



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: **15th March 2019** Signature: _____

CASE NO: 2016/3335

DATE: 15TH MARCH 2019

In the matter between:

DOBSON, AUBREY

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

ADAMS J:

[1]. This is an opposed application by the applicant for a mandatory interdict against the respondent which would have the effect of compelling the

respondent to remove a sewerage pipe which runs across the property of the applicant and to relocate same so as to accord with the conditions contained in the Title Deed relating to the applicant's property. In the alternative, the applicant applies for a declaratory order that the existence of the sewerage pipe across his property constitutes an unlawful infringement by the respondent of the applicant's property rights relative to the said property. The applicant also asks for ancillary relief aimed at a claim for damages which result, according to the applicant, from the respondent's alleged unlawful infringement.

[2]. The application is opposed by the respondent on the basis that, if regard is had to the applicable legislative framework, the applicant's property is lawfully subject to a servitude for purposes of sewerage and other Municipal services.

[3]. The applicant is the registered owner of a property in Lynnwood Manor Extension 1. During April 2007 he commenced the process of subdividing his property, and this he did with the assistance of a firm of land surveyors. On 28 June 2007 the applicant obtained official approval for the subdivision from the respondent. This approval was granted to the applicant by the respondent in terms of the provisions of section 92 (2) of the Town Planning and Townships Ordinance, 15 of 1986. The approval of the subdivision was subject to a number of extensive conditions, which were set out in writing as an attachment to the letter of approval from the respondent. In his founding affidavit the applicant confirms that he intended complying with the conditions imposed by the respondent for the subdivision, as he intended building on the remaining extent of the property.

[4]. As part of the conditions applicable to the subdivision of the applicant's property, the respondent required applicant to register, at his costs, a servitude over the property to cover the sewer pipe crossing the applicant's property, which had been *in situ* for at least 30 years. It is the case of the applicant that

he only became aware of the existence of a sewerage pipeline across his property on 15 June 2015, at which point in time he had escalated the finalization of the subdivision of his property. He says that he was not aware of the existence of the sewerage pipeline as it is not recorded on the title deed relating to his property. He thereupon contacted the respondent who, according to the applicant, accepted that the failure to register a servitude to cover the sewerage pipeline was as a result of a fault on the part of its predecessors. The respondent again reiterated that his approval of the subdivision was subject to the registration of a servitude on the applicant's property to cover the area traversed by the pipeline.

[5]. There are no municipal records relating to the sewerage pipeline, which is also not reflected on the title deed of the applicant's property.

[6]. The applicant refused to comply with the condition that he registers, at his expense, a servitude to cover the sewerage pipeline, which would traverse a portion of his property, making that part of the property unusable and of very little monetary value. This, according to the applicant, also resulted in the cancellation of the sale of the property, which caused him damages.

[7]. It is the applicant's case that the existing sewerage pipeline is an infringement of his property rights. He therefore requires the court to order the respondent to remove the existing sewerage pipe, which dissects a portion of his property, and to relocate same to one of the boundaries of the Erf, as provided for in the title deed of the property.

[8]. The case of the respondent is that, at all relevant times, it acted within the framework of its legislative power and authority and at no stage did it act unlawfully. The respondent denies that it infringes on the applicant's property rights. In terms of the applicable Ordinance, the owner of land, who wishes to

subdivide his property, shall comply with any requirements imposed by a Municipality in relation to the approval of the subdivision. The applicant has failed to comply with the conditions imposed. This means, so the respondent submits, that it has not acted unlawfully. In fact, in imposing the condition applicable to the subdivision, it acted well within its power and authority, which means that the applicant was obliged to comply with the condition so imposed.

[9]. I find myself in agreement with the respondent's submissions. I am not satisfied that the applicant has made out a proper case for the relief sought in this application.

[10]. His application therefore stands to be dismissed.

Costs

(5) The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

(6) I can think of no reason why I should deviate from this general rule.

(7) I therefore intend awarding cost against the first respondent in favour of the applicant.

Order

Accordingly, I make the following order:-

1. The applicant's application against the respondent be and is hereby dismissed.
2. The respondent shall pay the applicant's cost of this opposed application.



L R ADAMS
*Judge of the High Court
Gauteng Division, Pretoria*

HEARD ON:

12th March 2019

JUDGMENT DATE:

15th March 2019

FOR THE APPLICANT:

Adv A Van der Westhuizen

INSTRUCTED BY:

Jacques Classen Attorneys

FOR THE RESPONDENT:

Adv W W Geyser

INSTRUCTED BY:

Dyson Incorporated