

## ANOTHER DEMOLITION OF ENCROACHING BUILDING ORDERED

### Bet-el Faith Mission v Motthamme and Others

We have often before reported on case law where owners were ordered to demolish buildings built without municipal approval. This matter deals with a related scenario where demolition is sought of an encroaching building that was built without municipal building plan approval. It is a valuable read as the Court highlights that where encroachment is the only problem, there exists a discretion to either order the removal of the encroachment or to award damages and compensation, depending on certain considerations. However, where the building is also built illegally, without municipal approval there is little discretion as the Court will not condone an illegality.

The Judgment can be viewed [here](#).

### FACTS

Mr Motthamme owned a property adjacent to land owned by the Bet-el Faith Mission ('the Mission'). In 1998 Mr Motthamme replaced an existing wire fence on the Mission's erf with a brick and steel fence in the *bona fide* belief that the fence denoted the true boundary between the two erven. Then, when a car damaged his home in 2004, he repaired and expanded the house by building a brick garage which, unknown to him, was partly situated on the Mission's property. He did not submit building plans to the Mangaung Municipality (the Municipality), and had no permission to build.

It became apparent later on that the fence was not on the true boundary. Another neighbour of the Mission, Mr Beans, had also erroneously erected a structure which encroached on the Mission's land.

The Mission subsequently approached both Mr Beans and Mr Motthamme and requested that they remove the encroaching structures. Mr Beans complied with the request in 2012, but Motthamme refused. In 2015 criminal proceedings were instituted against Mr Motthamme in the Magistrates' Court for non-compliance with the provisions of the National Building Regulations and Building Standards Act ('the Act'). These were unsuccessful due to a discrepancy in the erf numbers on the charge sheet.

The Mission then approached the Municipality, for assistance. The latter issued a Notice in terms of the Act, notifying Motthamme of the illegal building on his property which encroached on the Mission's property. The Notice explicitly stated that the garage was erected "*illegally without any written permission from this department or any approved building plans ...and do encroach on ...*". He was accordingly instructed to demolish the building that encroached on the Mission's property.

Mr Motthamme simply refused to receive the Notice and refused to remove the encroaching garage. It was a fact that Mr Motthamme's son had approached the Mission on numerous occasions, offering to compensate it to have the relevant land transferred into his father's name.

The Mission therefore applied to Court for an order that Mr Motthamme must be obliged to demolish the garage which encroached onto its property. Mr Motthamme opposed the application and sought an order to pay reasonable compensation to the Mission and to have the portion of the Mission's land, on which the garage encroached, transferred to him.

The Mission did not want to accept compensation *in lieu* of its land as it had plans to increase the size of the church and to add more parking bays. Mr Motthamme however argued that he had been under the *bona fide* belief that the garage was built on his land and was not aware of any encroachment. Motthamme argued further that the Mission

had acquiesced in their occupation of the relevant land because it did not object when he built the wall on the church ground and did not complain when he built the 'offending' garage in 2004, and should therefore be estopped from demanding demolition.

## HELD

### ***Encroachment***

- Encroachment is not to be construed as a type of nuisance: it is an unlawful act. The encroacher unlawfully interferes with the neighbour's use of his land without having a right to do so. Equity or fairness only becomes an issue when the owner of the land claims removal of the encroachment and the court has to exercise its discretion to order such removal or to award compensation.
- Mr Motthamme's allegation that the Mission had known for about 20 years that they had built the garage and had had free and undisturbed possession of it all along held no water. It disregarded the fact that the Mission had asked him to remove the structure in 2012; instituted criminal proceedings against him in 2014, which proceedings only failed because of the discrepancy regarding the erf numbers; requested the Municipality to order them to demolish the illegal structure, which 2016 notification he ignored; and instituted the present application for demolition in 2017. This is definitely not the type of conduct that can be described as acquiescence.
- It was clear from the papers, furthermore, that there had been lengthy attempts to settle the dispute and there was no evidence that Mr Motthamme disputed the accuracy of the boundaries. In fact, on his own admission, he offered to purchase the land on which his garage encroached.
- As is evident from the Municipality's letter to Mr Motthamme, besides having been erected illegally without an approved building plan in contravention of the Act (which constitutes a criminal offence), an inspection proved the garage to encroach onto the Mission's land. It also extended over a servitude on the Mission's erf. It further contravened the restriction registered against his own property by being built over the 3.15m wide servitude encasing his own property on three sides. Therefore, even if Mr Motthamme was to be allowed to acquire the land from the Mission against compensation, the structure would remain illegal since it is built over the existing servitude in direct contradiction of the restriction registered against both erven.
- South African law has always carefully protected the right of ownership, especially of immovable property, as a most important and extensive right. It has been stated, in another case, that: "It is indisputable that an encroachment of the nature in issue ... constitutes an interference with applicant's property rights, such as to constitute a deprivation in terms of the provisions of section 25 of the Constitution. It follows that, in exercising its discretion the Court will accept, as a starting point, that the owner is entitled to obtain a demolishing order in respect of the encroaching structure. The primary remedy therefore is an order for removal of the structure."
- *Where encroachment is the only problem*, the Court has a discretion to either order the removal of the encroachment or to award damages and compensation. In such 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 land-owner. When compensation rather than demolition 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 and the principles of neighbour law are taken into account.
- However, *where a building not only unlawfully encroaches, but was also unlawfully built in contravention of the Act or building regulations or built without the plans having been approved by the municipality*, as in this

matter, different considerations apply. That is so because the law is clear that a court cannot condone illegal activity. As it was clear that the encroaching structure had been erected unlawfully without any approved building plans as required by the Act, the structure was both judicially and administratively an unlawful addition in terms of the Act and entitled the Mission to seek an order to have it demolished.

- In applying the disproportionality of prejudice test, the encroaching owner's own conduct plays an important role. The Court remains acutely aware of the financial implications, inconvenience and disruption which the partial demolition will cause Mr Motthamme, but the upholding of the doctrine of legality, a fundamental component of the rule of law, must inevitably trump such personal considerations.
- Despite the court's discretion to reach an equitable and reasonable solution in terms of the common law by ordering payment or compensation rather than removal in cases where the cost of removal would be disproportionate to the benefit derived from the removal, what tips the scale against a respondent is his actions. Mr Motthamme, in the present case, instead of complying with the instructions to demolish, engaged in obstructive behaviour to delay the finalisation of the litigation while persisting with his illegal conduct.

## CONCLUSION

Thus, in view of the particular circumstances of this case, the application for the partial demolition of the encroachment succeeded.