THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20165/2014

In the matter between:

FEDGROUP PARTICIPATION BOND MANAGERS (PTY) LTD **APPELLANT**

and

TRUSTEE OF THE CAPITAL PROPERTY TRUST COLLECTIVE INVESTMENT SCHEME IN PROPERTY **RESPONDENT**

Neutral citation: *Fedgroup Participation Bond Managers v Trustee of the Capital Property Trust* [2015] ZASCA 103 (30 June 2015)

Coram: Navsa ADP and Mhlantla, Pillay, Willis and Saldulker JJA

Heard: 19 May 2015

Delivered: 30 June 2015

Summary: Ownership of Land: whether an encroacher can bring an independent cause of action claiming transfer of the encroached – upon land in the absence of a removal order by the owner of the land – Building – Illegal structure – No approval of building plans by local authority.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Victor J sitting as court of first instance):

The following order is made:

1. The application to amend the notice of motion is dismissed with costs including the costs of two counsel.

2. The appeal is dismissed with costs including the costs of two counsel.

3. The cross-appeal is dismissed and no order is made as to costs.

JUDGMENT

Navsa ADP *et* Saldulker JA (Mhlantla, Pillay and Willis JJA concurring):

[1] In this case the question is whether someone encroaching on another's land is entitled, in the absence of an action or an application being brought by the owner of the land for a removal order, to approach a court for an order compelling the owner to transfer, not only that part of the land on which there is encroachment, but also to seek transfer of additional vacant land against a tender of compensation. The short answer is no. The background and the reasons for that conclusion follow.

[2] This appeal is directed against the judgment and order of Victor J in the Gauteng Local Division, Johannesburg in terms of which she refused an application by the appellant, Fedgroup Participation Bond Managers (Pty) Ltd (Fedgroup), for an

order along the lines described in the preceding paragraph. For clarity it is necessary to record specific parts of the order sought by Fedgroup, namely:

'1. . . .[D]irecting the respondent, in its capacity as registered owner of Erf 990 Sunninghill Extension 85 Township, Registration Division IR, Provence of Gauteng, in extent 1,1821 hectares ("the Property"), forthwith upon demand:

1.1 to do all things necessary and to sign all documents necessary to facilitate and to allow the subdivision of the Property in accordance with the Subdivision Plan annexed to the founding affidavit in these proceedings as Annexure "FA4"; and

1.2 to do all things necessary and to sign all documents necessary to facilitate and to allow the transfer of the newly-created portion of the Property, in extent 2 396 m^2 and as indicated on the aforementioned Subdivision Plan, to the Applicant, . . .'

[3] The respondent is the trustee of The Capital Property Trust Collective Investment Scheme in Property. The trust was established in terms of the Collective Investment Schemes Control Act 45 of 2002. We shall refer to it as CPT. As quid pro quo for the order referred to in paragraph 2, Fedgroup was willing to accede to an order in respect of which it would (i) bear all the costs pertaining to the subdivision of the property and the transfer of the newly-created portion thereof (ii) against registration of the transfer, pay to the respondent the sum of R1 950 000 plus value added tax. Furthermore, Fedgroup agreed to pay CPT a pro rata amount of the rates and taxes which the former had paid to the local authority since the commencement of the encroachment, in the ratio that the property to be transferred bore to the whole of the property.

[4] There is also a cross-appeal by CPT against the dismissal by Victor J of its plea of prescription, in terms of which it had contended that any claim which Fedgroup may have had for the transfer of the triangular piece of land it sought by way of the order referred to in the preceding paragraph had prescribed. The matter is before us with the leave of the court below.

[5] The background to the litigation culminating in the present appeal is set out hereafter. Fedgroup and CPT are each the registered owner of one of two contiguous prime commercial erven situated in Sunninghill Extension 85 Township, namely, Erf 989 measuring 5960 m^2 in extent (Erf 989), and Erf 990 measuring 1,1821 hectares in extent (Erf 990), respectively. Both erven are zoned in terms of the relevant Town Planning Scheme to permit the erection of offices.

[6] The improvements on CPT's property consist of two office buildings which have a gross lettable area of 6 652 m^2 which were let to the United Nations World Food Programme and Acer Computers.

[7] The improvements on Fedgroup's property included a substantial, but incomplete structure, which consists of a basement and concrete formwork. There is a dispute about what the gross built area of the incomplete structure would be. As will become apparent later, this is not an insignificant dispute.

[8] What follows is a description of how Fedgroup and CPT became adjoining land owners and how the encroachment at the centre of the present dispute occurred. On 31 July 2006 Fedgroup and CPT entered into a written agreement in terms of which the latter acquired from the former a total of twenty-seven income producing properties and associated businesses, as letting enterprises, for an aggregate amount of R308 035 000. One of the properties acquired by CPT is the erf referred to in paragraph 5 above (Erf 990), including the improvements referred to in paragraph 6. Registration of the property into CPT's name took place on 15 December 2006. The incomplete structure on Fedgroup's property referred to above partially encroaches on CPT's property. The encroachment was discovered by Fedgroup during April or May 2008, almost two years after the conclusion of the written agreement of sale. It is common cause that the incomplete structure which encroaches on CPT's property had already been erected when Fedgroup acquired it from a predecessor in title. It is unchallenged that the structure was erected unlawfully, more particularly because building plans had not been submitted for approval. We return to this aspect later.

[9] A fence erected on the property lulled Fedgroup into a false sense of security about the cadastral boundaries of the property it disposed of to CPT. Upon discovering the real state of affairs, Fedgroup approached CPT concerning the encroachment and to discuss a possible resolution. Communications between the parties ensued but ultimately negotiations broke down. This is unsurprising since the land concerned is prime commercial property with each party probably seeking to extract maximum benefit for itself.

[10] An admitted stumbling block to a non-litigious resolution of the problem was that CPT insisted that a proposed settlement agreement include a forfeiture clause in terms whereof all approvals required for subdivision and consolidation had to be obtained within a specified time, failing which any amount paid to CPT by Fedgroup as compensation would not be repaid. Fedgroup found this unacceptable.

[11] In June 2009 Fedgroup contended by way of a letter to CPT that it was entitled to seek rectification of the written agreement of sale so as to reflect the cadastral boundaries as understood by it at the time of the conclusion of the agreement. This was contested by CPT's attorneys and was not persisted in by Fedgroup, perhaps because of a clause in the written agreement of purchase which included a seller's warranty against encroachment.

[12] Because of the breakdown in negotiations and the resultant impasse Fedgroup decided to go on the offensive and launched an application for the orders referred to earlier. In resisting the application, CPT raised three points *in limine*. First, that Fedgroup had no cause of action in that there was no justiciable dispute. It contended that it was the owner of the property concerned and unwilling to dispose of it by way of sale. It developed its contention as follows. A land owner could not be compelled to sell property it was unwilling to part with. In effect, so CPT contended, Fedgroup sought to compel an expropriation which, in our law, was incompetent. Second, CPT raised prescription as a defence. It submitted that Fedgroup admittedly first became aware of the encroachment during April or May 2008 and that even if it had a cause of action, more than three years had elapsed before it launched proceedings in the court below. Lastly, CPT contended that there were material disputes of fact that could not be resolved on the papers. In this regard, CPT

contended that this was important in relation to the question of prejudice, more particularly in relation to compensation and the proposed subdivision and the necessary rezoning which is concomitant to transfer of the land sought by Fedgroup.

[13] We interpose to record that the order sought, set out in paragraph 2 above, included land additional to that on which the partially erected structure was situated and which Fedgroup sought to have excised from CPT's property, and transferred to it, based on the assertion that it needed the additional vacant land for optimal development of its own property and its further allegation, that CPT would have no use of the undeveloped additional piece of land it sought to have transferred into its name and that without which the transfer it sought would be worthless. It is uncontested that the land sought by Fedgroup constitutes 20 per cent of the total extent of the property owned by CPT.

[14] We return to list the material disputes asserted by CPT. First, there is a dispute about the valuation of the land sought to be excised. The parties are poles apart in their respective valuations.

[15] The parties' respective experts were divided about the extent of the financial loss and prejudice to each in the event of an order in favour of the other. Disputes arose in relation to demolition and the viability of redesign and redevelopment of the partially completed structure so as to avoid encroachment. The cost of redesign and demolition and removal was estimated by CPT's expert to be an amount of R4 223 138, which was admitted by Fedgroup's expert. However, Fedgroup was adamant that this amount did not constitute the total prejudice it would suffer in the event of the order not being granted, contending that the loss of development potential in financial terms far exceeded that amount. CPT on the other hand, contended that if it were to lose the additional land sought by Fedgroup it would be unable to develop the remaining land optimally and that its loss in financial terms would run into many millions of rands. There is a related dispute about the effect that the subdivision resulting from the order sought would have on the land-use rights of the remaining portions of CPT's property and its valuation. It would mean that the present improvement coverage would exceed the permitted land coverage and that it would require a rezoning application by CPT. Furthermore, the parties are divided on

the probabilities of success of an application for subdivision and rezoning. In this regard, Fedgroup contended that CPT's expert's present position on the difficulties to be encountered in securing approval for the subdivision and rezoning, flies in the face of an earlier indication by the same expert that there was a likelihood of success. According to CPT's expert, in the event of an order being granted as sought by Fedgroup, its property's value would be diminished by an amount of R4 410 721. This is an amount that exceeds the amount of R4 223 138 referred to above. CPT contended that it would thus be severely prejudiced in the event of the order being granted.

[16] The court below dealt with the first point raised by CPT, namely whether Fedgroup had a cause of action. Victor J categorised the order which Fedgroup sought as being one for 'specific performance'. Before us the parties were agreed that that conclusion could not be supported. Following on the aforesaid erroneous categorisation, Victor J took the view that an order such as the one sought by Fedgroup was entirely within the court's discretion.

[17] The court below went on to consider *Christie v Haarhoff*,[1] in which the court granted transfer of the encroached upon area, against compensation to be paid to the landowner. Victor J also referred to *Trustees, Brian Lackey Trust v Annandale*,[2] in which Griesel J held that the encroacher there could retain the structure against payment of compensation. Victor J considered it significant that in that case the encroaching structure encompassed 80 per cent of the owner's land. In support of her view that the court has a discretion, based on consideration of reasonableness and fairness, to order that an encroachment could continue against 'the payment of damages', Victor J cited *Rand Waterraad v Bothma*.[3] Her conclusion on whether Fedgroup had a cause of action is set out in paragraph 12 of the judgment of the court below:

'Based on the case law set out above I find that this court has a discretion to order transfer and compensation but obviously each case must depend on its facts. I find that the applicant's cause of action is good in law and can be raised in the absence of a demolition

[1] *Christie v Haarhoff and others* (1886-1887) 4 HCG 349.
[2] *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).
[3] *Rand Waterraad v Bothma en 'n ander* 1997 (3) SA 120 (O).

order. The question still to be determined is whether on these facts such an order is appropriate.'

[18] In relation to prescription, Victor J ruled against CPT. She concluded that Fedgroup's cause of action did not arise out of a 'debt' as envisaged in s 11*(d)* of the Prescription Act 68 of 1969, stating the following (para 14):

'The applicant has unwittingly been in possession of the respondent's immovable property. This cannot be interpreted to be a debt.'

She went on to state the following (para 15):

'This encroachment cannot be frozen in a point in time. The encroachment in my view is a wrong which continues. As long as the respondent has a right to require demolition there is no prospect of prescription.'

For this conclusion she found support in *Barnett v Minister of Land Affairs*[4] paras 20 and 21.

[19] Turning to the disputes of fact, Victor J took the view that there were indeed disputes concerning the town planning aspects insofar as the extended excision of land was concerned, and that there was 'a mass of speculation' as to whether the application for subdivision and rezoning would succeed. The reasons for inclining against Fedgroup are set out in paras 38 and 39 of the judgment of the court below:

'In this case a factor which introduces a degree of complexity and affects the exercise of my discretion is that the applicant is bent on seeking the entire triangular encroachment and not for example the solid unfinished building. In exercising my discretion I would have had no difficulty in directing the transfer of that portion of the encroachment against payment of compensation. It was the applicant's case, after the court specifically asked whether the transfer of the unfinished building would suffice. The applicant submitted that it would be of no value to the applicant unless the adjoining sliver of land and the guard house is incorporated. One area of the triangular piece of land has access to a public road and this was of importance to the applicant. There is an already built guard house. To sum up if the court were to order the transfer of only the incomplete building encroachment of 703 square metres this would not assist the applicant in any way as the entire encroachment was required for development.

[4] *Barnett & others v Minister of Land Affairs & others* 2007 (6) SA 313 (SCA).

In my view upon the proper exercise of my discretion based on all the facts set out above it is only the incomplete building which can be transferred to the applicant. That has been rejected and in those circumstances applicant's application must fail.'

It is against the conclusions set out in the preceding paragraphs that the present appeal and cross-appeal are directed.

[20] Before dealing with the correctness of the court below's reasoning and conclusions we pause to state that in anticipation of this court perhaps reaching the same conclusion as did Victor J, namely, that it was not competent to order transfer of land beyond that on which the offending structure was erected, Fedgroup filed a notice of application to further amend its notice of motion to include an alternative prayer, to restrict the relief it sought to the land on which the offending structure was erected. This amendment was only sought on appeal. It is, at this stage, apposite to recall that Fedgroup was emphatic in its founding affidavit that its acquisition of the limited land would be worthless. This is an aspect to which we shall revert in due course. We record further that, in response to the application to amend the notice of motion on appeal, CPT filed a notice of an application to strike out, conditional upon the amendment being granted. We now return to deal with the judgment in the court below and the applicable law.

[21] Regrettably, there are major misconceptions in the reasoning and conclusions of the court below. First, as acknowledged by counsel on behalf of both parties, this is not a case in which Fedgroup sought specific performance. Second, the consideration of the cases involving compensation in relation to encroachment was not sufficiently analytical. *Christie* was a case in which the court considered an action for trespass. A landowner had come to court complaining that the defendants had erected a large building on his property and had erected a wall and portion of the building thereon. The defendants had continued and 'refused to abate such trespass'. The extent of the ground trespassed upon was 141 square feet. The defendants admitted the trespass and alleged that they had acted in the bona fide belief that the whole of the ground upon which they had built belonged to themselves and that, on discovering the error, they informed the plaintiff. They contended that it was impossible, without great loss and damage, to remove the building and tendered the amount of £20 as compensation, further offering to bear the expenses of

surveying the land and of transferring it into their own names. The following part of the judgment is instructive (at 353 – 354):

'In this case, however, the plaintiff very properly does not press his *strict rights* to the extreme point; and it is practically agreed that the proper course will be for the plaintiff to transfer to the defendants the ground built upon, upon their paying all expenses of and incidental to the transfer, together with reasonable compensation for depriving him of the ground. The question for the Court to decide is what sum in all the circumstances of the case should be awarded as reasonable compensation. . .' (Our emphasis.)

It can justifiably be said that *Christie* was a case in which the parties had agreed to adjudication by the court of a reasonable amount to be paid for land in circumstances where the landowner had already agreed to the transfer, subject to the court deciding on adequate compensation. It can hardly be categorised as authority for there being a 'right' vested in an encroacher, to approach a court for an order to compel transfer of property belonging to another. It is also not insignificant that the action was instituted by the landowner.

[22] In *Lackey*, also relied upon by the court below, Griesel J referred to a discretion vested in a court to award compensation instead of ordering removal of an encroaching structure. It was stated that a substantial encroachment is not necessarily a bar to an order of compensation. It is true that in *Lackey* the encroacher instituted the action. That, however, was met by a plea and a counterclaim by the landowner for removal of the encroachment. The *lis* then, was not about whether an independent action at the instance of an encroacher was competent in the absence of a claim for removal. The counterclaim sought precisely that. What is important, though, is that the court in *Lackey* said the following (para 41):

'. . . On the evidence of this case, the inference is irresistible that the defendant was prepared to accept monetary compensation for his erf . . . .'

The court refused the aggrieved landowner's claim for a demolition order and issued inter alia the following declaratory order:

'It is declared that the defendant is not entitled to the removal from erf 878 of the encroachment erected thereon by the plaintiffs, subject to payment by the plaintiffs to the defendant of such damages as the parties may agree or the Court may determine to be payable.'

[23] *Rand Waterraad*, another decision on which the court below relied, dealt with an application by an aggrieved landowner for a declaratory order that the respondents in that case had no right in structures encroaching on his property and that the respondents had to remove them at their own cost. In that case the court reaffirmed the principle that where a demolition order was sought, a court had a discretion to refuse such an order and to confine the plaintiff to a claim for damages. Furthermore, in that case, in refusing the application, the court took into account the considerable time that had lapsed during which the landowner had raised no objections against the erection and presence of the offending structures. At 139 I - J the following appears:

'Geregverdigde billikheid dikteer dat vanweë die traak-my-nieagtige gelatenheid waarmee applikant hierdie aangeleentheid bejëen het hy nie geregtig is op 'n verwyderingsbevel soos vervat in die kennisgewing van mosie nie.'

This case is no authority for the proposition that an encroacher can approach a court as of right to compel transfer of another's immovable property.

[24] In *Meyer v Keiser*,[5] relied on by Fedgroup, the facts were as follows. A landowner instituted action against an encroacher for the removal of an encroachment. He alleged that unbeknown to him the defendant had built a house on the adjoining property which, to a substantial extent, encroached upon his property. In resisting the claim the defendant averred that the encroachment had occurred as a result of a *bona fide* mistake about the beacons demarcating the boundary. Moreover, the defendant indicated that in monetary terms greater prejudice would attach to him in the event of a demolition order. The defendant prayed that the court, in the exercise of its discretion, should order the plaintiff to transfer to him that part of the property upon which there was encroachment against payment of compensation. The plaintiff excepted to the plea on the ground that the defendant was not entitled to claim transfer of part of his property. The following part of the judgment in *Meyer* is important:

'When an award of damages is acknowledged as the permissible and appropriate form of relief in the case of an encroachment, an order for the transfer of that portion of the property encroached upon is incidental to, and consequent upon, such an award. The virtue of such an ancillary order is obvious but it need not necessarily be made (cf *De Villiers v Kalson*

[5] *Meyer v Keiser* 1980 (3) SA 504 (D).

1928 EDL 217 at 233), and in certain circumstances to do so may be impracticable or not permissible in law. The important point is that, whatever form the order takes in such a case, it is the award of damages which is the true basis for the relief granted. In my view, perhaps as a result of the form of the orders in the two decisions relied upon, this was overlooked by the pleader in the instant case which resulted in a misconception of the nature and extent of the Court's discretionary authority.'

The exception was upheld with costs and the plea was set aside with the defendant being granted leave to file a new plea if so minded.

[25] In *Phillips v South African National Parks Board,*[6] the South African National Parks Board had erected an encroaching fence on the applicant landowner's property. The court had regard to environmental legislation, and the prejudice that the parties might suffer in the event of the fence remaining in place compared to removal being ordered. Significantly, the court recognised that a loss of property would result in the event of it being ordered that the fence remain in place against the award of compensation. It reasoned that it might amount to deprivation of property and that section 25(1) of the Constitution might come into play (para 24). It nonetheless considered that such a deprivation might in appropriate circumstances be ordered in the exercise of a court's discretion. In that case, however, the landowner prevailed and removal was ordered.

[26] Professor Z T Boggenpoel, in an article in the *South African Law Journal*,[7] dealing with the rights of a landowner in respect of encroachments, states with reference to a number of authorities, that removal of the offending structure is 'ordinarily explained as being the default remedy in the case of encroachments'. She goes on to analyse cases that have reaffirmed the discretion to award compensation instead of ordering the removal of encroaching structures.

[27] Professor Boggenpoel was rightly critical of Victor J's judgment in this case for not being sufficiently analytical. She reasons with justification that the cases relied

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[6] *Phillips v South African National Parks Board* [2010] ZAECGHC 27.

[7] Z T Boggenpoel 'The Ambit of the discretion of courts in the case of encroachment: Fedgroup Participation Bond Manager (Pty) Ltd v Trustee of the Capital Property Trust Collective Scheme in Property' (2015) 132 *SALJ* 5.

upon did not provide the necessary authority to conclude that an encroacher can claim as of right that his neighbour's land should be transferred to him.

[28] Professor Boggenpoel, in a separate article,[8] very usefully traces the history of our law in relation to an aggrieved landowner's right to seek removal of an encroachment. The remedy has its roots in Roman law.[9] The point of departure in Roman Law was that an encroachment should be removed.[10] This could be done by self-help or by way of the *actio negatoria* where the encroachment protruded into airspace. The learned author, while acknowledging that the remedy had undergone significant development and modification when it was received into South African case law states that there appears to be no mention of a power of a court to order transfer of the encroached upon land to the encroacher.

[29] Similarly there is no mention of such a power in Roman-Dutch law. Boggenpoel explains that in Roman-Dutch law, the point of departure was the same as in Roman law, namely, that if anybody suffered as a result of something belonging to his neighbour overhanging or encroaching on his property, he could force the neighbour to remove it.[11] In the context of acquisition of ownership, Grotius stated that ownership is transferred to the affected landowner where someone built on his land.[12] According to Voet, 'whatever someone lets unto or constructs on another's tenement, becomes the property of him to whom the ground belongs.[13] Boggenpoel explains that no mention is made in the commentaries regarding an order for the transfer of the encroached upon land to the encroacher.[14] She states that her examination of early South African case law confirms the view that such an order was not competent at common law.[15] With reference to *Christie*, Boggenpoel concludes that in that case the court merely facilitated a bilateral agreement and that

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[8] Boggenpoel 'Compulsory transfer of encroached-upon land: A constitutional analysis' (2013) 76 *THRHR* 313 at 317.
[9] Boggenpoel (2013) at 317. See also *Corpus juris civilis* (D 9.2.29.1) S P Scott *The Civil Law: Including the Twelve Tables; The Institutes of Gaius; The Rules of Ulpian; The Opinions of Paulus; The Enactments of Justinian; and the Constitutions of Leo* (1973)); J R L Milton 'The law of neighbours in South Africa'1969 *Acta Juridica* 123 at 234; Van den Heever *Aquilian damages in South African law* (1944) at 84.
[10] See *D 9.2.29.1*.
[11] Van Leeuwen *Het Roomsche-Hollandsche Recht* 2.20.6.
[12] Grotius *Inleidinge tot de Hollandsche Rechtsgeleerdheid* 2.10.6.
[13] Voet *Commentarius ad Pandectas* 8.2.4.
[14] Boggenpoel (2013) at 318.
[15] And in this she relies on C G Van der Merwe *Sakereg* 2 ed (1989) at 203.

the transfer that was ordered was not against the affected landowner's will.[16] Similarly, in *Van Boom v Visser,*[17] the plaintiff did not press his rights of ownership and was willing to accept £100 to tolerate the encroachment. The court gave judgment in favour of the aggrieved landowner, reiterating that removal was the default remedy. The court stated, as an alternative, that the defendant could pay £25 for the transfer of the property and £10 damages. The following statement by the author is worth repeating:

'Although the end result in this case was that transfer was ordered, a very important qualification should be emphasised. The transfer of the encroached-upon land was dependant on the willingness of the affected landowner to give up his property and it was not an involuntary judicial transfer of the affected land.'

[30] Boggenpoel considered *Meyer* as well as the decision in *De Villiers v Kalson*[18] as illustrations that an order for transfer does not necessarily have to be made when a court exercises its discretion to grant compensation rather than order removal. The learned author submits that the power to transfer the encroached upon land, which she says has typically formed part of the court's discretion in the context of building encroachments, is a separate power that should be entirely dependent on the willingness of the affected landowner to give up his property. She submits that the judgments that endorse the view that the power exists for a court to effect an involuntary transfer of property do not provide adequate authority for that position. The following part of the article bears repeating:

'As the matter stands there is no authority in either common law or legislation in terms of which a court can sanction a forced sale of land in the context of building encroachment, against the will of the affected landowner. It should be kept in mind that South African courts only have the powers granted to them by common law or legislation. In this regard, there is no common law principle or legislation that grants them the authority to order compulsory transfer of land.

Furthermore, if the affected landowner does not want to give up his property, the involuntary transfer of property that the court authorises with a transfer order may be problematic in light of section 25 of the Constitution. The order will result in a deprivation of property, which will have to comply with section 25(1). Additionally, if the loss of property in the case where the

[16] Boggenpoel (2013) at 318.
[17] *Van Boom v Visser* (1904) 21 SC 360.
[18] *De Villiers v Kalson* (1928) EDL 217.

decision is made to leave the encroachment in place and transfer the encroached-upon land to the encroacher amounts to expropriation of property, the requirements of section 25(2) and (3) of the Constitution would also be applicable.'

[31] The learned author submits that the deprivation of property rights that occurs as a result of leaving encroachment in place and ordering transfer of the encroached upon land, must comply with s 25 of the Constitution which, she suggests, might be problematic. She reaches the following conclusion:

'It is argued here that although it should be possible in terms of the court's discretion to leave (even significant) building encroachments in place against compensation, the power to order transfer of the affected property is an entirely different matter. The discretion of a court in the context of building encroachments to decide on an appropriate remedy does not include the authority to effect a forced transfer of the land affected by the encroachment. Therefore, a compulsory transfer order will no doubt conflict with section 25(1) in as far as the common law does not authorise such an order and the transfer order will be unjustified and therefore arbitrary.'

[32] Other academics have expressed similar concerns about the constitutionality of court orders refusing the removal of encroachments, particularly where the encroachments are extensive or where a transfer of ownership of the encroached upon land is also ordered, on the grounds that this may constitute arbitrary deprivation of property.[19]

[33] Our law has always been careful to protect the right of ownership, particularly of immovable property. It is a most important and extensive right.[20] It is thus protected by registration in the Deeds Office. Limited real rights in land may also be required to be registered. *Silberberg and Schoeman's The Law of Property*,[21] in dealing with the exclusion of personal rights from the registration process, states the following at 65:

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[19] See, for example, A Pope 'Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles' (2007) 124(3) *SALJ* 537; AJ van der Walt 'Replacing property rules with liability rules: Encroachment by building' (2008) 125(3) *SALJ* 592 at 622; H Mostert (ed) and A Pope (ed) *The Principles of the Law of Property in South Africa* (2010) at 140.

[20] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 A - D.

[21] P J Badenhorst, JM Pienaar and H Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006).

'This exclusionary approach indicates support for the notion that ownership is the pinnacle of – or the most important right within – a hierarchy of rights, with limited real rights following close at heel. Other rights are understood as being in stages of inferiority to ownership as far as their protection in property law and publicising thereof are concerned.'

The learned authors provide a qualification, namely, that this hierarchical approach has come under scrutiny for failing to provide acceptable solutions to the increased pressure brought about by a proliferation of land reform legislation. However, it does not follow from this that the right of ownership should not be afforded its appropriate weight.

[34] Before us, counsel on behalf of Fedgroup, when engaged by this court on how they would circumscribe the right the encroacher was seeking to enforce in the court below, experienced difficulty in doing so. The response ultimately was that no right could be circumscribed but that it would be a sad day if this court did not come to Fedgroup's assistance especially in the face of the present impasse. Counsel on behalf of CPT responded as follows; it was the owner of the land; it had not sought the removal of the offending structure; and as far as it was concerned there was no justiciable dispute. There was thus no impasse.

[35] With few exceptions, the decisions discussed earlier in this judgment flowed from an owner seeking to enforce his full rights of ownership. Acquisitive prescription aside, we have difficulty in conceiving a basis on which an encroacher might offensively, as of right, claim the transfer of ownership into his or her name of another's land. An encroacher might be able to defend an action or application for removal on the basis that it is unjust and unfair to order demolition and removal. This is a defensive position that might rightly be adopted. Courts, in exercising what has now been accepted as a 'discretion' to award compensation instead of ordering removal, do so on the basis of policy considerations such as unreasonable delay on the part of the landowner, or on the basis of what might be viewed as acquiescence.[22] Prejudice and the principles of neighbour law are taken into account. However, an encroacher does not have an independent cause of action. He or she cannot offensively compel another to part with rights of ownership. Estoppel is

[22] In this regard, see Z T Boggenpoel 'The Discretion of courts in encroachment disputes'(2012) 23(2) *Stell LR* 253 at 256-257.

an apt analogy. It is thus unsurprising that counsel on behalf of Fedgroup experienced difficulty in formulating the legal basis for approaching the court below as did Victor J in dealing with prescription. She had difficulty in determining what, in effect, had been said to prescribe.[23] In concluding in sweeping terms that a court has a wide discretion to consider granting the relief sought by Fedgroup, the court below erred. In our view, the response of counsel on behalf of CPT set out at the end of the preceding paragraph is correct.

[36] It is clear from what is set out above that adjudication in relation to encroachment is fraught with complexities. For example, is compensation to be calculated in relation only to the value of use and occupation of the land, or should the negative impact of the deprivation of the full use of the land be taken into account? If the determination occurs in relation only to use and occupation it might obviate the need to consider transfer of ownership. Does the right to use and occupy endure only for the lifetime of the encroacher? In determining whether an encroachment should remain in place, town planning and zoning considerations might come into play. Ought compensation to be calculated in relation to the full market value of the land? If the answer is in the affirmative, does it mean that registration and transfer has to follow? If it does, does it amount to deprivation of property within the meaning of s 25(1) of the Constitution. Of course these difficulties arise only in the event of a landowner being unwilling to part with his or her property. Carefully crafted legislation, preferably upon the advice of the South African Law Reform Commission, may address at least some of these complexities.

[37] In the present appeal, Fedgroup has an insuperable difficulty. No court has ever gone as far as ordering the transfer of land greater than the area of encroachment. Such an order is just not competent.

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[23] In this regard, Victor J's reliance on *Barnett* was misplaced. That case dealt with the prescription of an owner's vindicatory claim. Brand JA , himself, in a later judgment, namely, *Bester NO & others v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125; [2012] ZASCA 125 (SCA) recognised that he had erred in accepting that a vindicatory claim was a debt that prescribed after three years. In *Absa Bank v Keet* [2015] ZASCA 81 (SCA), this court reiterated the significance of the distinction between real and personal rights and held that the vindicatory action is not a 'debt' that prescribes after three years in terms of the Prescription Act 68 of 1969. The point is that in the present case prescription was raised by the owner as against the encroacher. The court below, as is apparent from para 15 of the judgment, approached the matter from a flawed perspective.

[38] And even if a court had an inclination to come to Fedgroup's assistance, there is yet a further difficulty that Fedgroup cannot overcome, namely, several material disputes in relation to values and ultimately in respect of computation of compensation. On CPT's valuations and tendered evidence the compensation would be inadequate and it would suffer the greater and irreparable prejudice.

[39] As suggested by Boggenpoel in her 2015 *SALJ* article, an intractable problem for Fedgroup is that the encroaching structure it sought to have remain in place and of which it required transfer was erected unlawfully, more particularly, no building plans were submitted.[24] A court will not countenance or be party to perpetuating unlawful conduct.[25] For all the aforesaid reasons, the appeal cannot succeed. The difficulties referred to in paragraph 36 do not fall for consideration.

[40] It is necessary to deal briefly with the application to amend the notice of motion on appeal. As noted earlier, Fedgroup sought to amend its notice of motion on appeal to include an alternative prayer for transfer of only the encroached-upon land (and excluding the additional vacant land sought in the initial prayer). Fedgroup was emphatic in its founding affidavit that transfer of only this lesser area was worthless. It is difficult to comprehend why it is now pursuing that worthless endeavour. Furthermore, the case that CPT was called upon to meet was the transfer of the extensive area initially sought and it marshalled evidence in relation to valuation and prejudice relative to that case. The ground has now shifted radically to CPT's prejudice. This cannot be countenanced. The application to amend the notice of motion thus falls to be dismissed with costs.

[41] Insofar as the cross-appeal is concerned, it was in reality conditional. Considering the conclusions reached, the question of prescription has been rendered moot. The cross-appeal falls to be dismissed without an order for costs.

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[24] Section 4 of the National Building Regulations and Building Standards Act 103 of 1977 provides:

'**4 Approval by local authorities of applications in respect of erection of buildings**

(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.

. . .

(4) Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence . . . .'

[25] See *Lester v Ndlambe Municipality* [2014] 1 All SA 402 (SCA).

[42] For all these reasons the following order is made:

1. The application to amend the notice of motion is dismissed with costs including the costs of two counsel.
2. The appeal is dismissed with costs including the costs of two counsel.
3. The cross-appeal is dismissed and no order is made as to costs.

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M S NAVSA

Acting Deputy President

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H SALDULKER

Judge of Appeal

APPEARANCES:

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