IN THE NORTH GAUTENG HIGH COURT, PRETORIA (REPUBLIC OF SOUTH AFRICA)
CASE NO: 55641/12

In the matter between:

FERDINAND LEONARDUS KERFKHOF **1ST APPELLANT**

TINEKE JO-ANNE KERKHOF **2ND APPELLANT**

and

NICOLAAS BARNARD PIETERSE **RESPONDENT**

JUDGMENT

MOGOTSI AJ

INTRODUCTION

[Ij The applicants seek an order compelling the respondent to remove a carport which allegedly encroaches upon the applicant's property. The applicant's and the respondent are neighbours. Applicant's maintains that the encroachment infringes his right of ownership.

BACKGROUND

[2] The first applicant is married to the second applicant in-community of property and he acts on her behalf. They are co-owners of Portion 1 of L…... R…… Township better known as 9…., 2…th Avenue, R……, Gauteng Province

[3] The respondent resides in the neighbouring property which is Partron 1 of Lot 6……, R….. T…., Gauteng which is also held under a sectional title scheme.

[4] The applicant's allege that the respondent has erected a carport which is encroaching in their property. The applicant maintains that they have never given permission for such encroachment by the respondent, further that the structure is capable of being taken down should the Court so order. The applicant's *inter alia* rely on their land surveyor's opinion in support of their claim.

[5] The respondent's contention is that applicants are vexatious in coming up with this application as the car port was attached to the applicant's outer wall long before 1994

i. e. before the applicants could move in there. The first applicant wlio is involved in construction business should have been aware of the encroachment in 1997 or alternatively should have been aware of building regulations. Should the court find that there is an encroachment it should be found that applicants knowingly allowed such encroachment to happen as he did not protest within a period of one year and one day after becoming aware of such encroachment. The respondents furthermore contends that should the court find that there is such encroachment, equally the

respondents should be ordered to remove their carport.

[6] The respondent also raised several factors as "points *in limine*“ and argue that various “factual and real disputes between the parties make this application incapable of being adjudicated on papers. He prays that the application be either dismissed with costs or be referred for oral evidence or trial.

[7] The first applicant's view is that there is firstly no valid defence raised and secondly the raised points *in limine* are in any event the merits of this application and they cannot be argued separately.

[8] Coming to the points *in limine*

8.1 The first and second points *in limine* are about *locus standi* and non-joinder.

[9] The respondent admitted that he had erected a carport during 1994 by affixing it to the outer wall of the applicants' garage. Two sectional title deeds w[r]ere registered under title deed number T77316/94 and T77317/94 in terms of Sectional Title Act 95 of 1986. Rietfontein Beleggings is the ow[r]ner of certain portions of common areas in respect of the two mentioned Title Deeds. The respondent is the only member of the Sectional Title Scheme Rietfontein Beleggings.

[10] Respondent argues that the encroachment complained of form part of the common area belonging to Rietfontein Beleggings and not the respondent in his personal capacity therefore applicant should have instituted action against Rietfontein Beleggings which is a separate legal entity alternatively Rietfontein Beleggings should have been joined as a party as it has substantial and direct interest in this matter.

[11] It is also according to the raspondend, clear from the papers filed that there is genuine dispute of fact:between the parties regarding the issue of ownership of this particular portion where the encroachment occurs alternatively applicants should have issued summons.

[12] The Third Point *in limine* relates to prescription.

[13] The respondent contents that the Farm Rietfontein was divided into different portions in 1993, 1994-1999. As a result of which a fence was erected separating applicant's property and property belonging to Rietfontein Beleggings. The original plan and garage was amended in 1955. The respondent had for many years used the portion in dispute as a parking space and had also paved the area when he erected the said car port.

[14] The respondent and his predecessors in title have therefore owned and exercised undisturbed possession of this portion for a period of more than 30 years in terms of Section 1(c) of the Prescription Act 68 of 1969. The applicants claim has therefore prescribed.

[15] The Fourth Point - Factual dispute.

[16] Ownership of the portion of the property where that carport is erected is in dispute. Applicants content that the area belongs to them while the respondent contents that the portion belongs to Rietfontein Beleggings who w'as not joined in. The respondent
further alleges that it is the applicants who are encroaching onto the property of Rietfontein Beleggings (see Annexure "NBP17")

[17] There, are also two conflicting versions of how each party's quantity surveyor depicted the encroachment.

[18] I reserved my ruling on the points *in limine* and directed the two Counsels to proceed and address the Court on the merits of the application fully.

[19] I now turn to the merits of this application.

[20] In the absence of a servitude an owner may only built on his or her own ground. As a land owner, one is entitled to enjoy use, consume, convert, either destroy or sell his or her property and what the land produces in any way which is within the limits of state and local authority regulations provided that such and owner of the ground does not interfere with the legal right(s) of others, including a neighbour who may equally have such rights.

[21] There has been accusations and counter accusations about ownership and or usage of the portion in dispute even before the matter could be brought to court. The parties also exchanged documents and allege verbal abuse in the process of grappling with the situation.

[22] 1 will deal with issues raised in point *in limine* as well as the merits of this application because the two are intertwined.

[23] The question of non-joinder does not necessary depend upon the nature of the subject matter of the suit, but rather upon the manner in which, and the extent to which, the courts order may affect the interest of the third party. The test being whether or not a party has a direct and substantial interest in the subject matter of the action, that is a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.

See: ***Morgan v Salisbury Municipality 1935 AD 167.***

Burger v Rand Water Board 2007(1) **AM** ***30 (SCA) at 33A-B,***

Sikutshwa v MEC for Social Development Eastern Cape 2009(3) **514** ***47 (TKHC) at 561-57 A.***

\. [24] The non-joinder of a party would ordinarily constitute an irregular proceeding and the issue may have to be raised by way of the procedure provided in Rule 30. However, this matter is different in that the respondent admits having erected the carport. I will come back to this issue.

Regarding Prescription

[25] The respondent does not categorically state that he possessed the disputed portion openly and as if

he is the owner thereof for an uninterrupted period of 30 years or for such a period which together with any periods for which such thing was so possessed by his predecessors in title constitutes an uninterrupted period of 30 years, Section 1 of the Prescription Act 68 of 1969 (as amended). There is no counter claim filed and or affidavits from previous owners about what the actual position has been all along.

Factual dispute

[26] In the light of what the respondent is *inter alia* saying that "*The space between the border and the garage wall is only approximately 700mm and cannot be utilised productively'. "The applicants have failed to indicate how they are being prejudiced by this so called encroachment and how they will benefit if an order is granted for the removal of the send carport structure*there appears to be no genuine dispute and I said I will come back to this issue. The reality is only that the respondent feels that he may use the disputed portion as it will not benefit the applicant. I find difficulty in accepting this line of argument and it does not show a factual dispute or pose a difficulty in deciding the issue on the papers. The applicant does not have to show how the disputed portion will benefit him.

[27] It is worth noting that the City of Tshwane Municipality issued a certificate in terms of Section 14(1) (a) of the National Building Regulations Standards Act 103 of 1977 as revised confirming that the applicants building comply with the relevant provisions.

[28] In addition to that, it is not true that the evidence of Mr CJ Raal is hearsay as Mr Raal has filed a confirmatory affidavit which is not vague and general.

See: *SA Football Association v Mangope (2013) 341LJ 311 (LAC)*

[29] Even if it can be argued that there is a dispute the issue will be whether such a dispute of fact is real or not.(Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T). The respondent does not deny that he is the one who erected the extension or carport attached to applicants building. The respondent could not satisfy the Court that prescription is applicable and

that he has proved the requirements laid down in the Prescription Act

[30] In ***Nightman t/a JW Construction v Head Four (Pty) ltd and Another 2008 (3) SA 371 (SCA) at par 13*** the Court said *"A real, genuine and bona fide dispute of fact exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed".*

The Court went on further to say bare denials are not acceptable where the facts disposed to lie purely in the knowledge of the litigant, reality should not be distorted.

See also *Naidoo and Another* v *Sunker and Another (SCA) (unreported Case No 126/11$_1$ 29 November 2011)*

[31] Only real, genuine or *bona fide* disputes of fact will be entertained by the Court before a decision is made to dismiss an application, refer it to trial or for oral evidence on a limited issue.

[32] A litigant w^{r}ho argues that disputes of fact W'ere reasonably foreseeable must set out clearly those disputed facts in his answering affidavit which must set out the basis on wiiich it is alleged that the disputes w^{r}ere reasonably foreseeable.

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

Order

1. **The four (4) points *in limine* raised by the respondent have no merit and they are dismissed.**

2. **The respondent is ordered to remove the encroachment erected upon the applicant's property within twenty one (21) days after the granting of this order and to make good the land on which the encroachment was erected.**

3. **In the event of respondent failing to comply with par. 2 hereof the applicant is hereby authorised and directed to remove the encroachment on the respondent's behalf and if needs be with the assistance of the relevant sheriff.**

4. **Respondent is ordered to pay applicant's costs on party and party scale.**

D.D. MOGOTSI

Acting Judge of the High Court, Pretoria: