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

Case No: 11104/2022

In the matter between:

ARISTONAS (PTY) LTD **Applicant**

and

WILLEM VELTMAN **Respondent**

JUDGMENT DELIVERED ELECTRONICALLY: TUESDAY, 23 AUGUST 2022

NZIWENI AJ

Introduction

[1] This is an application for confirmation of a rule *nisi*, granted on 01 July 2022. The rule operated as an interim interdict restraining the respondent from removing the applicant's fence and calling upon the respondent to show cause if any on the return day, why the order should not be made absolute. The respondent anticipated the return day to seek the order granted against it to be set aside.

[2] At the hearing on 29 July 2022, I confirmed the rule *nisi* with an amendment and also informed the parties that reasons would be provided in due course. The reasons now follow.

[3] This case involves a dispute between two neighbours whose houses are very close to one another. It concerns a small area of land in respect of which a servitude was registered over an encroaching area. The contentious piece of land is located between the properties of the two neighbours. The dispute that the neighbours are presently embroiled in, involves a fence which results in an encroachment onto and over the servitude area.

[4] Aristonas (PTY) LTD, a private company (the applicant), is the owner of a residential property situated in Green Point ("Ariston property"). Adjoining the applicant's property is the property belonging to the respondent ("Veltman property).

[5] Both properties were initially owned by the respondent. In the respondent's answering affidavit, it is averred that in 1996, the respondent decided to extend the patio and the garden area on the second floor of the Veltman property. As a result of the extension, there were two encroachments onto the Aristonas property.

[6] When the Aristonas property was sold to the applicant, the applicant did not object to the encroachments. The parties then agreed that the respondent would register servitudes over the encroaching areas, in order to regularise the

encroachment. The encroachments were then registered as *praedial* servitude areas, which were created in favour of the Veltman's [respondent's] property.

[7] In December 2016, the applicant erected a Clearvu fence to separate its property [Aristonas property] and the respondent's property. Insofar as the encroachments issue is concerned, it is undisputed before this court that the applicant's fence does intrude in some way onto the Veltman property. The parties however, are at polar opposites when it comes to the extent of the encroachments.

[8] It is common cause in this matter that the parties failed to discuss the fence's construction before it was built. According to the respondent, he only discovered t the existence of the fence in 2018, when he asked the applicant to remove the fence enclosing the braai area. Pursuant to the communique written in 2018, requesting the applicant to remove the fence; the respondent learned that the applicant never actually did so until June 2022.

[9] It is stated in the applicant's founding affidavit that, on 27 June 2022, the respondent sent an email to the applicant stating that the applicant had five days to remove the fence, failing which he would remove it at the applicant's cost. When faced with the communique of 27 June 2022, the applicant approached and instructed an attorney and a land surveyor. According to the applicant, the land surveyor prepared an encroachment plan which *inter alia,* indicated that there was a minimal encroachment onto the respondent's property. Subsequent to the surveyor's report, the applicant's attorney wrote to the respondent informing him that he does not have

the authority to take the law into his own hands. The applicant then requested an undertaking from the respondent that he would not remove the fence.

[10] It is asserted on applicant's behalf that when the respondent failed to make the undertaking, the applicant approached the court on an urgent basis seeking an interim interdict to prohibit the respondent from removing the fence of the applicant. Applicant's counsel emphatically denied that the respondent seeks to forever deprive the respondent from accessing or enjoying his part of the servitude.

The respondent's response to the applicant's averments made in the founding affidavit.

[11] The answering affidavit contends that the founding affidavit is a contrived attempt to avoid placing material facts before the court. Furthermore, the respondent's answer to the founding affidavit alludes to the scale of the encroachment, contending that the encroachment constitutes a minor fraction and the effect of the fence, which he claims hinders the occupants of the Veltman property from accessing or using the servitude area.

[12] The respondent further argued before this court that he did not consent to the erection of the fence over the servitude area and has a clear right to have it removed. The respondent also claimed that the intrusion interferes with the legitimate enjoyment of the servitude.

Evaluation

Failure to make full and proper disclosure of facts

[13] In the respondent's answering affidavit it is averred that the applicant failed to make a full and proper disclosure of all material facts. According to the respondent, the applicant in so doing influenced the court decision in granting the *ex parte* relief by misleading the court in believing that the dispute between the parties concerns a mere fence that has been erected along the common boundary line. Whereas, according to the respondent, the matter involves an encroachment of a servitude. Counsel on behalf of the applicant contended that the underlying dispute about the fence is not before this court.

[14] It bears mentioning that, for purposes of this application that the applicant did not need to demonstrate that there was an encroachment on the servitude in the original application. I cannot see how the disclosure about the existence of the servitude and an encroachment thereupon might have influenced the first court in coming to its decision, had it known about the encroachment on the servitude. In this application it is not material, as the information was not going to influence the court in reaching its. It is settled now that the disclosure that is required must at all times be material facts to the matter (See *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348 E-349A).

The issue before the court

[15] It can be readily seen that, whether the encroachment should be removed or remain in place, is not the issue to be determined by this court. The issue in contention also does not involve a boundary dispute between neighbouring property owners.

[16] The main contention brought by the applicant before the court was to seek a relief preventing the respondent from taking the law into his own hand by removing the fence or encroachment which was erected by the applicant without its consent. The paramount question is whether the applicant has satisfied the requirements for a final order. Another issue which arose during the hearing for determination was whether the draft order proposed by the applicant can be granted even if it is not similar to the prayer on the motion of notice.

Has the applicant satisfied the requirements for the final relief?

[17] The remedy sought by the applicant is a final interdict. It is established now that the requirements for a final interdict are (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy.

In *Setlogelo v Setlogelo* 1914 AD 221, Innes CJ opined:

"The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. Now the right of the applicant is perfectly clear. He is a possessor; he

is in actual occupation of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession."

Clear right

[18] The interdict which is sought by the applicant will restrain the respondent from accessing certain parts of its servitude. There can thus be no doubt that the encroachment of the respondent's servitude effectively infringes upon the right of the respondent to the free enjoyment of his property. In certain circumstances, though the encroacher might be guilty of an encroachment, the removal of the encroachment cannot happen without permission of the encroacher or without the sanction of a court order. The landowner can demand the removal of the encroachment from the encroacher, however, if the encroacher refuses, the landowner cannot forcefully remove the encroachment. Instead it should approach a court and seek justice and redress if the parties cannot resolve the impasse amicably.

[19] On the respondent's own version, the encroachment is not just a minor encroachment, therefore, the respondent is not allowed to take the law into his own hands. The proper remedy for the respondent is to apply to the court for an order for removal of the encroachment and restoring the land to its original condition.

[20] The respondent contends that if the rule *nisi* is confirmed, it would be deprived from its right to exercise the servitude. I disagree. I do not get the impression that the applicant has brought this application to justify a continued existence of the encroachment on the servitude area.

[21] In any event, the applicant's application merely seeks to restrain the respondent from taking the law into his own hands. Consequently, for purposes of this particular application, insofar as the encroachment is concerned; it is not necessary to consider the merits and demerits of the encroachment.

[22] It is established that the applicant must prove on a balance of probabilities the right which it seeks to protect. In other words, the applicant has to show that he has a clear right to ask the court for the relief he is seeking. The question which aptly begs is, what right does the applicant have in the matter. What is apparent from the facts of this matter is that, the applicant has established a legal right that he is an owner of the fence and that the fence is partly erected on his property. It bears mentioning that the respondent did not seek any court order to force the applicant to remove the fence. Clearly, the applicant has a legal interest in the land and fence in question. In the context of this case, the respondent is not allowed to take the law into his own hands.

[23] I was thus satisfied that the applicant satisfied this particular requirement.

Injury actually committed or reasonably apprehended

[24] Gleaning from the papers, it becomes apparent that the respondent did not threaten the applicant with legal action but, has instead threatened him with the removal of the fence. A threat to remove a fence without consent from the owner of the fence amounts to a threat to cause damage to the fence which may cause damage to the property. Clearly, the respondent, as a disgruntled neighbour, took an

aggressive stance towards the erection of the fence. In essence the respondent threatened to take the law into its own hands, instead of referring the encroachment dispute to court.

[25] The papers of the applicant evinces that the applicant took the threat of the respondent to remove the fence very seriously. The Applicant then sought an undertaking from the respondent that he was not going to take the law into his own hands. According to the applicant, when the undertaking was not forthcoming from the respondent; it was forced to approach the court seeking an interdict restraining such threatened conduct.

[26] In general, a legal wrong cannot be remedied by resorting to taking the law into your own hands. Evidently, the respondent's threat to take the law into its own hands and to send people to remove the fence, was a good enough reason to fear and reasonably apprehend that such action won't be void of harm. Thus, the threatened and imminent invasion of the applicant's right in the property constituted proof of reasonably apprehended injury. As a result I am convinced that the fear was justified and well grounded. It was incumbent upon the applicant to protect its clear right, from a conduct which had a potential of falling afoul of the law. At the same time, preventing the respondent from conducting itself in a manner that involves a violation of the law.

Lack of adequate remedy

[27] The question which begs is whether there is another alternative for the applicant to avert harm.

[28] In the light of the fact that the respondent's threat to take the law into his own hands and remove the encroachment itself, and the respondent's failure to make an undertaking not to take any steps towards the removal of the fence; the applicant was forced to apply to court for an Interdict prohibiting such threatened conduct.

[29] Moreover, despite several negotiations, before the commencement of the hearing the parties could not reach agreement. Clearly, there is no other alternative relief available to the applicant other than an interdict, to provide the applicant with the necessary protection.

[30] From the aforegoing it is evident that the applicant has made out a case to justify the court in granting a final interdict to restrain the respondent from taking the law into his own hand.

Reconsideration of the order granted during the original court

[31] What remains to be considered is the reconsideration of the initial court order. In granting the final order; this court engrafted additions to the order issued in the absence of the respondent, by appending the words 'without a court order'.

[32] During the hearing of this application, it was strenuously argued on behalf of the respondent that the court cannot amend the order which was granted by the original court. The case law is replete with authorities that state that, if an order is granted during urgent proceedings in the absence of a party affected by it, ; in terms of Rule 6 (12) of the Uniform Rule of the Court, the court is free to reconsider the order initially granted in the widest sense, (See *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others* 1996 (4) SA 484 (W) at 486H-487A-C; *Oosthuizen v MIJS* 2009 (6) SA 266at 269B-G;).

[33] In the case at hand, an interim interdict was issued *ex parte* in order to maintain the *status quo* before both parties can be heard. The respondent anticipated the return date and set the matter down seeking the setting aside of the *ex parte* relief granted against it. Additionally, the respondent set the application down for hearing and filed an answering affidavit.

[34] Having considered both versions proffered by the parties during the hearing, the court was of the view that the original order in its current form was going to be prejudicial to the respondent, hence the amendment was added.

[35] In my view, in considering the purpose of Rule 6 (12) (*c*), there is no question that the circumstances of this matter fall squarely within the ambit of Rule 6 (12) (*c*). It is an important factor to consider that, the notice which was filed by the respondent on 27 July 2022, to anticipate the return date, is headed 'notice in terms of Rule 6(8) and Rule 6(12) (*c*)'. Keeping in mind that the respondent's notice in terms of Rule 6

(8) is read with the provisions of Rule 6 (12) (c); it is rather odd that the respondent would object to the court reconsidering the original order. Clearly, the notice filed by the respondent reaffirms that the provisions of Rule 6 (12) (*c*) are fully applicable in this matter.

[36] It is for these aforegoing reasons that I concluded the way I did on 29 July 2022.

CN NZIWENI
Acting Judge of the High Court

Appearances

Counsel for the Applicant		Adv C Fehr
Instructed by		**Erleigh & Associates Inc.** **D Erleigh**
Counsel for Respondent	:	Adv S Fuller
Instructed by		**Slabbert Venter Yanoutsos** **Ms Burger**