IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

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

....
DATE SIGNATURE

Case no: 2010/44337

SHAUN ROSEVEARE Plaintiff

and

YUKSEL KATMER Defendant

Case no: **2010/41862**

YUKSEL KATMER Applicant

and

SHAUN ROSEVEARE First Respondent

SHAUN ROSEVEARE N.O. Second Respondent

JUDGMENT

WILLIS J:

[1] This trial has been referred to by counsel for both parties as the 'cherry tree case'. It is an apt description. The trial action in fact concerns two cases that were consolidated and heard in a single trial. In the case of *Botha v Dos Santos and Another*[1] I delivered a judgment concerning 'sonde met die bure'[2] in a neighbouring suburb of Parktown. C.J. Langenhoven, aided by his fictional character, Herrie, immortalised this expression of 'sonde met die bure'. One cannot help wondering whether Langenhoven could have imagined that his description of relations with one's neighbours would be considered so apt in this disputed issue which focuses upon a cherry tree standing on the boundary of next-door neighbours living in the northern suburbs of Johannesburg.

[2] The plaintiff's property, 15B Fifth Street, Houghton Estate, is owned by a trust of which he is the sole trustee. The trust and Shaun Roseveare

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[1] [2005] ZAGPHC 362; 31356/04 SGHC

[2] Somewhat imperfectly and rather too blandly translated, this means: 'trouble with the neighbours'.

have been cited by the defendant as joint parties. It will be simpler to refer to Shaun Roseveare as 'the plaintiff' and his co-plaintiff as 'the trust'. The plaintiff's next-door neighbour is the defendant. She lives at no. 15. The defendant subdivided her property and sold a vacant stand to the trust (represented by the plaintiff). The plaintiff built a house at the aforementioned address. The defendant sold the property to the plaintiff in December 2006. The property owned by the trust is more formally known as Portion 2 of Erf 2499, Houghton Estate, the defendant's as the Remaining Portion of Erf 2499, Houghton Estate.

[3] The defendant convincingly described how she was rudely disturbed on the morning of 8 October 2010 by the sound of the plaintiff's workers were knocking down the wall between the plaintiff's property and her own. After a hectic altercation involving the plaintiff, the plaintiff's workers and the defendant, work on the demolition of the wall was temporarily halted. The defendant telephoned her attorney, who phoned the plaintiff's builder and asked him to stop knocking down the boundary wall. On the same day the defendant brought an urgent application, under case no. 2010/41862, for an interdict to restrain the plaintiff from proceeding with the demolition. The plaintiff opposed the application and brought a counter-application to restrain the defendant from being a nuisance, *inter alia*, by keeping noisy peacocks in her garden which frequently trespassed on to his property.

[4] At court that afternoon the parties reached an interim agreement in terms of which the plaintiff would stop knocking down the boundary wall. Later, the plaintiff brought a separate action, under case no. 44337/2010, against the defendant in which he claimed certain relief against her based

upon her encroachment on his property. By agreement between the parties the defendant's urgent application (together with the counter-application) and the encroachment action were consolidated into a single trial action. During the December 2010 that part of the wall knocked through was rebuilt by the defendant. At the end of the trial the plaintiff sought to amend his particulars of claim. That amendment was opposed by the defendant. The proposed amendment would have no bearing on the ultimate decision in this case. Therefore, no decision is made in regard to the plaintiff's application to amend.

[5] The unchallenged and incontestable evidence of Mr Stephen Shires the land surveyor who gave evidence as an expert for the plaintiff was that the wall built as a boundary between the properties of the plaintiff and the defendant encroached upon the plaintiff's property by a width, the extent of which constituted 0.5 to 2 metres. The total surface area amounts to some 20 square metres. That boundary wall had been built at the behest of the defendant before she sold the property to the plaintiff. The plaintiff convincingly described how he had only discovered the encroachment when the builder, who had built his house, could not obtain a true reading from the boundary in order to construct certain features of the plaintiff's house. This evidence of the plaintiff was corroborated by that of the land surveyor as well as that of the builder, Mr William Hawkins.

[6] The boundary wall contains a 'kink' which surrounds a large cheery tree. It is about 15 to 20 metres high. The cherry tree has, by reason of this 'kink,' been appropriated into the property of the defendant. The evidence of the land surveyor is that cherry tree falls within the surveyed property of the plaintiff, but only just. The roots of the cherry tree extend

into the property of both parties. This was also clearly apparent when an inspection *in loco* was held at both properties at the request of the parties from both sides.

[7] During the inspection *in loco* this 'kink' in the wall surrounding the cherry tree was patently unsightly when viewed from the plaintiff's property. This was especially the case when the 'kink' was seen from the upstairs bedroom areas, including the upper balcony. On the defendant's side of the property, there is a forest of trees in front of the cherry tree such that its trunk and the surrounding 'kink' are barely visible, particularly if one sits on the defendant's verandah, sipping coffee and nibbling upon Turkish delights (and other similar delicacies) to which the full contingent of the court, including the parties, together with counsel, pupils at the Bar, attorneys and clerks were treated during the inspection.[3]

[8] The cherry tree in question is much loved by both the plaintiff and the defendant. The plaintiff said in evidenced that he would willingly agree to an order restraining him from cutting it down. The defendant said that when she died or if she ever sold her property, she would be very happy for the plaintiff to have the tree. In the popular imagination, chopping cherry trees down borders on being heinous. Perhaps this has to do with Mason Locke Weems immortalising the story of the first president of the United States of America, George Washington, chopping down a cherry

[3] The defendant gave evidence that she is now in her sixties but that in her youth she had been a *cause célèbre* as a hugely popular singer and entertainer in her home country of Turkey. Time and chance brought her to Johannesburg in 1999. She has settled here. Jo'burgers may be charmed to know that she considers Houghton to be a rustic idyll. In the opinion of the defendant, the grander suburbs of her native Istanbul cannot compare with Houghton's tranquil atmosphere. During the inspection *in loco* she showed us photographs of herself with many famous people. I hope that she will not take it amiss when I say that her popularity is quite understandable just by having regard to her beauty. Living in a beautiful home, surrounded by fine art and antiques, she is today a *grande dame*.

tree and, when confronted by his father, confessing: 'Father, I cannot tell a lie; Pa, you know I can't tell a lie. I did it with my hatchet'.[4]

[9] The agreement of sale concluded between the parties contains an Annexure 'A' which contains the following, upon which the defendant relied:

> 1...(irrelevant portions deleted) The maintenance agreement referred to above (relating to the entrance gate-5th Street frontage, the driveway, the driveway walls and shared services) shall be registered by the owners of portion 1/2449 and portion 2/2449 Houghton Estate on the title deeds of both properties and shall be in force in perpetuity...
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> 2. The Purchaser agrees to brick up the part of the existing wall on the east side of portion2/2449 Houghton Estate where there is presently an inter-leading door...
>
> 3...
>
> 4. The Purchaser is aware that the east boundary wall of portion 2/2449 Houghton Estate has a slight deviation to protect a boundary tree and accepts the boundary wall as it stands.

[10] The defendant relies on these clauses in Annexure 'A' to contend that the plaintiff had agreed that the 'kink' in the boundary wall around the cherry tree would remain in perpetuity. Mr *Cohen*, who appeared for the plaintiff submitted that the clause 4 was void for vagueness. Even if it

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[4] Mason Locke Weems wrote the first biography of George Washington, *Life of George Washington; with Curious Anecdotes, Equally Honorable to Himself, and Exemplary to His Young Countrymen*. The biography was first published in 1800 and was republished 82 times, including translations into French and German. It seems that, alas, the story is fabrication. Weems, a pastor, was also a shrewd businessman with a keen sense of what the public wanted. The 'sin' of telling a lie was that of Weems himself. Weems has probably been forgiven by subsequent generations for telling such a good and memorable story about a hero. Why spoil a good story for the sake of the truth? See, for example: http://suite101.com/article/WashintonsCherryTree-a954

is not void for vagueness it means, at best for the defendant, merely that the plaintiff would not call upon the defendant to rectify the 'kink'. It does not mean, as does the maintenance agreement in clause 1, that the plaintiff would have to endure this kink in perpetuity.

[11] The plaintiff said that he had visited the defendant on two occasions to discuss straightening the wall where the cherry tree stands. He had understood her to have agreed to the existing wall being knocked down and being straightened. The second occasion was a few months before the fateful day on which the urgent application had been brought. On the second occasion, he went to visit the defendant with his builder, Mr Hawkins.

[12] Mr Hawkins was less certain than the plaintiff as to the nature of the agreement reached. The defendant's daughter had been at the house at the time. Both the defendant and her daughter were cross–examined at length about the question of an agreement having been reached for the wall around the cherry tree to be brought down. The defendant's daughter, Arzu, conceded that she may not have been present throughout the discussion as she had a young child requiring attention. Arzu was clear that, in her mind, knowing her mother as she did, no such agreement could have been reached. The defendant was convincingly adamant that she had not reached the agreement contended for by the plaintiff. The best that can be said for the plaintiff is that he misunderstood the defendant. Her command of English is not excellent. She availed of an interpreter when she gave evidence.

[13] The plaintiff said that the peacocks, which he was convinced said belonged to the defendant, had damaged his expensive vehicles by

pecking at them when they saw themselves reflected in the rear-view mirrors and highly polished metal surfaces of his motor cars. He said that they continually caused a mess in his garden and disturbed his peace with their cries. The defendant's case was that the peacocks were feral, having escaped from other neighbours' properties and that she had no control over them. It is common cause that keeping peacocks without permits constitutes a contravention of the relevant municipal by-laws. When we held the inspection *in loco*, a large ostentation of peacocks paraded around the defendant's garden. Their wings appeared clipped. If one is may judge from the manner in which, with heads tilted to one side, they waited expectantly for tasty morsels from her sumptuous garden table, they were quite tame. The population of peacocks in her garden was not 'broadly representative' of the species: there were uncomfortably too many males. One need not even be 'politically correct' to come to this conclusion.

[14] The defendant is an entrepreneurial young man. He has made and is likely to continue generate considerable wealth for himself through his air-freight business that operates throughout the continent of Africa. The defendant protested that she is in straitened financial circumstances. This, she said is reason that she subdivided her property in Houghton and sold off two plots. It seems that it may be more accurate to describe her financial circumstances as 'constrained' rather than 'straitened'.

[15] It has been clear since the case of *Hornby v Municipality of Roodeberg-Maraisburg and Arthur*[5] that the court has a discretion to award damages for an encroachment rather than a demolition thereof. I am in respectful agreement with the approach of Griesel J in *Trustees,*

[5] 1918 AD 278 at 296-7. See also the judgment of Innes CJ at 290

Brian Lackey Trust v Annandale[6] that a court has a wide, general discretion – in appropriate circumstances – to award damages instead of demolition in respect of encroachments.[7]

[16] If one travels along the boundary wall between the respective properties of the plaintiff and the defendant, the encroachment up until one reaches the 'kink' around the cherry tree is so minor that it would not make sense to order its demolition. The 'kink' around the cherry tree is so intrusive that it must be pulled down. Travelling further north along the boundary wall, after the 'kink', until the end of the plaintiff's property, the encroachment is not insignificant in terms of the degrees of longitude by which it 'trespasses' into the plaintiff's property. The length of the wall, after the 'kink', until the end of the property is not more than two metres.

[17] Having regard to the principles of reasonableness and fairness set out in *Regal v African Superslate (Pty) Limited*,[8] I am satisfied that the peacocks coming into the plaintiff's garden are a nuisance for which he is entitled to redress.

[18] What is to be done? The nature of the dispute between the parties is similar to those which arise in the Small Claims Court. All that is different is that the litigants in this case have more money than the typical claimant in the Small Claims Court. Scott Fitzgerald is reputed to have said to Ernest Hemingway, 'You know, Ernest, the rich are different from you and me'. The story goes that Hemingway replied, 'Yes. They've got

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[6] 2004 (3) SA 281 (C). See also *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club* 2007 (2) SA 40 (C) at 43.
[7] At 291H-292B
[8] 1963 (1) SA 102 (A) at 111F-G; and H *ad fin*; 112 A-B; 114D-E

more money'.[9] As someone who was, for many years, both a commissioner in the Small Claims Court[10] and a mediator at both IMSSA (the Independent Mediation Service of South Africa) and the CCMA (the Commission for Conciliation, Mediation and Arbitration) before my appointment to the bench, I have applied my mind to the question of whether a little 'judicial imagination' may be appropriate in making the order in this case. Is there a way in which one can resolve this dispute that is correct and defensible as a matter of law but is one which, as an instrument of conflict resolution, 'sonde met die bure' may be transformed into 'vrede met die bure'?[11]

[19] In *Kent v Transvaalsche Bank*[12] Innes CJ said:

> The court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word 'equity' in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all.[13]

I, like Griesel J, am mindful of the admonition expressed by Van den Heever JA in *Preller v Jordaan*:[14]

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[9] See, for example, McCloskey, D. 2008. 'You know, Ernest, the rich are different from you and me': a comment on Clark's *A Farewell to Alms*. In *European Review of Economic History*, Cambridge University Press **12**, 138-148.

[10] In our training as commissioners we were encouraged not to be too fastidious about legal niceties in the Small Claims Court but rather to find broadly equitable solutions.

[11] 'Vrede met die bure' means 'Peace with the neighbours'.

[12] 1907 TS 765

[13] At 774. Especially useful articles dealing with the legal conundrum created by encroachments are to be found in the following: Milton, J.R. L. 1968 'The Law of Neighbours in South Africa'. In *Acta Juridica* 123; Cillers J.B. and Van der Merwe C.G.1994. 'The "year and a day rule" in South African law: do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?' In *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*THRHR*) **57** 587-595**.** See, also Badenhorst, P.J. Pienaar, J.M. and Mostert, H. 2006 *Silberberg and Schoeman's The Law of Property*, 5th Edition, LexisNexis Butterworths: Durban at 121-127.

[14] 1956 (1) SA 483 (A)

> 'n Regter wat volgens sy gesonde verstand, na goeddunk en sonder regsreëls kan oordeel te vrese is as honde en slange.[15]
>
> (More to be afraid of than snakes and dogs is a judge who decides matters not according to law but rather his own sense of what is right and fair.)

[20] In *Cosmos (Pvt.) Limited v Phillipson*[16] Young J, after extolling the neighbourly principle of toleration set out by the court in the case of *Malherbe v Ceres Municipality*[17] and interpreting it to mean 'give and take' and 'live and let live'[18]said:[19]

> It seems to me that in this field the judgment does not subsume a particular case under a given law or concept, but rather that the appropriate category is determined according to certain principles which may sometimes produce an antinomy.[20] In the case of adjoining owners the relevant principles are, I think, expressed in the legal maxims: (i) *qui jure suo utitur neminem laedit*;[21] (ii) *sic utere tuo ut alienum non laedas*;[22] (iii) *prohibetur ne quis faciat in suo quod nocere possit alieno*;[23] (iv) *de minimis lex non curat*[24] or, as it is more often expressed in this field, *lex non favet votis delicatorum*.[25]

Young J went on to say:

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[15] At 550G-H; see Griesel J's remarks in the case of *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) at 292B
[16] 1968 (3) SA 121 (R)
[17] 1951 (4) SA 510 (A)
[18] At 125H
[19] At 126A-B
[20] A legally imperfect, even brittle solution but one which is morally correct, derived as a matter of grace.
[21] A person who exercises his or her legal rights causes no one any harm (my translation).
[22] Use what is yours in such a way so as not to harm others (my translation).
[23] It is unlawful to build upon one's own land in such a way as to cause distress to another (my translation).
[24] The law is not concerned with trifling matters (my translation).
[25] The law does not favour the wishes of the overly fastidious (my translation.)

> In my judgment, modern conditions require the exercise of a wide discretion in the adjustment of neighbour relationships, and there is power in the court to meet the situation.[26]

I respectfully agree with Young J. This judgment was approved by Hattingh J in *Rand Waterraad v Bothma en 'n Ander*.[27] Hattingh J's judgment was referred to with approval in *Lombard and Another v Fischer an Another*[28] and *Trustees, Brian Lackey Trust v Annandale*.[29] The principles of our Roman-Dutch common law allow for a broadly equitable solution in a case such as this.

[21] The plaintiff said he would have no objection to there being an interdict restraining him from chopping down the cherry tree. An order to this effect should calm the fears of the defendant. The plaintiff had originally been quite happy, at his own expense, to pull down the wall and straighten it around the cherry tree. As he seems to have ample means to do so now, it is best that he should do at his own expense. This will spare him relying on the defendant. Moreover, as the defendant claims to be short of funds, this will be equitable. The plaintiff said in evidence that he would be quite happy to erect the wall on a lintel to protect the roots of the cherry tree.

[22] In order to protect himself in the event that he sells his property to someone else, the plaintiff should register a servitude to cover the very small remaining encroachment. My order shall enable him to do so. Insofar as the removal of the peacocks is concerned, my experience over the years with the City of Johannesburg is that they are unlikely to attend

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[26] At 130A
[27] 1997 (3) SA 120 (O) at 137J-138b
[28] [2003] 1 All SA 698 (O) at 700a-e
[29] (*supra*) at 289B

to the matter within a reasonable time. The order will cater for any dilatoriness on the part of the City of Johannesburg.

[23] The plaintiff had to come to court in order to obtain substantive relief. Ordinarily, he would be entitled to costs. The plaintiff's rude awakening of the defendant on 8 October 2010, justified the defendant's bringing of the urgent application. In all the circumstances, it will be equitable to order each party to pay his or her own costs in this dispute.

[24] The following is the order of the court:

1. The plaintiff is interdicted from removing and/or cutting down the cherry tree as depicted by the symbol "X" on the attached diagram marked 'A' (see overleaf).

2. The plaintiff may rebuild and straighten the portion of the existing boundary wall where it deviates as depicted by the co-ordinates A, B, C and D on the attached diagram attached marked 'A' ('the kink') at his own cost. The height of the wall so constructed is to be at the same height as the existing height of the boundary wall.

3. The defendant shall remove all trees and/or branches on her property at her cost, which will interfere with the orders above.

4. The portion of the wall to be built as provided for above shall be constructed and erected on a lintel to be built above the exposed roots of the existing cherry tree as depicted by the letter 'X' on the plan attached marked 'A' so that the roots are not damaged.

5. A wire mesh and/or similar type of protection is be installed by the plaintiff in the space between the lintel referred to above and the ground surface so as to prevent the ingress and/or egress of animals and/or birds from the plaintiff property to the defendant's property and *vice-versa.*

6. Travelling further north along the boundary wall, after the 'kink', until the end of the plaintiff's property, the plaintiff may rebuild and straighten the remaining length of the wall to remove any encroachment.

7. The defendant is to give the plaintiff and/or his building contractors access to her property insofar as may be necessary to carry out the aforementioned building works.

8. The plaintiff is to register a servitude in favour of the defendant in respect of the remaining area of the encroachment on portion 2 of erf 2499, but subject to the costs of sub-division, including all diagrams and all documents necessary to effect such servitude be borne by the plaintiff.

9. The plaintiff in the exercise his rights in terms of the by-laws of the City of Johannesburg (Greater Johannesburg Metropolitan Council) to ensure the removal of peacocks and peahens that enter upon his property and, upon the plaintiff's request to the City of Johannesburg to remove the peacocks and/or peahens that enter upon plaintiff's property, the City of Johannesburg is authorised to do so, and failing

them, the SPCA (the Society for the Prevention of Cruelty to Animals) and failing and them, any other similar organisation may so remove the peacocks and peahens.

10. Those who remove the peacocks and peahens as aforesaid should first endeavour to find the peacocks and peahens good and lawful homes and may sell them to defray their reasonable expenses relating to the capture, transport and storage of the peacocks and peahens.

11. The parties are to bear their own costs in the consolidated action, including all costs previously incurred in their separate applications and actions in the current dispute between them.

DATED AT JOHANNESBURG THIS 28th DAY OF FEBRUARY 2013

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N. P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv *R.G. Cohen*

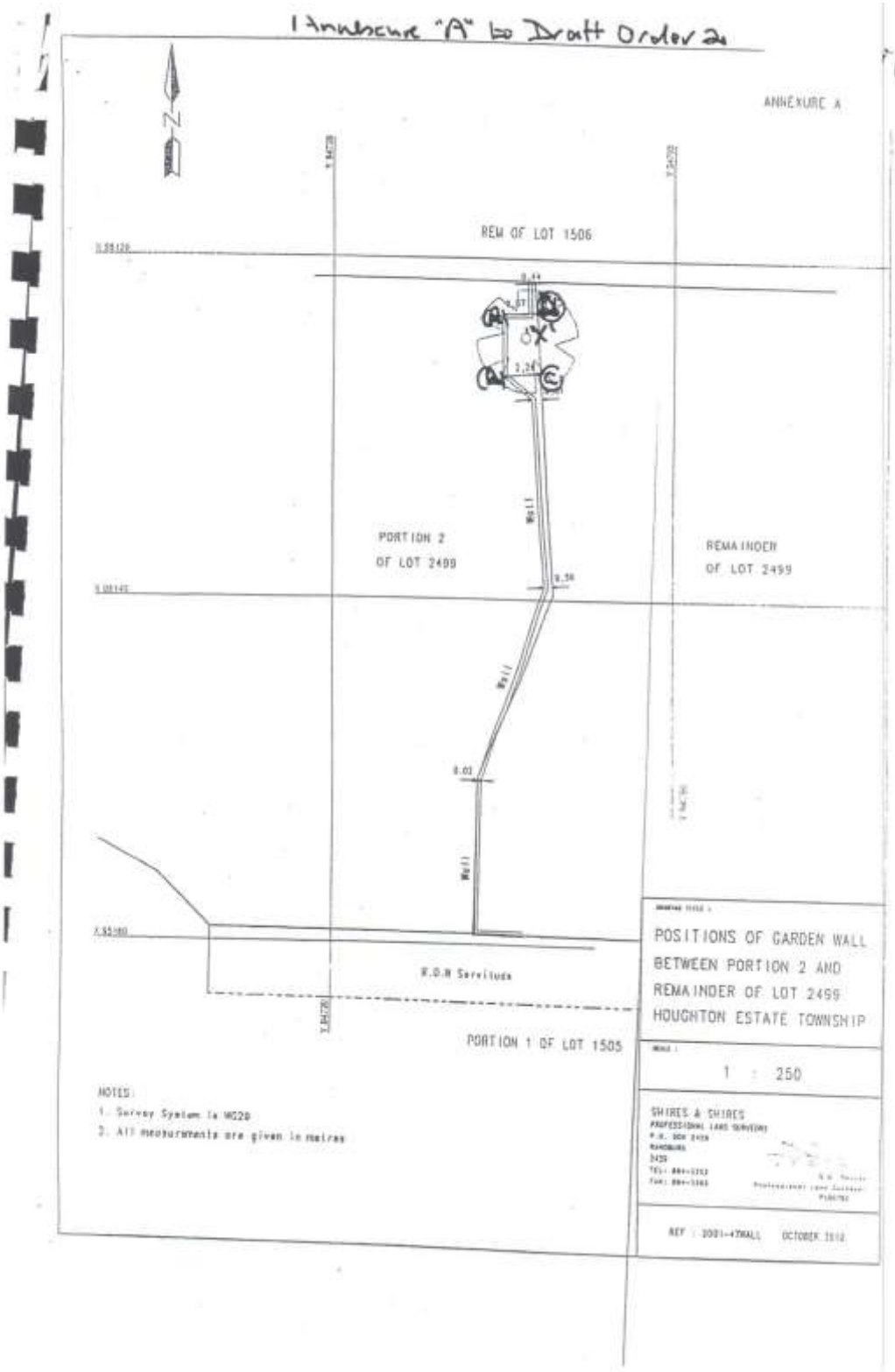
Counsel for the Defendant: Adv *R.J. Stevenson*

Attorney for the Plaintiff: Glynis Cohen

Attorney for the Defendant: Marie-Lou Bester

Dates of hearing: 5-8; 14 February 2013

Date of judgment: 28 February 2013


Annexure "A" to Draft Order 2a
ANNEXURE A
REM OF LOT 1506
PORTION 2
OF LOT 2499
REMAINDER
OF LOT 2499
Wall
Wall
Wall
R.O.W Servitude
PORTION 1 OF LOT 1505
NOTES:
1. Survey System is WGS84
2. All measurements are given in metres
POSITIONS OF GARDEN WALL
BETWEEN PORTION 2 AND
REMAINDER OF LOT 2499
HOUGHTON ESTATE TOWNSHIP
1 : 250
SHIRES & SHIRES
PROFESSIONAL LAND SURVEYORS
REF : 2021-47WALL OCTOBER 2021