

Party Walls: When neighbours don't see eye to eye

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INTRODUCTION

A party wall is generally described as a wall or fence erected on, above or over the physical boundary between two properties.¹ Party walls have become a topic of importance in modern day suburbia. With the burgeoning population and proliferation of privately owned urban property ownership in South Africa today, the number of "wall disputes" are blossoming concomitantly.

This article will explain what a party wall is, the varying legal theories regarding same and the rights and remedies of a prejudiced property owner in relation to common boundary walls.

CONCEPTUALIZING THE TERM "PARTY WALL"

Myth busting: Ownership of walls

A common misconception in neighbour law is that the rights of owners in relation to a party wall are derived from which owner erected the wall or fence, or what the intention of the property owner was when it was erected. Both of these are irrelevant in the majority of circumstances.

In *Dorland and Another v Smits*² the court defined a party wall as "one which stands partly on one property and partly on the adjoining property". There is no reference to who constructed the wall or for what purpose in this definition.

In the absence of proof that a boundary wall is wholly on one or other property, ownership is ordinarily presumed to be shared. If ownership is shared, neither owner may do anything to the wall without their neighbour's consent (this includes raising the wall, lowering it, or breaking it down). If the structure is damaged in any way, both neighbours must share the cost of repair.³

Assumption of positioning of party walls

Our law provides that unless there is any evidence to the contrary, a wall that forms the boundary between two properties is deemed to be built across both pieces

of land. This assumption, however, can be disproven by evidence showing that the property is built only on one person's land.⁴

Property boundaries

Although a wall or fence is often an indicator of the dividing line where one property ends and another begins, it is vital to understand precisely where the boundary of the property lies because the type of wall will determine which legal principles apply to the dispute. Party walls (which straddle two pieces of land) are dealt with differently to walls/fences built solely on one neighbour's land. In order to be sure whether you are dealing with a party wall or another type of wall, you may need to have a surveyor check the boundaries of the property as registered in the Deeds Office.

Rights and Remedies flowing from a party wall

The nature of a party wall and a neighbouring owners' rights are somewhat unclear in South African law. There are two schools of thought on the nature of party walls.

The one school of thought holds the view that neighbouring landowners are bound co-owners of the wall. This means two neighbouring landowners are co-owners of the fence built or erected on the boundary between their properties. Academics that subscribe to this school of thought are of the opinion that a special relationship is established once the parties become neighbours and occupy adjoining properties, and the relationship terminates when either party ceases to occupy or sells the property.

The co-ownership school of thought neatly explains why one co-owner of the wall cannot alienate their co-ownership interest in the wall separately from ownership of the land. This theory also explains conveniently why conversely, when a property owner does alienate their land upon which part of a party wall is built to a new owner, the (old) owner automatically transfers their co-ownership of their interest in the wall to the new owner of the land.⁵

In accordance with this school of thought, the co-owners have full entitlements of use and enjoyment of the party wall or fence but they can only utilize it in a way that does not prejudice the other neighbour.

Use of the party wall that affects the wall as a whole can only be undertaken with both neighbour's consent, unless it is an emergency and immediate action is necessary. Additionally, neither neighbour is allowed to demolish the party wall without the other's consent.

The title deeds of properties may indicate who is responsible for repairing of shared walls, for example, a servitude contained in the title deed may make one owner entirely liable for the costs of upkeep or repair.

If the title deeds do not indicate this, the norm is that both parties are obliged to make equal, reasonable contributions to the cost of repairs, maintenance or replacement of a damaged or destroyed party wall or fence, unless the contribution towards maintenance or repairs is seen as unreasonable.

Notwithstanding the aforesaid, some authors have objected to above mentioned view on the ground that the wall does not stand on commonly owned land but on two separate pieces of individually owned land, and they reason thus that treating the wall as common property while the two sections of land underneath it are owned by two separate individuals conflicts with the principle of attachment (also known as accession, or *inaedificatio*), according to which permanent structures belong to the owner of the land on which they stand.⁶

This leads to the second school of thought, which holds that half of the wall up to the midpoint, belongs to each of the neighbouring property owners individually and that each owner has a tacit servitude of lateral support against the other.

This theory is not without difficulty, however, as was seen in the case of *Dorland and Another v Smits*⁷, where 88% of the wall stood on the one piece of land and the remaining 12% on another piece.

In such a case it would appear that the wall belongs to the parties proportionally to the part of the wall standing on their property. However, it is unclear whether such an unequal division of common property is practically possible.

Both schools of thought have their flaws and criticisms, and there is still some uncertainty with regards to the nature of the boundary walls and the rights of the neighbouring property owners in our law today.

WHAT DOES THIS MEAN FOR NEIGHBOURING PROPERTY OWNERS?

The most common disputes surrounding party walls, are:

- The true location of the party wall;
- Claims by neighbours to land 'captured' by the wall, which is in the wrong position;
- Encroachment;
- Lateral support; and
- Costs of repairing / refurbishing / replacing or demolishing the wall.

#1. Dispute over location of wall

In the case of where the true location of the party wall is disputed, the first step would be to get a land surveyor to survey the property according to the official diagram that is lodged with the Surveyor General in Pretoria.

If it is found that the party wall falls 100% on the property of one neighbour, then that neighbour is deemed to be the owner of wall and they will be solely liable for the costs and maintenance of the wall and the neighbour will have no rights or obligations in relation thereto.

If the wall straddles two (or more) properties, then it is a party wall and all of the landowners upon which the wall is built will have some rights and obligations in terms of the wall – but precisely what those are will vary from one case to the next.

#2. Dispute over neighbour acquiring part of your land through prescription

It is relatively common that one neighbour will claim that, after 30 years, if they had possession of and utilized a part of their neighbour's property because the wall was in the wrong place, that they became the owner of that property by 'capturing' it through acquisitive prescription. In *De Meillon v Montclair Society of the Methodist Church*⁸, the dispute revolved around the true location of the party wall. In this case the Applicant who owned the neighbouring property intended to institute action to establish that he had acquired a certain piece of adjoining land by prescription. The Applicant applied for a temporary interdict restraining the Respondent from destroying the hedge that was long regarded as the boundary between the two properties and building a wall on what the surveyor identified as the true boundary.

The court held that the conduct of the Applicant and his predecessor in title was consistent in regarding the hedge as being the common boundary. The court further held that the Applicant had shown a *prima facie* case that the land between the true

boundary and the hedge had been acquired by the Applicant by acquisitive prescription and that he had acquired the rights of co-owner in the hedge upon the basis of the hedge being the common boundary.⁹

The De Meillon case indicates how the courts applied the principles of acquisitive prescription and the importance to property owners of establishing the true location of the boundary line between adjoining properties, to ensure their rights in the party wall are not negated and to protect their properties from diminishing by their neighbour acquiring some of their land through acquisitive prescription.

The law of prescription, however, is complex – and there are many factual and legal arguments that can defeat a prescription claim. For example, if there is a lease over the portion of land claiming to be “captured”, this may defeat the prescription claim.

#3. Dispute over encroachment

Another common dispute that often arises is the case of encroachment when, for example, neighbours install security measures such as an electric fence or metal spikes on the top of one side of the party wall that detract from the aesthetic appeal of the adjoining neighbour’s property.

In the Dorland case, the Appellants had erected an electric fence on the top of an existing wall between their property and that of the neighbour, who was the Respondent. The electric fence was attached to the Appellant’s side of the wall and protruded half a meter over it.

The Respondents applied for and were granted an order in the court a quo to remove the fence based on the fact that it detracted from the aesthetic appeal of the Respondent’s property and was a nuisance in that it was dangerous for the Respondent’s gardener.

However, the right to live a life of dignity, equality and freedom, when read in context with the rights to property and housing, may sometimes require that owners give up a portion of their entitlement to their own property in order that their neighbours can live safe and meaningful lives too.

There is thus a balancing act that a court will be called upon to undertake when damage to life or limb is at stake, which complicates the enquiry into whether a neighbour can erect security measures on a party wall.

#4. Dispute over lateral support

In the case of lateral support, disputes could potentially arise in the case of where one party is renovating or seeks to refurbish their side of the party wall or even break it down and rebuilt it entirely. In this regard the law indicates that adjoining property owners have a duty of lateral support towards the party wall. This means that should one neighbour’s conduct potentially threaten the stability of a party wall and the adjoining property owner suffer damages, the prejudiced party will have a claim for damages.

It is commonly held that a neighbouring property owner may build on their half of the wall, if it is strong enough to bear the additional burden, but if the whole wall requires strengthening, the consent of the other owner is required.

This notwithstanding, should the owner build over the middle of the wall, or place an unreasonable burden on the whole wall by building up on their half of the wall or by increasing the load on their side of the wall by putting too much soil behind it for the wall to retain, the normal remedies for encroachment are available to the affected neighbouring property owner.

One must remember, however, that the court’s approach to the question of what neighbours can do to or with a party wall, will depend on which theory of co-ownership the court accepts or endorses in each case. As there are sometimes conflicting consequences to the two theories, our courts will also need – at some point in the near future – to pick one and amend our common law to provide greater legal certainty on the issue.

#5. Dispute over costs of refurbishment/repair/rebuilding

In accordance with the co-ownership theory (which appears to be the theory most likely to be applied by the courts), ownership in the party wall is presumed to be shared and therefore the cost of maintenance and erection of the party wall is shared between the neighbours.

With regards to the second theory which holds that half of the wall up to the midpoint, belongs to each of the neighbouring property owners individually, the costs will be split between the neighbours based on the proportion of ownership of the party wall (which in reality will not be easy to do).

#6. Disputes relating to the safety or building standard of the wall

With the number of floods and flash floods having increased somewhat over the last few years, it is becoming more common for disputes to develop between neighbours when a part of the party wall collapses and it is required to be either demolished or repaired (usually according to certain building regulations, health and safety regulations or other municipal bylaws).

Because there is a requirement that both parties contribute to the costs of maintaining (and if necessary) rebuilding the wall, disputes arise when one party requires a particular building method, quality or safety standard and the other party disagrees. It is not uncommon for a municipality to become involved (from the perspective of regulating the building quality and safety). To complicate matters, municipal by-laws and practices differ from one municipality to the next, making this a particularly tricky issue to navigate if you are not familiar with both the national and local regulations.

CONCLUSION

Party walls are a contentious issue in neighbour law as they represent physically as well as metaphorically the line where neighbours' interests meet.

In order to ensure amicable living conditions, it is always suggested that neighbours should try to reach an amicable solution and try resolve disputes surrounding party walls through meaningful engagement before approaching the courts.

When you are met with an unreasonable neighbour, however, and you need to turn to the courts to protect your interests, it will be beneficial to utilize experts in the industry who are aware of the various laws that affect this fraught issue. As the cost of building (or the cost of damages caused by an inadequately built) wall could number in the hundreds of thousands or even millions, it is advisable to obtain proper legal and other professional advice (such as that of a surveyor or engineer) before you begin building, to ensure that you always stay on the "right side" of the wall.



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¹ *AJ Van der Walt, 2010, Juta, The law of Neighbours*

² *Dorland and Another v Smits 2002 (3) SA 691 (C)*

³ *SANS 10400 Building Regulations, "Party Walls and Fences: Strategic Planning of Boundary Walls and Fences" Boundary Walls And Fences In Residential And Commercial Areas (sans10400.org.za)*

⁴ *Van Bergen v Van Niekerk and another (2005) (180) ZAGPHC 180*

⁵ *AJ Van der Walt, 2010, Juta, The law of Neighbours*

⁶ *AJ Van der Walt, 2010, Juta, The law of Neighbours*

⁷ *002 (3) SA 691 (C)*

⁸ *De Meillon v Montclair Society of the Methodist Church 1979 (3) SA 1365 (D)*

⁹ *Ibid*