

NEIGHBOUR TO REMOVE 78 CM² OF AN ENCROACHING ROOF***Pillay and Another v Moonsamy and Another (D6707/21) [2024] ZAKZDHC 35 (5 June 2024)***

It is alarming that a dispute between neighbours regarding a relatively negligible encroachment should reach a high court. Nonetheless, the underlying legal principles for assisting an applicant are sound, as the discussion of the law in this judgment reflects. In addition, although a court has the discretion not to order demolition but instead to award compensation, this decision must be supported by cogent argument, failing which demolition will be the outcome.

The [judgment](#) and summary below highlight the reasoning of the court.

FACTS

Mr and Mrs Pillay were neighbours of Mr and Mrs Moonsamy. The Pillays brought this application for an order declaring that the Moonsamys' boundary roof between their properties, encroached upon their property and that the encroachment had to be removed.

The Pillays maintained that the encroachment was a nuisance and had impacted upon their use and enjoyment of their property. They had appointed a professional land surveyor to inspect the property and it was confirmed that the roof encroachment spans 78 square centimetres.

The Moonsamys defended the matter and argued that the roof was erected during 2007, before they owned the property. According to the municipality, the buildings were erected in accordance with plans approved by the municipality. As such, they argued, they could not be held responsible for the encroachment.

HELD

- It is trite that the registered owner of immovable property enjoys all the rights, responsibilities and liabilities accruing to such property. As such, the benefit of historical improvements to the property, by its previous owners, would accrue to its current owner. Similarly, the liabilities resulting from historical alterations to the property will, *vis-à-vis* third parties, accrue to its current owner, regardless of who had affected such alterations.
- As registered owners, the Moonsamys are liable to correct the encroachment upon the Pillays' property. It is in any event clear that no action or process against any other third party would provide the Pillays with the relief necessary to correct the encroachment. As the registered owners, the Moonsamys are the only persons who can be compelled to demolish the boundary wall.
- In *Mbane v Gxenyi* it was held that a mandatory interdict is available to a neighbour to compel the removal of an encroachment. This derives from the common law duty which a landowner owes to his adjoining landowner. That court described this duty as an obligation not to deprive a neighbour of possession or wrongfully to exclude him from the possession of what belongs to him.
- In recent years the question whether a court should, in the exercise of its discretion, order compensation instead of demolition. This is an issue to consider in the context of matters such as the present. In these instances, the deciding factor is the disproportionality or otherwise between the removal of the encroachment as against the damage or inconvenience suffered by the aggrieved landowner. When compensation rather than demolition or removal is ordered, it is usually done on the basis of policy considerations such as an unreasonable delay on the part of the landowner, or on the basis of what might be viewed as acquiescence, and prejudice.
- In the present matter the facts showed that, as soon as the Pillays became aware of the encroachment, they sought its removal. The Moonsamys refused to heed to the request and offered no acceptable or meaningful

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| SUMMARY OF JUDGMENT |

suggestion to address the problem. No party made any meaningful submissions that damages would be a better route.

- Clearly the Moonsamys are in breach of the law. For the court to allow them to keep the structures as is, would be to perpetuate the wrongfulness and thus result in a dangerous precedent in that it would negate the very purpose of orderly urban living and building that respect property boundaries.
- However, on hearing the parties' respective counsel on the question of damages as opposed to ordering removal, it is clear that the only way to resolve the harm caused by the encroachment would be for its removal.

CONCLUSION

The encroachment does have a negative impact on the Pillays' use and enjoyment of their property and therefore the application to compel the removal of such encroachment, is granted.