

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NO: 6886/07**

**In the matter between:**

**KENROCK HOMEOWNERS ASSOCIATION      Applicant**

**and**

**ALAN DAVID RAPHAEL MEWETT      Respondent**

---

**JUDGMENT : 10 FEBRUARY 2010**

---

**TRAVERSO, AJP**

[1] This matter has a long and protracted history, and is reminiscent of the Shakespearean comedy “*Much Ado about Nothing*”.

[2] The applicant is the Homeowners Association of the Kenrock Country Estate, which is allegedly an upmarket estate in Hout Bay. It is common cause that all homeowners automatically become members of the association.

[3] The respondent is a businessman and a property owner on the estate.

---

**[4]** As is the case with all similar homeowners associations, the applicant has a constitution which binds its members.

There is also an Architectural Design Manual and a Landscape Design Manual which forms part of the constitution.

**[5]** The facts are briefly the following.

**[6]** The respondent purchased Erf 8834, Hout Bay in April 2002. During 2006 (the exact date being unclear) the respondent erected a 195 metre long diamond mesh wire fence supported on poles with flat tops along the southern street boundary, the western side/common boundary and the northern communal open space boundary.

---

[7] The applicant contends that this was done in contravention of the Architectural and Landscape Design Manuals.

[8] This lead to a flurry of correspondence between the parties. The applicant demanded that the fence be removed as it is "*in clear contravention*" of the Kenrock Architectural and Landscape Design Manuals. The respondent made certain settlement proposals by suggesting *inter alia* that he would plant creepers to cover the wire mesh fence but this was rejected out of hand by the applicant. I will return to this aspect later. First I will refer to certain provisions in the constitution of the applicant as well as the Architectural and Landscape Design Manuals.

---

[9] The constitution refers to the Architectural and Landscape Design Manuals as the “*design manual*”. The purpose of these manuals is to control aspects of the design and position of buildings and other structures.

[10] The constitution provides for disputes in connection with the constitution to be resolved by means of arbitration, except where an interdict is applied for. The right of either party to institute legal proceedings is specifically reserved in terms of the constitution.

[11] The Architectural Design Manual provides, under the heading “*Boundary Walls and Fences*”, *inter alia*, as follows:

---

**“13.1 General**

**13.1.1      *The intention is to minimize boundary walls, and thereby create a more open rural setting as opposed to a traditional urban one.***

**...**

**13.2.2      *A 1,2m high simple black metal fence may be used to enclose the street boundary.***

**...**

**13.3.2      *A simple black metal fence may be used to a maximum height of 1,2m on the side / common boundaries.***

(It is of note that these provisions are not couched in peremptory terms.)

**...**

**13.6          *Fences not permitted include***

**13.6.1      *Vibracrete type fencing***

**13.6.2      *Timber fences***

**13.6.3      *Face brickwork.”***

**[12]**    Clauses 13.2.2 and 13.3.2 were amended on 24 April

2003 to read as follows:

---

- “1. In terms of clause 13.2.2 and 13.3.2 of the Architectural Design Manual, Bekeart Mesh – 50mm X 50mm X 50mm supported on 125mm diameter machined and treated poles with round tops, to a maximum height of 1,8m on the side and common boundaries” is approved as an alternative to the simple black metal fence of palisade type.***
- 2. In the opinion of the trustees the above-mentioned fencing material does not detract from the aesthetics of the Estate.”***

**[13]** Bekeart Mesh is depicted hereunder:



17  
81  
73

[14] The wire mesh fence erected by the respondent is also depicted hereunder:



[15] The Landscape Design Manual provides, *inter alia*, as follows:

**“2.1.1      The extent and height of boundary walling is specified in the architectural design manual. In general it is intended to minimize boundary walling and fencing, but where required the use**

---

***of visually permeable simple metal fences in black will be allowed.***

***...***

**2.1.4** ***Under no circumstances will ‘vibracrete’ walls or walls in an unsuitable style or colour be allowed.***

**2.1.5** ***The use of climbing plants on walls, buildings, trellises and fences and indigenous shrub screens or informal hedges is to be encouraged. Fences covered with creepers are encouraged.”***

**[16]** Against this background the respondent wrote to the applicant on 20 September 2006 stating:

***“I suggested to Mr. Clarke that I would eradicate the problem by covering the fence with a creeper. Please confirm which creeper is allowed so I can start covering the fence as per the architectural design manual.***

***I hope that this issue is now closed.”***

---

[17] The applicant's attitude to this appears from the following e-mail from a certain Romain Midgley to Mr. Vaughan Clark, the deponent to the founding affidavit:

***"Per Alan Mewett's e-mail below, please confirm if I may advise him that the creeper proposal is not an option, and that the Association will commence with penalty levies until such time as his fence is made compliant.***

***The landscape manual encourages the use of creepers on walls, buildings, fences and trellises but the intent is obviously not to mask a deviation.***

***I await your instruction before communicating with Mr. Mewett."***

The applicant persisted in its demand that the fence be taken down, and sadly the matter was not closed. The dispute continued. On 3 October 2006, in response to a

---

further demand that the fence be taken down the respondent writes:

***“How you interpret my suggestion as a way to resolving a problem of the interpretation of the design manual and to which the trustees are responsible, as a tactic of deviation. I find this rather peculiar.***

***The following facts need to be considered or at the very least thoughtfulness needs to be encouraged before such drastic measures are taken as per your request.***

- ***I am prepared to take the fence down as per your military style order***
  - ***I require a time extension in order to do this for many reasons***
  - ***I cannot afford a new fence at this moment in time as the fence that you are asking to be pulled down cost me R20 000 to erect.***
  - ***The only constructible fence permitted/allowed is unobtainable to me, reason been (sic), is that I am been (sic) held responsible for a bill that Aiden Rabitte is getting billed for, even though there was no agreement between the fence supplier and myself. I have never met or spoken to anybody from the fence company. Re the construction thereof. Due to these***
-

*circumstances there is a dispute and he will not supply me with the material.*

- *Dogs will run amok*
- *The fines that will be a consequence of there been (sic) no fence with dogs roaming and will be unpleasant for the rest of the homeowners.*
- *Security reasons.*

*Once again please supply me with real reasons for the current fence not been (sic) good enough as to serve as a support structure for the imminent creeper. I have decided to go ahead with this action of a creeper in any event so it seems silly to take down a support structure only to replace it with another one. I will be leaving the poles as support structures anyway which surely will not be a problem as they will be covered completely and not visible at all ...”*

And so the negotiations proceeded until the launch of these proceedings. In this regard the deponent to the applicant's founding affidavit states:

**“7.12      On 23 May 2007 Respondent advised the estate manager, Jos Joubert, telephonically that he would take down his**

***fence this week on condition that Applicant waive the penalty levies imposed on him.***

- 8. I am of the opinion, given that this matter was first raised with the Respondent since the erection of the fence in June/July 2006 who has willfully disregarded all requests to remove the fence, that Respondent's offer is not genuine. The offer by the Respondent is conditional and not acceptable to the Applicant. At present, penalty levies owed amount to R7880.00."***

**[18]** In addition the respondent requested that the dispute be determined by means of arbitration as provided for in the constitution, but that request too was rejected.

**[19]** A proper interpretation of the constitution of the applicant makes it clear that the provisions regarding the fences are not absolute or peremptory. The only absolute

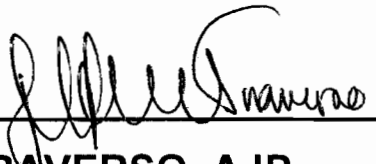
---

prohibitions are those contained in paragraph 13.6 of the Architectural Manual and 2.1.4 of the Landscape Design Manual to which I have referred to above. In any event the constitution was amended to provide for the use of wire mesh fence albeit Bekeart mesh. To the untrained eye the difference will hardly be noticeable. If creepers are planted (as should be encouraged in terms of the constitution) it will be impossible to tell if it is plain wire mesh or Bekeart mesh.

**[20]** Part of the relief claimed related to the fence protruding onto the common property. That part of the fence has been removed and there is accordingly no need for me to deal with it.

---

[21] In all the circumstances I am not satisfied that the applicant has made out a case for the required relief and accordingly the application is dismissed with costs.

---

**TRAVERSO, AJP**  
**10 February 2010**