# IN THE HIGH COURT OF SOUTH AFRICA

# LIMPOPO DIVISION, POLOKWANE

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO THE JUDGES: YES/NO |
| (3) | REVISED. |
| | ..... |
| | ..... |

Case no: HCAA21/2021

In the matter between:

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| DOUBLE FOUR PROPERTIES (PTY) LTD | APPELLANT |
| And | |
| POLOKWANE MUNICIPALITY | FIRST RESPONDENT |
| BROADLANDS HOME OWNERS ASSOCIATION NPC | SECOND RESPONDENT |

JUDGMENT

**MULLER J:**

[1] Leave to appeal to the Full Court was granted by the presiding Judge after the main application instituted by Double Four Properties (Pty) Ltd[1] was dismissed

[1] Hereinafter "Double Four".

with costs and a counter-application instituted by Broadlands Home Owners Association NPC[2] was granted with costs.

[2] In the main application Double Four sought an interim interdict against the Polokwane Municipality[3] pending the outcome of an action to be instituted[4] to provide a sewer connection to which the drainage installation of the Baobab Office Park[5] situated on the property known as portion 348 (a portion of portion 220) of the farm Tweefontein 915 situated on the corner of Range Street and Munnik Avenue in the township of Polokwane, can be connected.

[3] Double Four also sought an order that the municipality reconnect the sewer system of the office park with that of Broadlands pending the provision of such permanent connection to the sewer system of the municipality together with an interdict to restrain Broadlands from constructing, reconstructing, altering, adding to or making any permanent disconnection in or of any drainage installation which may or will have an effect on the proper functioning of Double Four's drainage installation without first having obtained the lawful permission of the municipality.

[4] The application was dismissed on the basis that Double Four had failed to establish a *prima facie* right to a sewage connection against both the municipality and Broadlands.

[5] The salient background facts are as follows. Double Four purchased the office park after it was put up at an auction. The stand where the office park is situated

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[2] Hereinafter called "Broadlands".
[3] Hereinafter "the municipality".
[4] The action has been instituted under case 6151/2021.
[5] Hereinafter "the office park".

is on the corner of Range Street which leads to and from Broadlands. The main entrance gate to Broadlands is in close proximity to the entrance of the office park. To enter the office park use must be made of the length of the entrance road from Munnik Avenue to the main entrance to Broadlands where the entrance to the premises of the office park is situated. The office park consists of a one storey building with office space and is presently occupied by a commercial bank[6] who had concluded a lease agreement with the previous owner Nkhwazi Trust.[7]

[6] The municipality issued a final occupation certificate in respect of the office park as well as a zoning certificate zoning it as "Business 4." The municipality prior to the sale charged the trust for sewage availability. Ownership of the office park was duly transferred to Double Four on 8 March 2018. In terms of the approved building plans the drainage installation of the office park should be connected to the municipal sewer system and not to the Broadlands sewer system.

[7] On 12 September 2018 the bank forwarded an email to Double Four in terms whereof the bank informed Double Four that Broadlands blocked the connecting drainage pipe which leads from the office park to Broadlands.

[8] It is for the first time that Double Four has learnt that the drainage system of the office park is connected to that of Broadlands. Double Four instructed its attorney Oosthuizen to investigate. He made telephonic contact with attorney Bosman who acted on behalf of Broadlands. Bosman confirmed the factual position to him and also informed him that there is an agreement concluded

[6] Hereinafter "the bank".
[7] Hereinafter "the trust".

between the trust and Broadlands in terms whereof the trust pays a levy of R12 000.00 per month for the connection of the drainage pipe to the sewer system of Broadlands and also for an encroachment on the property of Broadlands. Bosman informed him that he had notified the auctioneers of the situation prior to the auction.

[9] On 27 September 2018 Bosman informed Oosthuizen in a letter that there is no agreement between the trust and Broadlands and that Broadlands is unaware of any blockage of their sewer lines. He made it clear that Broadlands will not allow plumbers onto its property, other than plumbers employed by it. Double Four was informed that it has made unlawful use of the sewer system of Broadlands and the request to connect the drainage pipe leading from the office park was declined. In addition Double Four was informed that it unlawfully encroached on the property of Broadlands by making use of extended road access.

[10] The bank in turn complained that the smell at the office park has become unbearable and that the drainage system is leaking. It stated that the municipality was called to unblock the drainage installation with no success.

[11] On 5 December 2018 Double Four was informed by Bosman that Broadlands will remove and repair a broken pipe on its property but will not reconnect the pipe from the office park and intends to block it off to prevent leakage onto the property of Broadlands.

[12] Double Four, in the meantime has obtained the services of an expert Wicus Pretorius to investigate certain issues that included the drainage issue. Pretorius confirmed in a preliminary report that all erven within Broadlands are

serviced by an internal sewer reticulation installation of Broadlands that is connected to the municipal sewer system on the lower boundary of Broadlands. The sewer system was never transferred to the municipality. The sewer system should have been connected to a manhole close to Broadlands main entrance, but due to the invert level being too high this could not be achieved. The alternative was to connect the office park sewer system to a pipe on the boundary of Portion 286 where a sewer pipe was provided for that purpose. The engineers were apparently not aware that the office park was not on the property of Broadlands. He confirmed that he had discussions with Bosman who informed him that that all previous agreements between the trust and Broadlands are null and void due to non-performance by the trust. As-built plans (submitted if there were amendments to the original approved plans) have not yet been approved. Approvals from the chief building inspector, fire services, storm water road and water sanitation had not been obtained. The as-built plan indicated that the sewer connects to the municipal sewer. He indicated that the trust paid the municipality for a sewage connection. Broadlands acknowledged in a letter dated 18 May 2016 that the trust that:

> "We hereby acknowledge that we have received the full amount due by yourself and that access will now be granted to your property.
>
> As per the BHOA Board's approval you may commence with the construction of the road on the property as indicated in the attached document.
>
> Once the contract has been signed and all documentation is in order the connection to the sewerage will be permitted."

[13] A meeting was arranged with Bosman and held on 15 January 2019. During that meeting Broadlands made it clear that it will only reconnect the drainage

pipe if Double Four enters into an agreement with Broadlands to pay it R15 000.00 per month together with a 10% annual increase. Double Four did not accept the proposal.

[14] Double Four attended at the municipality on 23 January 2019. The manager: Water and Sanitation agreed that the municipality is responsible to provide a sewage connection to the office park. He suggested that the municipality will conduct an inspection of the property and if need be restore the connection to the Broadlands sewer system.

[15] On 24 January 2019 Bosman addressed a letter to Oosthuizen in terms whereof he confirmed that Broadlands tenders to reconnect the drainage installation and will allow the encroachment on the Broadlands property in return for a payment of R13 000.00 per month with an escalation of 10% per annum.

[16] Double Four as a result of the continuous stench and the failure of the municipality to intervene was forced to install a 5000 litre tank which is emptied every second day on the premises of the office park as a temporary measure. A 10 000 litre tank has been added outside the buildings of the office park.

[17] Another meeting was arranged with the municipality and other stakeholders including representatives from Broadlands. Bosman informed them at a meeting that the trust developed the office park and that the access road encroached on the property of Broadlands. Broadlands installed a drainage system that serves the individual properties in Broadlands and which connects with the sewer system of the municipality. An agreement had been entered into between the trust and Broadlands that the drainage system from the office park could be connected on a temporary basis to that of Broadlands. Bosman stated

that the pipe was blocked and those the plumbers who are employed by the bank broke the pipe when they tried to unblock it. The pipe was then sealed off by Broadlands. He reiterated that Broadlands is willing to conclude an agreement with Double Four to be registered against the title deeds of the properties to pay a monthly levy for the encroachment and the use of the drainage system of Broadlands. The municipality at the meeting agreed that it has a duty to provide the office park with a sewerage service. To date no progress has been made.

[18] I now turn to the case of the municipality. The municipality accepts that it has a constitutional duty to provide basic sewer services and that Double Four has up to the present day not been provided with a sewer connection to which the drainage installation of the office park can be connected. However, the assumption of Double Four that, according to the approved plans that the drainage system of the office park be directly connected to the sewer system of the municipality is incorrect. According to the municipality the correct position is that when Broadlands, who was the owner wishing to subdivide its property, and excise the portion on which the office park is situated from its property, it was decided that due to the elevation of the office park the most practical solution will be to connect its drainage system to the municipal sewer system by utilising the Broadlands sewer system. A sewer pipe was provided to establish a connection on the boundary of portion 286 which is property within Broadlands and which is adjacent to the office park. The reference in the approved plans to “NEW SEWER LINE” and NEW 110mm dia. UPVC SEWER LINE WITH MIN. FALL 1:60 TO MUNICIPAL CONNECTION” refers to the approval of a connection to the municipal sewer through the sewer system of

Broadlands. The municipality also appreciates that due to material differences between Double Four and Broadlands no agreement can be reached between them which necessitates a direct connection from the office park to the sewer system of the municipality. A process needed to be followed in terms of the By-laws[8] of the municipality to apply for a sewer disposal system or other sewer services. Section 2(1) and (2) of the relevant By-law provides that:

> "(1) The Council must take reasonable measures to realise the right of every person to a basic water supply and sanitation services as contemplated in the Act.
>
> (2) Notwithstanding this basic right, every person who is the head of a household or in charge of a business enterprise or industrial undertaking or the representative of any such person, and who or which desires to consume water must make application to the council as contemplated in section 4 to acquire such services."

[19] The right of Double Four to be provided with a sewer connection, according to the municipality, can only be established once Double Four is able to show that it has complied with the provisions of the By-law. The process to be followed is that an application must be lodged with the municipality. The municipality will then identify the nearest suitable point of access to the municipal sewer. Double Four is then required to appoint an engineer to design a functional on site sanitation service infrastructure to discharge sewage from the office park into the municipal sewer system. The municipality will consider a proposed design and approve it, if satisfied that an application as prescribed has been submitted and should be granted.[9] Double Four will have to bear the costs.

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[8] Standard Water and Sanitation By-Laws Published under LAN 196 Limpopo Provincial Gazette 1937 dated 14 June 2011.
[9] Chapter 6 Part B of the By-law.

[20] Broadlands is the owner of and is responsible for the maintenance of its entire infrastructure within the borders of the estate. Broadlands sewer system connects to the municipal sewer system which is not located on the property of Broadlands. The office Park is merely a neighbour of Broadlands. When the office park was developed by the trust the building plans were approved by the municipality indicated that the office park sewer system will connect to the municipal sewer pipe line directly. Instead of connecting the office park drainage outlet to the municipal pipeline, the trust connected it with the Broadlands system.

[21] Broadlands objects to the order sought. Firstly, because there is no obligation on it as a neighbour to provide Double Four with a connection to the Broadlands sewer system, and secondly, that the order will have a permanent effect. Put differently, Broadlands will be compelled to keep the sewer of the Double Four connected to their system indefinitely which is unacceptable to Broadlands.

[22] When the office park was to be sold on auction, Broadlands by letter, notified the auctioneers and the attorneys of the trust that the office park has no sewer connection and that the office park as such is illegally connected to Broadlands.

[23] Broadlands specifically denies that it blocked the drainage pipe of the office park because of non-payment of a levy. There is no agreement between Double Four and Broadlands in terms whereof Broadlands is entitled to charge a levy for the use of the Broadlands sewer system and Double Four has never paid Broadlands for such use.

[24] The illegal connection to Broadlands has its origin at the time building work was being conducted at the office park.

[25] It is necessary as point of departure to emphasise what was said in *Administrator and The Firs Investments Pty Ltd v Johannesburg City Council*:[10]

> "It is of the essence of a town-planning scheme that it is conceived in the general interests of the community to which it applies. Protection of those interests falls, in my opinion, within the ambit of municipal function."[11]

and

> "Moreover, all town-planning schemes are so intimately concerned with matters which normally form the subject of municipal government - e.g., streets which are vested in the municipality, buildings, traffic problems, drainage, health, civic amenities and so forth…"[12]

[26] It was undisputed at the hearing in the court below that the municipality has a constitutional obligation to ensure that sustainable services are provided to the community in respect of those services that a municipality must provide and to promote a safe and healthy environment.[13]

[27] On the other side of the same coin is the right of Double Four to be provided with those services. The municipality contended, however, that the right is not unqualified, but is subject to compliance with the provisions of the relevant By-Law and approval by the municipality.

[28] It is, in addition, not disputed that building plans have been approved by the municipality for the erection of an office building on and the development of the office park and for the drainage system of the office park to be connected to the municipal sewer system. Why the drainage system of the office park was

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[10] 1971 (1) SA 56 (A).
[11] 70D.
[12] 71A; Also *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) 401B-E.
[13] Section 152(1) of the Constitution.

connected to the sewer system of Broadlands with the approval of the municipality remains an issue.

[29] In conclusion, even if it is accepted that Double Four has to apply to the municipality for a connection after its drainage system was "unlawfully" connected to the sewer system of Broadlands instead of the approved direct connection to the sewer system of the municipality, Double Four remains in need of a workable and sufficient sewer connection to the system of the municipality. There is no reasonable expectation that the municipality presently can provide a connection to its sewer system other than by utilising the sewer system of Broadlands to which the municipality connected the office park "unlawfully." The connection appeared to have been made for the convenience of the municipality, at the time, due to the costs involved to establish a connection in accordance with the approved plan. It is for present purposes, not a defence for the municipality to claim that an application must be made for such a connection when the approved plan shows where the connection to the municipal system must be and when an occupation certificate was issued the purpose of which is to certify compliance with the requirements of National Building Regulations and Building Standards Act[14] in respect of the office park, which no doubt, included the installation of an approved drainage system and its connection to the municipal system in terms of the relevant By-laws and conditions for the establishment of the office park. The municipality allowed the office park drainage system to be connected to the Broadlands sewer system.

[14] Act 103 of 1977.

Whether it was allowed because it was thought (erroneously) at the time that it was part of Broadlands is of no moment.

[30] In *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*[15] the requirements to obtain interim relief were formulated as:

> "Briefly these requisites are that the applicant for such temporary relief must show-
>
> (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, is prima facie established, though open to some doubt;
> (b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy."[16]

[31] In the *court a quo* the learned Deputy Judge President held that the case has to be determined according to the *Plascon-Evans* rule[17] and proceeded to state that:

> "The applicant sought an interim order. It is well established that in order to succeed, it needs only establish a prima facie right, though open to doubt. More specifically, the applicant must show that on their version, together with the allegations of the respondents, that they cannot dispute, they should obtain relief at the trial. On the contrary, the application cannot succeed if, having regard to the respondents contrary version and the inherent probabilities, serious doubt is cast on the applicants case, the application cannot succeed - **see Webster v Mitchell 1948 (1) SA 1186 (W)**."

[32] It was held in *Webster v Michell supra* that:

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[15] 1969 (2) SA 256 (C) 267A-F.
[16] *Setlogelo v Setlogelo* 1914 AD 221, 227.
[17] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

> "In the grant of a temporary interdict, apart from the prejudice involved, the first question for the court in my view whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. *Prima facie* that has to be shown. The use of the phrase "*prima facie* established though open to some doubt" indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right *prima facie* established, may be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject, of course to the respective prejudice in the grant or refusal of interim relief."[18]

[33] In *Yusuf v Aboobaker and Pietermaritzburg Local Transportation Board,*[19] the court considered that use of the expression "a *prima facie* right" is unfortunate and means no more than that a "preponderance of probabilities" favour the applicant.

[34] There is no dispute between Double Four and the municipality, on the papers, that Double Four has a *prima facie* right to be provided with a sewer connection to the municipal sewer system, even if the right is qualified, as contended by the municipality by submitting an application to the municipality. Broadlands did not take issue with this right but took issue only with the right to make use of its sewer system by the office park. Broadlands is aware of the connection since

[18] At 1189.
[19] 1943 NPD 244, 245.

2016. Broadlands in my view is not authorised to unilaterally alter or disconnect the sewer connection without the written permission of the Municipality.[20]

[35] The undisputed evidence is that the sewer connection between the office park and Broadlands were blocked and that the contents of the sewer seeped to the surface. (It matters not that Broadlands deny that it has severed the connection on the property of Broadlands.) Double Four was forced to erect a tank on the premises (which must be emptied twice a week) to prevent further seepage of sewer contents to the surface and to some extent reduce the stench. There can be little doubt the situation caused a persistent health hazard to those working in the office park and the surrounding area.

[36] In addition to the aforesaid, a nuisance to health may be interdicted. It was held in *Consistory of Steytlerville v Bosman*[21] that:

> "… it is not necessary for the purpose of an interdict that the injury sought to be prevented should be of a pecuniary nature. A nuisance to one's health, for instance, may not cause any damage in money, and yet it is an every-day practice to interdict it."

[37] The court must next determine if there is well-grounded apprehension of irreparable harm. The test is whether a reasonable man might entertain a reasonable apprehension that harm will result. In both instances described above the harm may not be of a pecuniary nature. But, the absence of a pecuniary harm is no impediment to the interim relief claimed.[22] This court should not take a too narrow approach to the requirement of reasonable apprehension of harm. Apart from the health hazard, a real likelihood exists that

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[20] Section 96 of the By-law.
[21] (1893) 10 SC 67, 70.
[22] Prest CB *The law and Practice of Interdicts* (1996) 65; *Burgers and Others v Joubert and Others* (1866) 1 Roscoe 351, 354-355; Section 24(a) of the Constitution.

the bank might terminate its lease with Double Four which will result in pecuniary loss. Double Four had to purchase two tanks which need to be emptied weekly at a cost to abate the health hazard. I am satisfied that Double Four has succeeded to show a well-grounded apprehension of harm.

[38] When the prejudice to the applicant if the relief is refused is weighed against the prejudice that the municipality and Broadlands will suffer if the relief is granted, it seems to me that the balance of convenience favours Double Four. It is common cause that that sewer system of Broadlands were utilised for a number of years prior to the blocking that occurred. Temporary re-connection to the Broadlands sewer system will be less than an inconvenience to Broadlands than it will be to Double Four if the relief is refused. The office park will remain without a sewer system and the public health hazard unabated.

[39] There is no other satisfactory remedy available to Double Four pending the finalization of the action. In my view the court *a quo* erred in dismissing the application.

[40] In *Airoadexpress (Pty) Ltd v Chairman Local Board Transportation Board Durban and Others*[23] the court reaffirmed the general power preserved by the court to grant interim relief *pendent lite* to avoid hardship and injustice in exceptional circumstances where a litigant will be remediless, but for the exercise of such power. On the assumption that Double Four still has to apply for a sewer connection despite the connection having being indicated in terms of the approved building plans and the subsequent provision of an occupational certificate by the municipality, Double Four still has no sewer connection. The

[23] 1986 (2) SA 663 (A) 676 B-D.

absence of a sewer connection causes a health hazard. To avert escalation of a serious public health hazard from developing into a catastrophe it is open to this court to come to assistance of Double Four *pendent lite.* No other remedy is available to Double Four but for an interim order to connect its drainage system to that of Broadlands until the dispute between the municipality and Broadlands has been resolved.

It follows that the appeal is to be upheld.

**THE COUNTER-APPLICATION**

[41] Broadlands instituted a counter-application against Double Four and was granted final relief in terms of an order declaring that Double Four is encroaching onto the property belonging to Broadlands known a Portion 350 of the Farm Tweefontein No 915 LS, together with an order that Double Four remove all traces of encroachment from the property of Broadlands.

[42] When an applicant seeks final relief in motion proceedings disputes of fact must be determined on the facts as stated by the respondent together with the admitted or undenied facts in the founding affidavit of the applicant which provides the factual basis for determination unless denials or disputes raised in the version of the respondent are not real or genuine or the denials are bald or unworthy of credit or the respondent's version raises such obvious fictitious disputes of fact or is so untenable or implausible or far-fetched that a court is justified in rejecting that version.[24]

[24] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) supra* 634H-635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par 26.

[43] Broadlands in support of the relief claimed stated that the properties of Broadlands and the office park are adjacent to each other. Range Street which is also a public road which allows access to Broadlands is constructed on portion 350 which is the property of Broadlands. A traffic light is situated at the intersection of Munnik Avenue which is a public road and main thoroughfare and Range Street which leads to the entrance gate of Broadlands and the entrance to the office park. The entrance to the office park is situated in close proximity to the entrance to Broadlands. Electrical cables which provide electricity to the traffic lights at Munnik Avenue and electrical services as well as the water supply to Broadlands are situated on portion 350 and run under the area where the entrance to the office park is. It is not in dispute that anyone going to the office park must as of necessity use Range Street and the entrance which is situated on portion 350. Broadlands explain in annexure CB that:

> "Die uitgangsbaan van Gedeelte 348 is in sy geheel op Gedeelte 350 geleë."

[44] The entrance or the "uitgangsbaan" is part the disputed encroached area. I understand Broadlands to accept that the office park must have an access road and for that purpose an entrance was provided. From what is depicted in annexure CG it appears that the area of encroachment is an area (approximately 129 square metres[25] (marked with white lines) of portion 350 which is adjacent to Range Street and the actual boundary between the Portion 348 and 350. The 129 square metre area is currently paved and inside the perimeter of the office park. The area is utilised as a passage for vehicles to travel to and from a parking area inside the office park. It appears from the photograph that the buildings of

[25] According to Broadlands.

the office park were erected so close to the boundary between portion 348 and 350 that it was necessary to encroach upon portion 350 to allow vehicles to travel from the parking area of the office park to the entrance at Ranger street. Annexure CB contains an explanation together with a sketch plan as follows:

> "1. Die hoek van die gebou is 2, 87 meter van die grens D-E af.
>
> 2. Die uitgangsbaan van Gedeelte 348 is in sy geheel op Gedeelte 350 geleë.
>
> 3. Die eiland waarop die toergansbeheer hekke is lê op die grens D-E. Die helfte van die eiland oorskry op Gedeelte 350.
>
> 4. Die palisade op die grens D-E lê om die helfte op Gedeelte 348 en Gedeelte 350. Waar die randsteen begin is dit 9cm binne Gedeelte 348. By baken D is dit 9cm buite Gedeelte 348.
>
> 5. Die palisade langs die grens C-D lê op Gedeelte 350. By baken D is dit 3cm buite Gedeelte 348. By baken C is dit 26cm buite Gedeelte 348.
>
> 6. Die palisade op die grens B-C is binne Gedeelte 348 geleë".

[45] The way I understand it, is that it is really only the portion of the passage together with the boom gate for traffic leaving the office park which forms the encroachment. Thus the left lane of the passage for vehicles leaving the office park if it dived in two and area where the boom gate in respect of those vehicles is situated, which are encroaching on portion 350. If the encroachment is removed the passage will only be wide enough to accommodate one vehicle to enter or leave at a time.

[46] The encroachment is insufficiently identified in the papers. A map or drawing produced by an expert to indicate the exact extent of the area of the encroachment should have been put up as evidence to make clear where the area is situated.

[47] In the opposing affidavit Double Four lamented the use of a Google Earth photo to indicate where and to what extent the office park encroached onto the property of Broadlands. Double Four accepted, however, that an area of approximately 129 square metres is encroaching onto the property of Broadlands but avers that it is an insignificant area. An area of 129 square metres can hardly be described as insignificant in my judgment.

[48] It does not mean that Broadlands rights as landowner should likewise be brushed aside and be regarded as being insignificant. It is opportune to note that rights of the adjoining landowner Broadlands are adversely affected as a result of the encroachment on its property because the passage or drive way which allows traffic to pass the building of the office park to and from the parking area or whether the entrance which is situated on the land of Broadlands is wider than 6 metres allowed by Broadlands.

[49] In *De Villiers v Kalson*[26] the court approved of the statement in Maasdorp's *Institutes of Cape Law,* as the correct exposition of the law:

> "That where a building is erected partly on ones own ground and partly on anothers, the owner of the ground encroached upon may demand the encroachment be removed, or that the party making the encroachment shall take transfer of the piece of ground actually occupied by the encroachment and so much of the rest of the ground rendered useless to him thereby and to pay him the value of the ground so transferred together with the costs of transfer and a reasonable sum as damages for the trespass and as a solatium for the compulsory expropriation. Where there has been a delay in applying for the removal of the encroachment the Court will restrict the party injured to the latter remedy.

[26] 1928 EDL 217, 229.

[50] In *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee, Capital Property Trust*[27] the court retraced the development of our law in relation to an aggrieved landowner's right to seek removal of an encroachment with the aid of an article authored by Boggenpoel ZT '*Compulsory Transfer of Encroached-Upon Land: A Constitutional Analysis'*. The court reiterated the principle as:

> "Boggenpoel explains that in Roman-Dutch law the point of departure was the same as in Roman law, namely that if anybody suffered as a result of something belonging to his neighbour overhanging or encroaching on his property, he could force the neighbour to remove it."[28]

[51] In *BSB International Link CC v Readam South Africa (Pty) Ltd and Another*[29] the court reiterated that the common law principle, as expressed by CG van der Merwe[30] finds application in cases of encroachment on the property of another:

> "In the case of encroaching structures the owner of the land which encroached upon can approach the court for an order compelling his or her neighbour to remove the encroachment…Despite the above rule above the court can, in its discretion, in order to reach an equitable and reasonable solution, order the payment of compensation rather than the removal of the structure. This discretion is usually exercised in cases where the cost of removal would be disproportionate to the benefit derived by the removal. If the court considers it equitable it can order that the encroaching owner take transfer of the portion of the land which has been encroach on. In such circumstance the aggrieved party is entitled to payment for that portion of the land, costs in respect of the transfer of the land as well as a *solatium* on account of trespass and involuntary deprivation of portion of his or land."[31]

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[27] 2015 (5) SA 290 (SCA).
[28] Par 29.
[29] 2016 (4) SA 83 (SCA).
[30] "Things" 27 *Lawsa* (2 ed) para 158.
[31] Par 24.

[52] Double Four has placed reliance on the Roman-Dutch law rule that a landowner cannot insist upon removal of the encroachment if he/she has allowed the encroachment knowingly.[32] It is to be stressed that the application of this rule has always been subject to the equitable discretion of the court.[33] In *Stark v Bloomberg*[34] the court held, where a building encroached on neighbouring land, and stood for more than a year without protest from the owner of the land that:

> "[it] is not the practice of the Courts to order buildings to be removed but to award damages. Such damages will not merely be value of land encroached upon, but the Court will also be guided by the loss which the owner of the land has sustained by the encroachment."

[53] In *Van Boom v Visser*[35] action was instituted for the removal of a certain building from the land of the plaintiff and for damages. The defendant was ordered to remove the encroachment, or in the alternative, to purchase the piece of land he has encroached upon and to pay damages in the amount of £10.

[54] There cannot be any doubt that this court has a discretion whether to order removal of the encroachment or to make any other reasonable and equitable order depending on the circumstances of the case.[36]

[55] Of course, if the office park is allowed to encroach onto the property of Broadlands, the encroachment will be lawful. Double Four will then exercise a right of access to the encroached portion of the property of Broadlands whereby

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[32] Van der Merwe CG "Things" 27 *Lawsa* (2 ed) para 158.
[33] *Hornby v Municipality of Roodepoort-Maraisburg* 1918 AD 278, 296-298.
[34] (1904)14 CT 135. As *quoted in De Villiers v Kolson supra* 229.
[35] (1904) 21 SC 360. 361.
[36] *De Villiers v Kalson* supra 229-230; *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78, 87-88; *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd and Another* 1971 (2) SA 397 (W) 405D; *Rand Waterraad v Bothma an n Ander* 1997 (3) SA 120 (O) 138C-G; *Phillips v South African National Parks Board* (4035/ 07) [2010] ZAECGHC 27 (22 April 2010) par 21; *BSB International Link CC v Readam South Africa (Pty) Ltd and Another supra* par 26.

Broadlands will be deprived of its right of enjoyment over that portion of its property. As such the deprivation must comply with the provisions of section 25(1) of the Constitution which provides that:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[56] Van der Merwe *supra* observes: in par 163 of LAWSA:

> "Generally, loss of property by operation of the rules of the common-law cannot be treated as expropriation in South African law, simply because expropriation can only be undertaken by the state on the authority of legislation. By and large instances where someone loses property by operation of law on the authority of the common law, are therefore to be treated as instances of deprivation of property that must comply with the non-arbitrariness requirement in section 25(1). This means that there must be good reason for such deprivation. The combination of a compensation award with an order to transfer the land to the encroacher is a serious and extraordinary step in South African law. Such an order would have to be justified under section 25(1) separately from the decision; the decision to deny injunctive relief, and the effect that such deprivation would have on the investment in property must be considered carefully. It must not be assumed glibly that the affected landowner must be satisfied with compensation; the deprivation must be justified adequately in every individual instance."

[57] The common law, is law of general application.[37] Deprivation of property is permissible if such deprivation is not arbitrary. The Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue*

[37] *Du Plessis and Others v De Klerk and Others* 1996 (3) SA 850 (CC) par 44; *The President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 96; *S v Thebus and Another* 2003 (6) SA 505 (CC) par 65.

*Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[38] held that 'arbitrary' in section 25 means:

"Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
(b) A complexity of relationships has to be considered.
(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property
(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be establish in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive….
(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and end; in others this might only be established by a proportionality evaluation closer to that required by s 36(1).

[38] 2002 (4) SA 768 (CC).

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."

[58] It is important too, not to lose sight of the fact that the judgment of the Constitutional Court dealt with the constitutional validity of deprivation of property in terms of section 114 of the Customs and Excise Act.[39] Nevertheless, the factors enumerated above, in my view, apply equally to deprivation of property in terms of the common law.

[59] The court below was not requested nor did it consider transfer of the encroached portion of the property to Double Four. I understand the law, as explained by Maasdorp, to be that the party who encroaches may purchase the encroached upon portion, only if the other party is willing to sell it. That was also the approach adopted by the court in *Van Boom v Visser supra.*

[60] Whether a court has the power to force a party to sell the encroached upon portion of the property is doubted. No argument was presented on this topic before us. This court, therefore, need not decide the issue in the present case.

[61] The encroachment in the present matter is not caused by a building or other permanent structure erected on the property of another. The area encroached upon is an area sufficiently wide to allow for vehicles to reach the parking area of the office park.

[62] Double Four argued in the court below that Broadlands allowed the encroachment to persist and has waived any right to have the encroachment removed. In addition thereto, Double Four contended that it purchased the

[39] Act 91 of 1964.

office park unaware of the existence of the encroachment. In the alternative it was argued that Broadlands is prepared to allow the encroachment upon payment of compensation but that they were unable to agree on a reasonable amount as compensation.

[63] I am unconvinced that Broadlands has waived its right to have the encroachment removed. The *onus* is on Double Four to prove with clear evidence that Broadlands waived it's right on a balance of probabilities. Delay in enforcing its right also does not provide proof of a waiver nor does the delay bring about the loss of the right. But the failure to take steps within a reasonable time to have the encroachment removed may be taken into consideration to decide whether Broadlands should be permitted to assert its right.[40] In *Rand Waterrraad v Bothma supra* the court applied principles of equity and similarly denied the applicant the right to remove the encroachment due to its supine approach to the litigation and the failure to assert its right within a reasonable time period.[41]

[64] The fact that Double Four was unaware of the encroachment when it purchased the office park is neither here nor there. Nothing turns on the access to the office park as an encroachment complained of is, elsewhere. It is, to say the least, rather surprising that the right of access to the office park has not been registered. [42]

[65] It is not disputed that the point of access to the office park was granted in terms of the approval in respect of the development by the authorities together with the

[40] *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A) 736H.
[41] p138.
[42] Van der Merwe CG *Sakereg* 2nd ed (1989) 526.

consent of Broadlands.[43] The real issue in contention indeed is, the location of a two-way passage used by vehicles which runs adjacent to the building of the office park to give access to the parking area. The area between the street and the passage forms an island between the two. The passage is encroaching upon the property of Broadlands, as described in a letter (Annexure KJO 26) dated 24 January 2019:

> "Should no agreement be reached, would you be so kind as to inform us when your client intend to make available the road access, in more specific the portion which encroach on our clients land, back to us. In this regard it is obviously not our intention to disallow your client entry into its property, but is it merely to limit same to an entrance into the property, instead of a road running the length of the property. Full detail pertaining thereto is available with Mr Wicus Pretorius who is in the service of your client."

[66] Counsel were requested to indicate whether the entrance to the office park and the passage inside the perimeter of the office park leading to the parking area is a street within the urban area of Polokwane, and if so, whether such a passage could be closed in terms of the order as framed in the counter-application without written consent of the first respondent.

[67] Mr Bosman who appeared on behalf of Broadlands argued that no such consent is needed because a boom gate has been erected at the entrance to the office park which prohibits access to and from the office park. The passage inside the premises of the office park is, therefore, not a public road.

[68] Section 80A(1)(*l*) of the National Road Traffic Act permits a local authority to promulgate By-laws in relation to the use of any public road within the area of

[43] *Ius in personam ad servititem adquirendam.*

jurisdiction of the local authority. Section 14 of the Standard Street and Miscellaneous By-Laws issued by the Municipality[44] provides that:

> "No person shall make or cause to be made any hole, trench, pit or excavation in any street or remove any soil metal or macadam therefrom without the previous consent of the council in writing."

[69] The definition of 'street' in the By-law states that:

> "street includes any street, road or thoroughfare shown on the general plan of a township, agricultural holding or other division of land or in respect of which the public have acquired a prescriptive or other right of way. And any other words or expression to which a meaning has been assigned in the Road Traffic Ordinance, 1966 (Ordinance 21 of 1966), shall have that meaning."

[70] Section 93 of the National Road Traffic Act[45] reads that:

> "Any proclamation, regulation, by-law, notice, order, prohibition, authorisation, appointment, permission, information, or document made, issued, imposed, granted, furnished or given and any other action taken in terms of any provision of a law repealed by subsection (1) shall be deemed to have been made, issued, imposed, granted furnished, given or taken in terms of the corresponding provision of this Act (if any)".[46]

[71] The National Road Traffic Act defines a public road as:

> "'**Public road'** means any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which or to the public or any section thereof has a right of access, and includes-
>
> (a) the verge of any such road, street or thoroughfare;
>
> (b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and

[44] Promulgated in terms of Administrators Notice 137 dated 23 January 1974.
[45] Act 93 of 1996.
[46] See also section 93B.

(c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare."

[72] In terms of the order sought in the counter-application, Double Four is required to remove all traces of any encroachment from portion 350. It seems to me that removal of the encroachment will inevitably result in the removal of at least a section of the entrance as well as part or the whole of the sidewalk of Range Street together with the passage used by motor vehicles all of which are situated on portion 350.

[73] The public generally has access to the office park and the parking area. No evidence has been presented by any of the parties that access is restricted by Double Four by utilization of the boom gates which is situated in the 129 square metre area of encroachment which is presently utilised by Double Four as a passage for vehicles.

[74] The mere presence of boom gates on the premises of the office park is not proof that employees and clients of the bank have restricted access to the office park.[47] A restaurant business was earlier conducted from the premises. The inference is irresistible that the passage is a public road.

[75] Removal of the outbound passage and part of the sidewalk adjacent to the outbound passage between the street and the passage both of which are on portion 350 may only be undertaken in terms of the By-law with the written consent from the municipality.

[47] *S v Kriel* 1968 (3) SA 452 (T); *S v Rabe* 1973 (2) SA 305 (C); *S v Dillon* 1983 (4) SA 877 (N).

[76] Broadlands has not given any indication whether the area is earmarked for any specific purpose in the foreseeable future nor has it placed any value on the encroached area. I doubt whether the area can be utilised by Broadlands as a result of its location between the street and the boundary between portions 350 and 348.

[77] The encroached area is being utilised by Double Four since 2016. The encroached area is a narrow strip between the public street and the boundary which as I have said forms an island between two streets which appears not to be commercially viable which Broadlands can utilised or exploit commercially.

[78] It seems to me that it will be just and equitable that value of the encroached area be determined and Double Four be ordered to compensate Broadlands for past and future use of the encroached area. A right to use and enjoy the encroached area for vehicles to leave the parking area should be registered against the title deed.[48] There are no *numerus clauses* of servitudes. Van der Merwe CG says:

> "Soos reeds vermeld, bestaan daar geen *numerus clauses* van erfdiensbaarhede nie. Mits aan die geldigheidsvereiste voldoen word, hoef 'n gronddiensbaarheid nie in 'n geykte vorm gegiet te word nie…. Niks verhoed egter die eienaar van die heersende erf om ooreenkomstig sy behoeftes n ongeykte gronddiensbaarheid, van watter aard ookal, deur ooreenkoms ten opsigte van die dienede grondstuk te vestig nie"[49]

[79] The author referred, as authority, to the judgment in *Venter v Minister of Railways.*[50] A property was transferred to the government on condition contained in the deed of transfer that the government shall not have the right to carry on any trade or business of a public nature from the property so transferred. The

[48] As a real right.
[49] Van der Merwe CG *Sakereg* 2nd ed (1989) 480-481.
[50] 1949 (2) SA 178 (ECD).

owner of another portion of the property applied for an interdict to restrain the government from doing business from its property. The court with reference to *Tonkin v Van Heerden*[51] held:

> "In the case just quote no attempt was made to argue that the servitude created by the condition was invalid because it was unduly in restraint of trade. That is not strange, because the very nature of a praedial servitude excludes the possibility that it may be unduly in restraint of trade. A praedial servitude comes into existence only if the right to be acquired by the *praedium dominans* is for perpetual benefit."

[80] I consider that it is for the respective parties to decide if the area should be transferred to Double Four.

[81] The counter-application should be referred back for the court to consider the amount of compensation. To do so the parties must be afforded the opportunity to place expert evidence, they deem necessary, before the court. For that purpose the determination of the quantum of compensation to be awarded is referred to evidence.

[82] As far as the costs are concerned I consider that the costs of the application should stand over for determination at the trial and that the costs of the counter-application should stand over for determination at conclusion of the counter application.

[83] Double Four is entitled to the costs of the appeal in respect of the application. I consider it fair that each party bear the costs in respect of the counter-application.

**ORDER**

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[51] 1935 NPD 589.

**1. The appeal in respect of the application is upheld with costs.**

**2. The order of the *court aquo* is set aside and replaced with the following order:**

**2.1 that the First Respondent is ordered to provide a sewer connection to which the drainage installation of the property known as portion 348 (a portion of portion 220) of the farm Tweefontein 915 situated at the corner of Range Entrance Street and Munnik Avenue, Broadlands Estate, Polokwane ("the Baobab Office Park") can be connected.**

**2.2 That pending the provision of such permanent connection point, the second Respondent is ordered to reconnect the sewer system of the Baobab Office Park with that of the Broadlands Estate, alternatively that the First Respondent is ordered to compel the Second Respondent to do so.**

**2.3 That the Second Respondent be interdicted and restrained from constructing, reconstructing, altering, adding to or making any permanent disconnection in or of any drainage installation which may or will have an effect on the proper functioning of the Applicants drainage installation without first having obtained the lawful permission of the First Respondent.**

**2.4 That the orders in prayers 2.1 to 2.3 above shall operate as an interim interdict with immediate effect pending the outcome of an action instituted by the Applicant.**

**2.5 The costs of the application are reserved for the trial court to consider.**

**3. The appeal against the counter-application is upheld.**

**4. The order is set aside and replaced with the following order:**

**4.1 The application is referred to evidence in respect of the determination of the amount of compensation.**

**4.2 The costs of the counter application is reserved.**

**5. No order is made in respect of the costs of the appeal of the counter-application.**

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GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

I concur

_____

EM MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

I concur

_____

MG PHATUDI

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

**APPEARANCES**

| | |
|---|---|
| 1. For Appellant: | LM Malan SC |
| | WA De Beer |
| 2. For first Respondent: | Adv JAL Pretorius |
| 3. For second Respondent | N Bosman |
| 4. Date judgment reserved: | 13 May 2022 |
| 5. Date judgment delivered: | 11 August 2022 |