DATE HEARD: 14 November 2022

DATE OF JUDGMENT: 17 November 2022