



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

CASE NO: 2024-023727

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

22 March 2024
DATE

SIGNATURE

In the matter between:

TTJ PROPERTIES CC

Applicant

and

ELMOFLEX (PTY) LTD

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] This application came before me in the urgent court on Thursday, 7 March 2024. I undertook to give judgment on Tuesday 12 March 2024, which judgment had to be

postponed due to my falling ill on 9 March 2024. As a result, this is the first available opportunity to deliver this judgment.

[2] The applicant, TTJ Properties CC, sought relief against the respondent, Elmoflex (Pty) Ltd, for relief essentially in the following terms:

2.1 That the respondent restore to the applicant, *ante omnia*, the applicant's joint possession of the common boundary wall between the parties' respective immovable properties by restoring the wall to its location prior to 27 February 2024;

2.2 That pending the finalisation of the legal proceedings foreshadowed in the founding papers in which the applicant will seek an order declaring that it has acquired ownership of a portion of the respondent's property measuring 1 166m² through acquisitive prescription, together with ancillary relief, the respondent be interdicted and restrained from:

2.2.1 Demolishing, removing or relocating the common boundary wall between the parties' adjoining properties situated along Boeing Road East, Bedfordview, Gauteng;

2.2.2 Interfering with the applicant's use and possession of the disputed area of land measuring 1 166m² situated on the applicant's side of the common boundary wall and which the applicant contends had become part of its property through acquisitive prescription ("the disputed area of land"), as well as the applicant's use and possession of any improvements on the disputed area of land;

- 2.2.3 Instituting or permitting any of its contractors or labourers to enter upon any part of the applicant's property including the disputed area of land and various relief ancillary thereto.

[3] Subsequent to the issue of the application, the applicant delivered an interlocutory application for various amendments to the notice of motion, including:

- 3.1 The renumbering of various paragraphs of the existing notice of motion;
- 3.2 The addition of a new paragraph 3 that the respondent be ordered to restore to the applicant the free and undisturbed possession of the piece of land depicted (on the diagram attached thereto marked "NOM1"), by the letters and figures FZE321F measuring 1 166m² ("the disputed area of land") together with a storeroom in the aforesaid area sketched in free hand into the aforesaid diagram for identification purposes;
- 3.3 The addition of new paragraphs 4.4 and 4.5:
- "4.4. That the respondent be interdicted and restrained from continuing any further demolition or relocation of those parts at the boundary wall that had not yet been demolished since 27 February 2024, especially at the point where the common boundary wall meets internal wall 1 on the applicant's property as depicted in annexure "NOM1" hereto;
- 4.5 Demolishing or interfering with any portion of the scaffolding or support structures of the Samsung billboard, especially in the area around point E in the diagram contained in annexure "NOM1" hereto;"
- 3.4 By amending the figure "3" in the existing prayer 4 (now prayer 5.1) to the figure "4" and by adding the following new prayer 5.2

“5.2 That the applicant be directed to prosecute the proceedings contemplated in prayer 5.1 to finality within a period of one year from the date of institution thereof or within such longer period as the Court may on good cause permit failing which the interim interdict in terms of prayer 4 will lapse.”

[4] The applicant in effect, claimed a *mandement van spolie* together with an interim interdict restraining the respondent from spoliating the applicant in its possession of the common boundary wall between the immovable properties of the applicant and the respondent respectively, together with the applicant's possession and use of the disputed area of land. The applicant alleged that the disputed area of land had been in the applicant's peaceful and undisturbed possession since during or about 2 April 1992, a period in excess of approximately 30 years.

[5] The respondent opposed the application.

[6] The *causa* for the issue of the application and its urgency was that the respondent commenced demolishing the common boundary wall on or about 27 February 2024 in order to relocate allegedly, the common boundary wall (“the wall”) so that the respondent's immovable property incorporated the disputed area of land measuring 1 166m² into the respondent's property.

[7] The urgent relief was sought pending finalisation of proceedings to be issued by the applicant declaring that the applicant had acquired ownership of the disputed piece of land through acquisitive prescription and related relief. The applicant delivered the interlocutory application for an amendment of the notice of motion in that the applicant launched the application whilst the respondent was in the process of demolishing the wall. Immediately prior to the application being heard before me, the respondent, who allegedly continued with the work in the interim, relocated the wall such that the applicant lost possession of the disputed area of land. Thus, the applicant's need to

amend the notice of motion to provide for the restoration of the disputed area of land to the applicant's possession, as sought by the applicant.

[8] The respondent, in the course of its answering papers, did not undertake to not take further steps in respect of the wall and the disputed area of land. As a result, the applicant sought the interdictory relief referred to in the notice of motion in the interlocutory application, seeking the amendment to the existing notice of motion in the application uploaded on CaseLines at 08-2.

[9] The respondent alleged that the applicant did not justify the short notice given to it to deliver answering papers, that the application was not urgent and that the respondent was the registered owner of the disputed area of land. As a result, the respondent contended that given that it was the registered owner of the disputed area of land and that the wall in fact stood on its registered property, the respondent was well within its rights to demolish and move the wall from where it stood historically prior to 27 February 2024.

[10] As to the urgency of the application, the fact that the respondent continued to take steps in respect of the common boundary wall such that the disputed area of land had been moved, effectively to within the respondent's immovable property as and when the application came before me, justified the applicant approaching this Court urgently.

[11] Accordingly, the respondent alleged, in respect of the substantive merits of the application, that its actions were lawful and that there had not been any unlawful interference by the respondent with any rights of the applicant. Accordingly, the respondent sought that the application be dismissed with costs.

[12] In order for the applicant to find success in the application, it had to show peaceful and undisturbed possession of the disputed area of land and its share of the wall between the applicant and the respondent's respective immovable properties. Furthermore, the applicant had to demonstrate that the respondent unlawfully deprived the applicant of that possession. See in this regard *Nino Bonino v De Lange*¹.

[13] The merits or otherwise of the applicant's possession and the respondent's right to dispossess the applicant, if any, are not justiciable in spoliation proceedings. No person may take the law into his or her own hands and dispossess another without the authorisation of a court order. A court tasked with determining a spoliation will not enquire into the merits of the dispute but will grant an order restoring possession to the party in peaceful possession prior to the dispossession once the requirements are proven and without enquiring into the merits of the dispute.

[14] The respondent did not dispute that it took steps to move the wall from its established historical position prior to 27 February 2024. The applicant alleged that subsequent to the respondent being notified of these proceedings, the respondent hastened its relocation of the wall so that as and when the application came before me, the applicant had lost possession of the disputed area of land as a result of the respondent's repositioning of the wall. It was for that reason that the applicant found itself obliged to seek the amendment to the notice of motion as the notice of motion as it originally existed did not fit the existing factual matrix of the application at the time that the application was argued before me. In the circumstances, it is appropriate for me to grant the application for the amendment to the notice of motion in the event that I find in favour of the applicant.

¹ *Nino Bonino v De Lange* 1906 TS 120 at 122.

[15] The respondent's opposed the application on the basis that its conduct in moving the wall was lawful as the wall in fact stood on the respondent's property. Accordingly, the respondent's alleged interference with the applicant's alleged possession of its share of the wall and the disputed area of land was not unlawful.

[16] The respondent contended in its heads of argument that the disputed area of land was situated on the property of the respondent. Accepting for the purposes of this judgment that this is in fact correct, the *mandement van spolie*, serves to protect the factual position as it existed immediately prior to the respondent's dispossession of the applicant's possession of the common boundary wall and the disputed area of land.

[17] The applicant demonstrated with reference to a series of photographs and historical correspondence that the disputed area of land and the wall were accepted by the parties historically as being in the possession of the applicant. Furthermore, the applicant over the years, had utilised and had access to the disputed area of land and the wall.

[18] The applicant demonstrated the position prior to 27 February 2024 as well as post 27 February 2024, with reference to the series of photographs uploaded on CaseLines. The photographs, CaseLines 10-22, by way of example, reflected where the wall stood at the date of hearing before me and reflected the open trench where the wall had stood historically prior to the respondent moving the wall.

[19] A structure referred to by the applicant as "storeroom 2" stood, immediately prior to the date of the hearing before me, on the respondent's property pursuant to the relocation of the wall from its historical position prior to 27 February 2024. Prior to the relocation of the wall, storeroom 2 stood on what was considered and accepted to be the applicant's property.

[20] The photograph uploaded at CaseLines 10-4 reflected the support structures of a billboard. The wall running left to right across the photograph was referred to by the applicant as "internal wall 2" running across the width of the applicant's property prior to 27 February 2024. The wall running down the right of the photograph at CaseLines 10-4 had been repositioned pursuant to the respondent's relocation of the wall.

[21] The photograph uploaded at CaseLines 10-5 reflected the position at the time that the application was heard before me. The newly repositioned wall stopped against the base of the Samsung billboard. The southern boundary wall was visible in the background of that photograph. The photograph uploaded at CaseLines 10-11 was taken the day prior to the hearing. It reflected the repositioned wall subsequent to 27 February 2024. The respondent's conduct in moving the wall had caused various openings in the wall, potentially prejudicing the applicant's security as a result of the various gaps or openings in the wall. The remains or traces of the wall from its historic position prior to 27 February 2024, were visible in various of the photographs.

[22] It was easily apparent from the photographs that the applicant was in possession of the wall as well as the disputed area of land prior to the respondent moving the wall and thereby dispossessing the applicant of the wall as well as the disputed area of land.

[23] The respondent had no right to demolish and relocate the wall from its historical position prior to 27 February 2024. The respondent had no right to dispossess the applicant of the disputed area of land in the process, notwithstanding the respondent's allegation that the wall and the disputed area of land were located on the respondent's property.

[24] The respondent did not have a court order authorising the respondent's conduct in relocating the wall and nor did the respondent act pursuant to an agreement with the

applicant to do so. Accordingly, the respondent's conduct in relocating the wall was unlawful and the applicant proved before me that it was in peaceful possession of its share of the wall as well as the disputed area of land prior to the respondent relocating the wall, unlawfully, with effect from 27 February 2024.

[25] In the circumstances described above, the applicant is entitled to the relief sought by it in terms of the amended notice of motion. The applicant is entitled to the interdictory relief as the respondent's undertaking extended only pending judgment of the application.

[26] The applicant and the respondent's counsel agreed between them during the course of the proceedings before me on the wording of any order to be granted by me in the event that I found in favour of the applicant as I do.

[27] In the circumstances, the following order is granted:

1. The respondent, Elmoflex (PTY) Ltd, is ordered to restore the applicant's joint possession of the common boundary wall between the parties' respective immovable properties as more fully depicted in annexure FA6 to the founding affidavit of the founding papers by restoring the wall to the location it was in prior to 27 February 2024.
2. The respondent is ordered to restore to the applicant free and undisturbed possession of the disputed area of land as depicted on the diagram marked "NOM1" by the letters and figures FZE321F measuring 1 166m² ("the disputed area of land"), together with the storeroom within the aforesaid area sketched in free hand into the aforesaid diagram for identification purposes.

3. Pending finalisation of the legal proceedings foreshadowed in the founding papers in which the applicant will seek an order declaring that it has acquired ownership of a portion of the respondent's property measuring 1 166m² through acquisitive prescription, together with ancillary relief, the respondent is interdicted and restrained from:
 - 3.1. Demolishing, removing or relocating the common boundary wall between the parties' adjoining properties situated along Boeing Road East, Bedfordview, Gauteng;
 - 3.2. Interfering with the applicant's use and possession of the disputed area of land measuring 1 166m² situated on the applicant's side of the common boundary wall and which the applicant contends has become part of its property through acquisitive prescription ("the disputed area of land"), as well as the applicant's use and possession of any improvements on the disputed area of land;
 - 3.3. Instructing or permitting any of its contractors or labourers to enter upon any part of the applicant's property including the disputed area of land;
 - 3.4. Continuing any further demolition or relocation of those parts of the boundary wall that have not yet been demolished since 27 February 2024, especially at the point where the common boundary wall meets internal wall 1 on the applicant's property as depicted in annexure NOM1;

- 3.5. Demolishing or interfering with any portion of the scaffolding or support structure of the Samsung billboard, especially in the area around point E in the diagram contained in annexure NOM1.
4. The applicant is directed to institute the proceedings contemplated in paragraph 3 above within a period of 30 days from the date of this judgment, being 22 March 2024, failing which the interim interdict in terms of prayer 3 will lapse.
5. The applicant is directed to pursue the proceedings contemplated in paragraph 3 above to the stage where the applicant can apply for a trial date within a period of 1 year from the date of the institution thereof, or within such longer period as a court on good cause may permit, failing which the interim interdict in terms of paragraph 3 will lapse.
6. The respondent is ordered to pay the costs of the application on the scale as between attorney and client.

I hand down the judgment.


CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 22 March 2024.

COUNSEL FOR THE APPLICANT: Mr M W Verster

INSTRUCTED BY: Antoon Botha Inc.

COUNSEL FOR THE RESPONDENT: Mr K Lowies.

INSTRUCTED BY: Vardakos Attorneys.

DATE OF THE HEARING: 7 March 2024.

DATE OF JUDGMENT: 22 March 2024.