



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case No: CA 241/2022

Reportable	Yes / No
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In the matter between

RAYMOND MHLABA MUNICIPALITY

APPELLANT

And

COEGA PACKING (PTY) LTD

RESPONDENT

Coram: Pakati J et Brooks J et Bands J

JUDGMENT ON APPEAL

PAKATI J

Introduction

[1] This is an appeal against a judgment which dismissed the application of the appellant to rescind an order granted by Smith J, on 27 July 2021. The appellant had failed to oppose the said application (“the main application”) launched by the

respondent and the order was granted in its absence. The court *a quo* as per Rugunanan J granted the order dismissing the application for rescission, on 19 July 2022. The appeal is with leave of the court *a quo* against the whole of the judgment and order he granted. The rescission application was brought in terms of Rule 42 of the Uniform Rules of Court and common law. The respondent opposed the application.

[2] In the main application, the appellant was the first respondent, and the respondent, the applicant. For convenience, I shall refer to the parties as they appear in the appeal.

Background facts

[3] The respondent is the owner of Erf 3902, Fort Beaufort (“the property”) situated within the Raymond Mhlaba Municipal Area. The property is 21.1099 hectares in extent and approximately 3 kilometres from the centre of Fort Beaufort. It is zoned for industrial use although it may, in addition, be used for agricultural purposes. It falls within the area of jurisdiction of the appellant and Amathole District Municipality, the second respondent, in the main application. The issues between the parties fall within the function of the appellant as the local government municipality in that during 2011, the appellant permitted and facilitated and continues to permit and facilitate the encroachment of a municipal graveyard from Erf 2232 owned by the appellant, onto the property in extent of about 2935 square metres. During 2012, the appellant used a portion of the property as an illegal dumpsite and established various sewerage works on the southern boundary by some 407 square metres without the respondent’s right or permission to do so and the appellant continues to do so. The portion of the

property on which the encroachment rests was surveyed in extent of 4.7979 hectares as shown in the sub-division diagram referred to as Portion “A”. During 2019, the sewerage works, in extent of 407 square metres, were constructed by Amathole District Municipality to provide services to the residential area which is the neighbour to the south-eastern corner of the property.

[4] Regarding the encroachments, various engagements, discussions, and meetings were held between the respondent and the appellant over an extended period whereupon an understanding was reached that the appellant would purchase a two-hectare portion of the property that had been encroached upon. Numerous correspondences were exchanged between Mr Elfranco Britz, for the appellant, and Mr Siegfried Gericke, on behalf of the respondent, regarding this issue. On 29 January 2013, an understanding was reached, and the terms were recorded as per Annexure “EH11”¹. In an email dated 31 January 2013, Mr Gericke addressed an email to Mr Britz which *inter alia*, stated: “*Please be advised that Riverside and its Board of Directors hereby officially inform you that we are requesting the amount of R563 000-00 from the Nkonkobe Municipality for the purchasing of the land in question. The illegal establishment of a graveyard on Riverside Property refers. Please note: The establishment of the graveyard has effectively “blocked” our entrance to the adjoining piece of land, and further compensation might be sought.*”

¹ The understanding was recorded as follows: “...We will negotiate once we have received the valuation and formal offer of purchase.”

[5] On 01 February 2013, Mr Britz forwarded another email to Mr Gericke informing him that the matter had been forwarded to the office of the Municipal Manager and that a private valuator would assess the property and submit the valuation to the Municipal Manager's office, which was done. From March 2013, there was no progress due to lack of response by the appellant. Mr Gericke sent further emails to Mr Britz dated 20 March 2013, and 27 March 2013, about lack of response by the appellant. Mr Britz obtained the valuation for a portion of Erf 3902 amounting to R207 000-00 which was accepted by the appellant.

[6] A meeting between Mr Britz and Mr Gericke was held on 02 April 2013, whereupon it was agreed that: (i) the respondent would donate the land to the appellant; or (ii) the appellant would purchase two hectares of the property; or (iii) two hectares of the respondent's property would be exchanged for property of equal size owned by the appellant. On 04 April 2013, the parties proposed that they conclude a lease agreement for a period of thirty years of land known as Njola in exchange for a donation by the respondent of land required by the appellant. Negotiations between the parties continued but did not yield any results. In 2019, the appellant continued to establish graves on the property, thereby ignoring the respondent. The appellant disregarded efforts of the respondent to engage with it and continued to unlawfully appropriate and use the property as a municipal graveyard.

[7] During October 2020, the respondent instructed Mr Kyle Van Niekerk, a Land Surveyor, to conduct a survey and an on-site inspection and prepare diagrams for the sub-division, which he did. On 04 November 2020, Mr Andre Crouse, a professional

Land Valuer and Appraiser, determined the fair market value of the encroached portion to be a sum of R4 580 000-00. The respondent, as the owner of the property, acknowledged in its founding affidavit that in the ordinary course, it has the right and is entitled to compel the appellant to remove the encroachments from its property.² However, it could not compel the appellant to acquire, purchase or expropriate the portion of the property encroached upon for its use. It further considered that the portion of the property upon which the encroachment is situated, is no longer capable of any beneficial use to it. As a result, it has suffered and continues to suffer a loss to the value of the property. However, it contended that it was not in the public interest that human remains buried on the property be exhumed and buried elsewhere as that would be impractical and a waste of public funds. It also acknowledged that the material dumped on the property could be removed but did not know where it would be taken to. It therefore tendered to sell that portion of its land described as Portion A to the appellant for it to acquire the property and in return, compensate the respondent on condition that the appellant paid the costs of the sub-division and transfer. However, the attempts to negotiate with the appellants to reach a constructive resolution to the issue had been unsuccessful due to lack of co-operation by the appellant. This conduct left the respondent with no option but to approach the court for relief.

[8] During June 2021, the respondent launched the main application seeking the removal of the appellant's encroachment upon its property consisting of the municipal

² See *Smith v Basson 1979 (1) SA 559 (W)* where the Court held that since the over-hanging branches which intrude on the airspace above the affected neighbour's land constitute an encroachment, he can insist on having the encroachment removed.

graveyard, dumping site and sewerage works from the property namely, Erf 3920, Fort Beaufort and to make good the respondent's property within 90 days of service of the court order upon the Municipal Manager. In the alternative, it sought, in the discretion of the court, that the appellant be ordered to compensate it for its encroachment upon its property by paying an amount of R4 850 000-00 together with a *solatium* calculated in terms of s 12 of the Expropriation Act within 30 days of service of the court order upon the Municipal Manager. Upon payment, the respondent would be ordered to sign all necessary documentation to effect transfer of that portion of its property to the appellant.

[9] On 18 June 2021 at 12h19, the Sheriff served the main application comprised of the notice of motion, founding affidavit and annexures upon Mr Zolileyo Mjebeza at the appellant's legal department at 8 Somerset Street, Fort Beaufort. The respondent also served the notice of set down upon Mr Mjebeza, on 21 July 2021 at 11h19, at the same address, although it was not required to do so. No notice of opposition was received by the respondent. Mr Britz received the papers a few days later. He forwarded same to Mr Nini, the Director of Corporate Services.

[10] On 27 July 2021, Smith J granted the order in circumstances in which the appellant failed to oppose the application. The order directed the appellant to compensate the respondent for the encroachment upon its property by paying an amount of R4 850 000-00 together with a *solatium* calculated in terms of s 12 of the Expropriation Act. An ancillary order was also granted directing the respondent to sign

all such documents deemed necessary to effect transfer to the appellant of the portion of the property as described in the sub-divisional diagram.

[11] As a consequence of the order by default, the appellant approached the court *a quo* applying for rescission of the judgment granted on 27 July 2021, relying on Rule 42 of the Uniform Rules of Court and the common law. Two issues had to be determined by the trial court namely,

11.1 that service of the process and notice of set down were irregular; and

11.2 that recourse to the application procedure in the main proceedings rendered it incompetent and impermissible for the court to have made the order for payment of damages with reference being made to the Expropriation Act when there was no expropriation of land.

[12] Regarding service of the process, the court *a quo* referred to *Vhembe District Municipality v Stewarts and Lloyds Trading (Pty) Limited and Another*³ where the requirements of s 115(3) of the Local Government: Municipal Systems Act 32 of 2000,⁴ were examined by the SCA in respect of the rescission application in circumstances where the summons was served on a person other than the Municipal Manager at the address of the municipality.

³ *Vhembe District Municipality v Stewarts and Lloyds Trading (Pty) Limited and Another* [2014] 3 All SA 675 (SCA) para [9].

⁴ Section 115(3) of the Local Government: Municipal Systems Act 32 of 2000, provides: “**115 Service of documents and process**

(3) Any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office.

[13] *In casu*, the court *a quo* found that there was proper service of the notice of motion and notice of set down on the person in attendance at the office of the Municipal Manager.

[14] Regarding the second issue, the court *a quo* found that the extent of the land owned by the respondent was determined by a land surveyor and a fair market value of the encroached portion of the land was determined by a valuator, '*hence the amount of compensation to be paid by reference to s 25(2) of the Constitution was plainly determinable and liquid*'. He found further that the order made ensued unaffected by any procedural error, which if it was known to Smith J, it would have precluded him from making the order which he did. He concluded that there was no basis for rescinding the order under Rule 42 or the common law. The application was dismissed with costs on 19 July 2022, as alluded.

[15] Aggrieved by the court order, the appellant filed a notice of appeal dated 21 December 2022, and listed the following grounds summarised thus:

15.1 That the court *a quo* erred in finding that there was proper service of the process upon the respondent. The court should have found that service upon Mr Mjebeza of the Legal Department was not service upon the Municipal Manager or a person in attendance at her office. As such there was no proper service in terms of s 115(3) of the Local Government Municipal Systems Act;

15.2 The court *a quo* failed to deal with the arguments advanced concerning the competence of seeking a forced transfer of the land encroached upon.

15.3 The trial court erred in holding that the claim was a liquid claim because it relied on a valuation and that such could be brought by way of application proceedings.

15.4 He failed to deal with the element of the order which directed a *solatium* to be paid as calculated by the Expropriation Act. Had it done so, it would have held that this was incompetent, and that rescission should have been granted.

Issues on appeal

[16] Initially, the appellant raised *inter alia*, prescription as a defence. However, this defence was not pursued when the appeal was argued. Instead, the appellant contended that there existed a misapprehension on the part of Smith J when he granted the default judgment which was erroneously sought and erroneously granted in that the proceedings effectively sought an order for damages which included a payment of a *solatium* in terms of s 12 of the Expropriation Act. An issue further was whether it was competent to order a forced transfer of the encroached portion of the respondent's property to the appellant and order a *solatium* to be paid by the appellant in terms of the Expropriation Act. That is because such transfer amounted to deprivation of property as contemplated in section 25(1) of the Constitution and the appellant did not expropriate any land. In addition, the appellant alleged that service of the process was irregular because of internal problems. The Municipal Manager contended that she was not informed of the court process which resulted in lack of instructions to the attorneys to defend the matter. The court had to also determine whether there was a plausible explanation for the delay and whether a *bona fide* defence had been established.

[17] The respondent alleged that the appellant did not dispute that the appellant is, in terms of sections 155 and 156 read with schedule 4 Part B and schedule 5 Part B of the Constitution, obliged to provide for, manage and administer cemeteries, sewerage works and refuse dumps in its jurisdiction, which are the object of the encroachment of the respondent's property.

The applicable authorities

[18] Rule 42(1) (a) of the Uniform Rules of Court provides that the court may, in addition to any other powers it may have, *mero motu* or upon the application of any other party affected, rescind, or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. In *Freedom Stationery (Pty) Ltd and Others v Hassam and Others*⁵, Van der Merwe JA (Ponnan, Tshiqi and Schippers JJA and Carelse AJA concurring) had this to say:

"[25] As I have said, when an affected party invokes rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. In my view it suffices that the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues, and the facts of the matter. In this regard it would be useful to enquire whether the relief could have been granted without amendment of the process in question. If so, the failure of an affected litigant to take steps to protect his interests by joining the fray ought to count against him...In circumstances such as these, a party who did not oppose or participate in the proceedings would not be entitled to relief under rule 42(1)(a). This is not only logical and fair but accords with the fundamental principle of finality of litigation."

⁵ *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) at para 25.

[19] In *Nyingwa v Moolman NO*⁶, White J held:

“It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.”

[20] Alkema J in *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd*⁷ held:

“[27] It has often been held that, where the rules prescribe a particular procedure, and that procedure is not followed, then such procedural error renders the judgment sought and granted ‘erroneous’ within the meaning of rule 42(1) (a). What is effectively being rescinded is the procedure in terms of which the judgment was granted, and therefore, by necessary implication, also the judgment.

[21] The learned Judge referred to *Lodhi 2 Properties Investments CC & Another v Bondev Developments (Pty) Ltd*⁸ where the court held that the phrase ‘*erroneously granted*’ relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim. Thus, a judgment to which a party was procedurally entitled cannot be said to have been erroneously granted in the absence of another party.

[22] My understanding of the above is that a rescission of judgment in terms of Rule 42(1) (a) can only succeed if the procedure followed when the judgment was obtained was erroneous or there was a procedural irregularity. It has often been held that,

⁶ *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510F-G.

⁷ *National Pride Trading 452 Pty Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at para 27.

⁸ *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at paras 25-27.

where the rules prescribe a particular procedure, and that procedure is not followed, then such procedural error renders the judgment sought and granted 'erroneous' within the meaning of rule 42(1)(a).

[23] The strength of the applicant's defence on the merits of the rescission application also becomes crucial. An application for rescission of a judgment or order granted by default requires that an applicant shows good cause/sufficient cause for his default. In *Grant v Plumbers (Pty) Ltd*⁹ the court remarked that the application must be *bona fide* and not made with the intention of delaying the plaintiff's claim and the applicant must show that he has a *bona fide* defence to the plaintiff's claim. The court held further that it would be sufficient if a *prima facie* defence is set out. If it is a weak defence the application has a little chance of succeeding.¹⁰ The learned Judge added that if it appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance.

[24] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)*¹¹ the court as per Olivier JA, Cameron JA, and Jones AJA, had this to say:

"11 ...With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd*, *HDS Construction (Pty) Ltd v Wait supra*, *Chetty v Law Society, Transvaal*)"

⁹ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477.

¹⁰ *Carolus and Another v Saambou Bank Ltd and Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349B-E

¹¹ In *Colyn v Tiger Food Industries Ltd T/A Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) para 11.*

[25] In order to succeed at common law an applicant for rescission of a judgment taken against him by default must show sufficient cause.¹² This generally entails that the applicant must:

- (i) give a reasonable (and obviously acceptable) explanation for his default;
- (ii) show that his application is made *bona fide*; and
- (iii) show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success.¹³ The courts, however, retain a discretion which must be exercised after a proper consideration of all the relevant circumstances.¹⁴

Whether there was irregular service of the application and notice of set down

[26] The appellant contended that there was irregular service of process as the papers were not served at the correct address. It contended further that because of the internal problems the Municipal Manager was not informed of the court process and because of that, attorneys were not instructed to oppose the application, as alluded. At paragraph 35 of the founding affidavit, the Municipal Manager stated that the notice of set down '*was served at Fleet Management Workshop at Ordinance Street and not at the municipal offices at 8 Somerset Street as is required by rule 4(1) (a) viii) of the rules of the Honourable Court.*'

¹² *Colyn v Tiger Food Industries Ltd T/A Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9C.

¹³ *Colyn* at 9D-F.

¹⁴ *Colyn* at 9B-D.

[27] However, the Municipal Manager confirmed that the court process was received by Mr Mjebeza, the Labour Relations, and Legal Manager, on 18 June 2021. A few days later Mr Britz, a manager in the administration, received same and forwarded it to Mr Nini. The Municipal Manager stated that Mr Njokweni, the Legal Manager, was *'an employee who is often absent without permission from the department and this is presently under investigation.'* She asserted that his absence *'placed a tremendous burden on the legal department and in particular Mr Mjebeza'*. She asserted further that the court process was not brought to her attention by the abovementioned officials and they *'simply forgot to brief attorneys as they were distracted by the present financial crisis that has befallen all municipalities including the Covid – 19 restrictions.'* It is strange that the Municipal Manager did not know whether to refer to Mr Mjebeza as the Relations Manager or Legal Manager, which makes it unclear as to which office Mr Mjebeza held.

[28] In response, the respondent submitted that Mr Mjebeza could not have been so busy that he was unable to attend to court process served upon him. This conduct showed wilful disregard of the court papers because the office of the appellant is at 8 Somerset Street, the argument went.

[29] Mr Marais, for the appellant, raised an issue regarding a notice in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. This section provides:

“3 (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (a) The creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
- (b) The organ of state in question has consented in writing to the institution of that legal proceedings-
 - (i) Without notice; or
 - (ii) Upon receipt of a notice which does not comply with all the requirements set out in subsection (2)."

(2) A notice must-

- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and
- (b) briefly set out-
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor."

[30] Ms Watt, on behalf of the respondent, correctly stated that this was never raised in this case. In reply, Mr Marais conceded that this section was never raised but indicated that when it was referred to in *Vhembe supra*, he thought it might be relevant.

[31] Section 3 was neither raised before the court *a quo* nor mentioned as one of the grounds of appeal, I will therefore not deal with it in this judgment. Regarding service of the court process, Mr Marais conceded that service of process was done properly and that this court is bound by *Vhembe*. Nevertheless, I will deal with the issue of service especially where it overlaps with the explanation for the appellant's default under common law.

[32] The Municipal Manager asserted that nothing was done with the notice of set down because at the time it was received, Messrs Nini and Mjebeza '*were heavily*

involved in Union demands, policies, and organograms and placements. So was I.' She asserted further that negotiations with SAMWU and IMATU were time consuming and demanding. Despite the appellant's knowledge of the application from the date of service of the application to date of hearing, on 27 July 2021 (40 days), nothing was done to oppose the application. This conduct shows total disregard of the court application papers. This cannot be permitted. The appellant's explanation for the default in this regard is unreasonable and unacceptable. There is no satisfactory explanation of the 40-day period. The confirmatory affidavits by Messrs Nini, Mjebeza and Britz lack detail of what happened during the period of the delay. Instead, they just confirmed the correctness of the Municipal Manager's affidavit insofar as it related to them, which is unhelpful. To say that Mr Mjebeza was too busy to attend to legal process that was served upon him, clearly shows a flagrant disregard of the court process which amounts to wilful neglect of same. It is unclear what Mr Nini did with the court process after he received it from Mr Mjebeza. For the appellant to say that *'the aforesaid employees did not bring the papers to my attention and simply forgot to brief attorneys as they were distracted by the present financial crisis that has befallen all municipalities'*, is inconceivable especially coming from the Municipal Manager.

[33] A judgment or order may be granted in the absence of another party if that other party is aware that legal process has been initiated against them. Service of the said process to the other party becomes important. A party who initiates the proceedings would ensure that the process has been properly served on the other party to successfully obtain an order by default, which the respondent did in this case, as shown above.

[34] The instant case, is in all fours with the circumstances in *Vhembe*. The appellant has, in my view, failed to show that there was irregular service of process. The appellant acknowledged receipt of the notice of motion and its annexures on 18 June 2020 and notice of set down on 21 July 2021, served on Mr Mjebeza as shown in the return of service, which notice was in turn given to Mr Britz and then, Mr Nini. In my view, the court *a quo* did not misdirect himself when he found that there was proper service of both the notice of motion and notice of set down.

The nature of the relief granted by Smith J

[35] Mr Marais, for the appellant, submitted that where an award of damages is the appropriate relief, an order for the transfer of the portion of the property encroached upon is incidental to and consequent upon such an award but, the award of damages is the true basis for the relief granted. He submitted further that a court exercising a discretion should not conflate compensation with transfer as transfer need not necessarily be made. He stated that the preferred position was an order that the encroachment be removed rather than payment of compensation. In para 54 of the founding affidavit, the appellant alleged that transfer of the owner's land to the encroacher amounted to deprivation of property as contemplated in s 25(1) of the Constitution. For this assertion, it relied on *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee Capital Property Trust*¹⁵.

¹⁵ *Fed Group Participation Bond Managers (Pty) Ltd v Trustee Capital Property Trust* 2015 (5) SA 290 (SCA) at para 24.

[36] Ms Watt, on behalf of the respondent, submitted in reply that the appellant has neither put up a *bona fide* defence to the basis of the order granted on the merits nor has it put any defence on the sum of the compensation determined by the Court. She further submitted that the case of *Fed Group* relied upon by the appellant is distinguishable from the instant case.

[37] Griesel J, in *Trustees, Brian Lackey Trust v Annandale*¹⁶ remarked:

“[32] In exercising such discretion, the starting point, in my view, should be that an owner is ordinarily entitled to claim a demolition order in respect of the encroaching structure. The primary remedy in cases of encroachment is, therefore, an order for removal of the encroachment. However, as with claims for specific performance, rigid enforcement of that primary remedy can sometimes give rise to an unjust result and, as appears from the *Benson* case *supra*, that is precisely the *raison d'être* for the Court's discretion, namely, so as to enable the Court to avoid an unjust result...”

[34] Weighing up, therefore, the option of *complete* demolition, on the one hand, against payment of compensation (including a *solatium*), on the other, I am satisfied that the former option would indeed produce an unjust result. The considerations leading me to this conclusion fall broadly into two categories, viz (a) disproportionality of prejudice; and (b) principles of neighbour law.”

[38] Turning to *Fed Group*, the issue to be determined was whether the encroacher on another's land was entitled, in the absence of an action or 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 an encroachment, but also seek transfer of additional vacant land against a tender of compensation. The court *a quo* was of the view that the order sought was entirely within the court's discretion and granted the relief sought which the court *a quo*

¹⁶ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 32 and 34.

categorised as a '*specific performance*'. She declined the aggrieved landowner's claim for a demolition order.

[39] The SCA as per Navsa ADP and Sadulker JA (Mhlantla JA, Pillay JA and Willis JA concurring) held at para [35]:

"[35] ...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. Prejudice and 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 his rights of ownership."

[40] In my view, the facts in *Fed Group* are distinguishable from those of this case because the owner of the property encroached upon was unwilling to sell the property encroached upon. The encroacher sought an order that the owner of the land encroached upon be directed to transfer ownership to it. The owner did not seek removal of the encroachment from the property, as in the instant case. There were also significant disputes of fact as well as the value of the portion of the property encroached upon. Moreover, the appellant, *in casu*, did not offer to remove the encroachments on the property of the respondent. However, it appeared that it was willing to accept that it should take ownership of the respondent's property encroached upon.

[41] Reverting to whether the judgment was erroneously sought or erroneously granted, the appellant contended that the order granted in the alternative was erroneously granted in that it was '*legally incompetent*' for default judgment to have been made in this instance namely, seeking removal of the encroachment but relying upon payment of damages and other ancillary relief, as shown above. For this assertion, it relied on *Marais v Standard Credit Corporation*¹⁷ where Coetzee J held:

"In my view the word 'erroneously' covers a matter such as the present one, where the allegation is that for want of an averment there is no cause of action, ie nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purposes of Rule 42(1)(a)."

[42] Mr Marais submitted that the appellant has a *bona fide defence* arising from the proceedings which sought an order for damages which was granted on application papers and included an order for payment of *solatium* in terms of s 12 of the Expropriation Act, where there was no expropriation of land. That is because a claim for compensation in respect of an encroachment of the owner's property was a claim for damages and therefore illiquid. He argued that it was inappropriate for the respondent to seek damages by way of application papers. In paragraph [48] of the appellant's heads of argument it is alleged that in uncontentious matters where default judgment is sought in respect of damages, a court in its discretion, may dispense with the hearing of evidence. However, the question of compensation for encroachment is a complex issue and should have been dealt with by way of *viva voce* evidence. For this assertion, reliance was placed on *Economic Freedom Fighters & Others v Manuel*¹⁸ where the Court as per Navsa JA, Wallis JA, Sadulker JA, Molemela JA and Poyo-Dlwati AJA concurring, held:

¹⁷ *Marais v Standard Credit Corporation* 2002 (4) SA 892 (WLD) at 897A-B.

¹⁸ *Economic Freedom Fighters & Others v Manuel* 2021 (3) SA 425 (SCA) at paras 92 and 93.

[92] An unliquidated claim for damages must be pursued by institution of an action. No less so, when an aggrieved victim of a defamatory statement seeks compensation. That has always been the position and it is reflected in the Uniform Rules of Court. Uniform Rule 17(2) compels a person claiming unliquidated damages to use a long-form summons and file particulars of claim, and Uniform Rule 18(10) obliges 'a plaintiff suing for damages [to] set them out in such manner as will enable the defendant reasonably to assess the quantum thereof' and plead thereto. In respect of damages claims for personal injury the rule requires even greater specificity. Summary judgment proceedings, regulated by Uniform Rule 32, are limited to claims based on a liquid document, a liquidated amount in money, the delivery of specified movable property, and ejectment. It is not a remedy available in respect of claims for unliquidated damages.

[93] This is not mere technicality. Claims for unliquidated damages by their very nature involve a determination by the court of an amount that is just and reasonable in the light of a number of imponderable and incommensurable factors. That exercise cannot be undertaken in proceedings by way of application. As Harms DP said in *Cadac*¹⁹:

'(M)otion proceedings are not geared to deal with factual disputes — they are principally for the resolution of legal issues — and illiquid claims *by their very nature* involve the resolution of factual issues.'

[43] *Economic Freedom Fighters* dealt with a claim for damages for defamation in terms of the *actio iniuriarum* which is a delictual claim for compensation for wounded feelings and loss of reputation. It was a claim for non-patrimonial damages, commonly known as general damages.²⁰ The claim was for unliquidated damages which involved a determination by the court of what amount was just and fair considering several imponderable and incommensurable factors.²¹ The SCA found that the ordinary procedure in claims for unliquidated damages should be by way of action.²² Therefore, an unliquidated claim for damages is one where the *quantum* is undeterminable. In my view, the instant case is distinguishable from this case.

¹⁹ *Cadac [Pty] Ltd V Weber-Stephen Products Co and Others 2011 (3) SA 570 (SCA) ([2011] 1 All SA 343; [2010] ZASCA 105.*

²⁰ *Economic Freedom Fighters* supra at para 91.

²¹ *Economic Freedom Fighters* supra at paras 92 and 93.

²² *Economic Freedom Fighters* at para 127.

[44] Mr Marais submitted that the respondent attempted to deal with this matter by putting up an evaluation by an expert to indirectly show the value of the land which has its own problems, more particularly if one has regard to the use of land but of more significance was that the respondent in its application failed to make a proper case to prove loss which required compensation to be paid. In support of this argument, the appellant relied on *Rand Waterraad v Bothma en 'n Andere*.²³ It further mentioned that some of the difficulties in computing damages where there was an encroachment are detailed in *Fed Group*²⁴, where the court remarked:

“[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.”

[45] Ms Watt, in response, submitted that the main application was not advanced as an expropriation of property in terms of the Expropriation Act. The respondent utilised the provisions of the Expropriation Act to calculate the *solatium*. She submitted further that the remedy and relief granted by Smith J is not a damages claim found in delict. Instead, he exercised a judicial discretion aimed at preventing injustice.

²³ *Rand Waterraad v Bothma en 'n Andere* 1997 (3) SA 120 (O).

²⁴ *Fed Group* supra at para 36.

[46] *In casu*, it has not been disputed that the respondent was willing and agreeable to giving up ownership of the portion of its property and transferring same to the appellant after having been compensated. That was confirmed by the Municipal Manager who stated that *'negotiations had been ongoing between the municipality and Coega Packing since as far back as 2012.'* Mr Britz, acted on the instructions of the municipal council in obtaining evaluations for Erf 2232 since May 2023. In paragraph [20] of the founding affidavit, the Municipal Manager said: *"Unfortunately, and for reasons that have not been given to me, the transfer of the erf did not follow nor was payment made to Coega Packing."* She confirmed that further negotiations between Mr Britz and the representatives of the respondent invoiced the appellant for an amount of R207 000-00 with Vat in the amount of R235 980-00 ("UT5") regarding Erf 3902. On 31 October 2014, Mr Gericke forwarded an email to Mr Zwelethemba Nkosinkulu of Nkonkobe regarding the illegal graveyard on Riverside Land and stated:

"Our meeting in the office of the Town Manager, Mr Maneli and my subsequent email to your good office refers. Please provide me with info re progress on the payment by the Nkonkobe Municipality for the Riverside Land."

[47] In response, Mr Nkosinkulu requested Mr Gericke to provide him *'with relevant documentation for the Finance Department to process your payment as agreed'* in an email dated 18 November 2014 at 11:44. The appellant lacked response and failed to co-operate with the respondent who expressed its disappointment and frustration.

[48] The question that also requires determination is whether there existed a *bona fide* defence arising from the form of proceedings which sought an order for damages

which was granted on application papers and reference made to s 12 of the Expropriation Act, where there has been no expropriation?

[49] In my view, there is no expropriation of land in this case. It can also not be referred to as a forced sale because the appellant did not approach court in the absence of an application by the respondent for the removal of the encroachment seeking an order compelling the respondent to transfer the encroached land against a tender of compensation. In the absence of expropriation of land, s 25 of the Constitution did not arise. That is because in terms of s 25(1) of the Constitution the deprivation must be in terms of the law of general application and the law may not allow an arbitrary deprivation of property. The law of general application regulating encroachments is the common law.²⁵ The common law allows in certain instances that a court may deviate from the default remedy of removing the encroachment and award compensation instead. In terms of s 25(2) of the Constitution, property may be expropriated only in terms of the law of general application for (a) a public purpose or in the public interest and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by court. If there is a further order of transfer of the property encroached upon in favour of the encroacher, against the will of the property owner, that would amount to deprivation inconsistent with s 25 of the constitution. In *Meyer v Keiser*²⁶ Kumleben J held at page 507:

“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

²⁵ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para 44; See also *S v Thebus* 2003 (6) SA 505 (CC) paras 64-65 which provide authority for the fact that the common law is law of general application.

²⁶ *Meyer v Keiser* 1980 (3) SA 504 (D) at 507.

incidental to, and consequent upon, such an award. The virtue of such an ancillary order is obvious but it need not necessarily be made..., 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.” Emphasis added.

[50] In *Phillips v South African National Parks Board*²⁷ the applicant sought an interdict to compel the respondent to remove the fence and relocate it to the cadastral boundary or onto the respondent’s property. The respondent raised three defences, and a counter application claiming a declaratory order in terms of which the applicant would be entitled to damages instead of removal of the encroachment and that the respondent be entitled to transfer of ownership of the SANParks portion. The Court as per Eksteen J, had to determine whether a fence that resulted in the encroachment should be removed or remain in place. The learned Judge set the law regulating encroaching structures in SA, specifically regarding the discretion that courts must leave encroaching structures intact in exchange for compensation. The Court held that courts have the discretion to award compensation instead of removal of the encroachment. In paragraph [21] the learned Judge stated that it has consistently been accepted that where an applicant seeks a demolition order in respect of an encroachment constructed on its property, the court does have a discretion. In this case it can be deduced that a court will follow an essentially policy driven approach when exercising its discretion in encroachment disputes, balancing the interests of both parties to determine whether removal or compensation would be the most appropriate remedy. In doing so, it will take cognisance of the right of removal but keep in mind that this right is by no means conclusive anymore. Importantly, courts may

²⁷ *Phillips v South African National Parks Board*²⁷ (4035/07) [2010] ZAECHGHC 27 (22 April 2010).

refuse to grant an order for removal if policy reasons dictate that the most appropriate remedy is compensation instead of removal of the encroachment.

[51] It is undisputed that it is not in the interests of the public for human remains buried on the encroached portion (the graveyard) of the respondent's property to be exhumed and buried elsewhere. I agree with the respondent's submission that the cost would be out of bounds and difficult to overcome. Mr Britz had also previously indicated that there was no municipal land in proximity of Fort Beaufort suitable to be utilised as a graveyard. It was recognised that the appellant needed to acquire land from the respondent for a cemetery in Newtown but in the application for rescission the appellant acted as if it had no obligation to provide land for the cemetery in Fort Beaufort. Notably, this was uncontested by the appellant. It is inescapable that the applicant failed to address the issue not only when the parties were engaged in negotiations but also after the process had been served on it.

[52] It was further not seriously disputed that it would be impractical and a waste of public funds to remove sewerage works from the portion of the property and establish same elsewhere as there is no suitable site to do so. The respondent stated that the dumped material could be removed from the respondent's property. However, it is not known where it would be legally dumped. This was also undisputed. The amount and compensation granted by the Court *a quo* was equal to the market value of the portion of the property and a *solatium* calculated in terms of s 12 of the Expropriation Act after the land surveyor had determined the fair market value of the portion that had been encroached on. This means that the amount was determinable.

[53] According to the appellant, the disclaimer shows that the evaluation amount of the property was not accurate for a conclusion that an amount of R4 850 000-00 of compensation for the respondent's encroached property was not guess work. The appellant referred to a valuation certificate dated 21 May 2013 for a significantly smaller area of the cemetery encroachment of Erf 2232. A greater portion has now been appropriated by the appellant. This was uncontroverted by the appellant. It claimed that the valuation amount granted by the court *a quo* 'is also exorbitant and out of context.' In paragraph 66 of the appellant's founding affidavit the following can be gleaned:

"66. In due course, a further updated valuation will be obtained by the municipality to support the lesser amount as previously discussed in correspondence."

[54] However, the appellant has not provided an updated valuation which points to one direction that it has not seriously disputed the attached evaluation by the respondent especially that there was no confirmatory affidavit attached to the respondent's founding affidavit by the valuer in the motion proceedings. If the appellant was seriously disputing the valuation, it was incumbent upon it to provide another valuation to dispute the one that was placed before the court. Otherwise, the *quantum* of the amount for compensation was determined by way of a valuation of the market value of the portion of the property to be transferred plus a *solatium* determined by use of a formula contained in the Expropriation Act. The amount of compensation payable to the respondent was established in the respondent's founding affidavit and the Court, in its discretion was satisfied with the evidence regarding compensation and granted the determinable amount which rendered the damages, liquid. Therefore, the submission that a valuation of the immovable property is not an exact science and is

an enquiry relating to a subject abound in uncertainties where there is more than guesswork, in the circumstances of the instant case, the complexities in assessing damages did not arise.

[55] In my view, the nature of the relief sought by the respondent in the motion proceedings was, in the main, to exercise its right to compel the appellant to remove the encroachments from its property. Smith J, in his discretion, granted the relief in the alternative which, in my view, was policy driven after consideration of the interests of both parties. It is clear from the facts of this case that removal of the encroachment from the portion of the respondent's property would have proved to be an impossible exercise and a waste of public funds, as alluded. I am satisfied that the respondent's claim was not a claim for damages in delict but payment of compensation which is a remedy to be granted in the discretion of the court in circumstances where to order the removal of encroachment would result in hardship and injustice and instead it brought about an equitable, just, and reasonable outcome.

[56] Regarding the argument that the judgment was erroneously sought and granted, that cannot be sustained. I say so because this allegation is not supported by the facts of this case. In exercising his discretion in favour of leaving the encroachment in place and that the land encroached upon be transferred to the appellant, did not sanction involuntary transfer of the respondent's property. The circumstances in which the relief was sought, does not exhibit any procedural irregularity on the part of Smith J. It has not been shown what fact was he unaware of which and if he was aware of, it would have precluded him from granting the order sought in his discretion, as he did.

[57] In the circumstances, the appellant's explanation for its default is unacceptable and there is no room for rescission in terms of Rule 42(1) (a). The appellant also failed to present good cause or a reasonable and acceptable explanation for his default under common law. There are also no prospects of success on the merits. There exists no *bona fide* defence arising from the form of proceedings which sought an order granted by Smith J. The appellant's explanation for the default is weak in that not the entire period is explained. The appellant's application for rescission of the judgment of Smith J was correctly dismissed by the court *a quo*.

Costs

[58] The only outstanding issue is costs. Mr Marais submitted that the appeal should succeed with costs and requested that the costs order should include costs of two counsel. In response, Ms Watt, submitted that the appeal should be dismissed with costs. She referred to *Blue Crane Route Municipality v South African National Parks Board*²⁸ where Bloem J held:

"23. Had it not been for the defendant's failure to enter an appearance to defend, this application would not have been necessary. It cannot be said that the plaintiff's opposition to the application was unreasonable."

[59] Ms Watt submitted further that the respondent should not be mulched with costs. Instead, each party should, in the discretion of the court, be ordered to pay its own costs.

²⁸ *Blue Crane Route Municipality v South African National Parks Board* (953/2021) [2022] ZAECKMKHC 24 (31 May 2022) at para 23.

[60] It is a general rule and fundamental principle that a successful party should be awarded costs. This rule should not be departed from except on good grounds.²⁹ The award of costs is wholly within the discretion of the court, but this discretion is a judicial discretion which must be exercised on the grounds upon which a reasonable person would have concluded.³⁰

[61] It is indeed so that if the appellant in the instant case had served and filed a notice to oppose and opposed the main application, the rescission application would have been unnecessary. In this instance, there is no reason why costs should not follow the result.

[62] Regarding employment of two counsel, I am of the view that this matter was not complicated to justify employment of two counsel. I also consider that before the court *a quo*, no two counsel were employed and the circumstances of the case remained the same.

In the circumstances, I issue the following order:

The appeal is dismissed with costs.

²⁹ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at 912.

³⁰ *Gelb v Haskins* 1960 (3) SA687 (a) AT 694A-B.

B PAKATI

Judge of the High Court

I agree

R BROOKS

Judge of the High Court

and

I BANDS

Judge of the High Court

For the appellant:

Mr PT Marais, instructed by Wheeldon
Rushmere & Cole Attorneys, Makhanda.

For the respondent:

Ms KL Watt, instructed by Cloete & Company,
Makhanda.

Date of hearing:

18 July 2023

Date of delivery of the judgment:

16 January 2024