

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 3929/2019

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE	SIGNATURE

In the matter between:

UMHLABA ERF 1 PROPERTIES CC

Applicant

and

SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD

First Respondent

OJ INVESTMENTS CC

Second Respondent

REGISTRAR OF DEEDS

Third Respondent

**EKURHULENI METROPOLITAN
MUNICIPALITY**

Fourth Respondent

Summary

Commercial eviction – ownership dispute – res judicata – privies – respondent cannot pursue counter-application asserting ownership without rescinding court

order confirming applicant's ownership of contested property – improvement lien – improvement lien cannot be exercised when underlying claim has prescribed

JUDGMENT

FRIEDMAN AJ:

[1] In February 2019, the applicant (“Umhlaba”) instituted an application in which it seeks the following relief:

- a. An order confirming the termination, alternatively cancellation, of “the short-term lease between the Applicant and the First Respondent in respect of leased premises known as the Amandla Service Station”.
- b. An order ejecting “the First Respondent and all other persons occupying the leased premises through the First Respondent, including the Second Respondent . . . within 15 days of the date of this order” and ancillary relief designed to give effect to this order.
- c. A monetary claim for:
 - i. R1 539 510.00.
 - ii. R105 000.00 per month from 1 December 2018 to the date on which the first and second respondents vacate the premises, plus VAT and interest.

[2] The first respondent has opposed this application and brought a counter-application, discussed below. The second respondent, OJ Investments CC, has not opposed this application. An order joining the Registrar of Deeds and the Ekurhuleni Metropolitan Municipality (“the Municipality”) was granted on 22 May 2019. This has some significance, and I address it below.

[3] There was, on the papers, a dispute about whether the first respondent is the same entity which, on the first respondent's version of the facts as described below, acquired a right to transfer of the land which is the subject of this dispute. By the time of the hearing, this issue had largely become irrelevant. I shall, therefore, refer to the

first respondent below simply as “Shell” and do not intend to distinguish between the first respondent and its predecessors.

[4] The premise of Umhlaba’s application is that it is the owner of portion 6 of Erf 2[...], T[...] Extension 12 Township (“portion 6”) and that Shell is occupying part of it unlawfully. Portion 6 is a consolidation of portions 4 and 5 of Erf 2[...]. Portion 6 is the land on which the Amandla Service Station is located. The second respondent operates the service station in terms of an agreement with Shell. Portion 4 was the part of the property on which the service station was built and portion 5 was vacant land.

[5] Umhlaba’s notice of motion may be broken down into two broad categories. First, its ejectment claim is based on its claim to ownership of portion 6 and the notion that Shell has no right to occupy it. Secondly, it claims monetary relief in relation to a short-term contract of lease which may or may not have been concluded between it and Shell, and Shell’s occupation of the property. The relief envisaged by prayer 1 of its notice of motion (ie, a declaration that the short-term lease has terminated or was cancelled) has been overtaken by the fact that Shell disputes that any such lease was concluded in the first place. As a result, Umhlaba did not press for that relief in argument. In substance, Umhlaba seeks compensation for Shell’s occupation of the premises – either in terms of a short-term lease or as holding-over damages.

[6] Shell’s counter-claim is based on the premise that it has a right, which arose before Umhlaba acquired transfer of portion 6, to the transfer by the Municipality of that property to it. Shell’s counter-claim seeks to undo the transfer of portion 6 to Umhlaba and compel the Municipality to transfer portion 6 to Shell.¹ When it comes to the dispute about the short-term lease and holding-over rental, only portion 4 is relevant because it is common cause that, whether or not a short-term lease agreement was actually concluded, any lease agreement concluded between the parties would only ever have related to portion 4.

¹ The papers are not entirely clear, or I am not reading them properly, on the question whether the counter-claim covers the whole of portion 6 or simply the part of portion 6 on which the Amandla Service Station is built. Nothing turns on that, for the purposes of this judgment.

[7] For the remainder of this judgment, I shall describe portion 6, ie the property which is the subject of the ownership dispute, as “the property” or the “disputed property”. I shall describe portion 4, which is a far less prominent character in this story, as “the Service Station portion”.

The background

[8] Multiple affidavits have been filed in this matter and the court file gives the impression, at least superficially, that there are various complicated factual disputes. In my view, many of those disputes are not key to the proper resolution of this application and so I attempt, below, to focus only on what is relevant.

[9] It seems relatively clear on the papers that, before Umhlaba came onto the scene, Shell thought that it had purchased the contested property from the Municipality. On its version – which is not seriously disputed when it comes to what I say here – in 1992 Shell first purchased another property (described in its affidavits as “the second property”) from the Municipality. Shell bought the second property with the intention of constructing a petrol service station on it. However, during the preparation for the building, it turned out that the second property was further away from the main road in the area than initially thought. As a result, Shell says that it concluded an agreement with the Municipality to exchange the second property for the contested property. Shell has provided a resolution, taken by the Municipality in 1993, resolving to approve this exchange agreement.

[10] In 1993 and 1994, necessary rezoning was sought and consent given for it, and the building was completed by Shell in either late 1993 or early 1994 (the deponent to Shell’s answering affidavit is not sure). Necessary sub-divisions were also approved during this period, but they seem not to have been registered. There was, thereafter, a process which spanned roughly sixteen years, in which there was an initial attempt by Shell’s various representatives and attorneys to have the contested property transferred to it, a long lapse of time in which nothing seems to have happened, and then renewed attempts. In November 2003, the Municipality wrote to Shell to say that it had instructed private attorneys to attend to the

registration of the contested property in Shell's name. In February 2004, the Municipality published a notice in terms of section 79(18)(b) of Local Government Ordinance, 1939 notifying the public of its intention to transfer the contested property to Shell and providing for objections, if any, to be made.

[11] Thereafter, Shell says that attempts were made to compel the Municipality to transfer the property to Shell, with litigation being contemplated but then not pursued. Shell is hamstrung in this case by the fact that the relevant employees now responsible for this matter were not involved in the early phases (including the period between 2003 and 2010) and are constrained to rely on file notes and documentary records to piece the facts together. There is not much evidence of what happened between 2003 and 2010. But in October 2010, the Municipality passed a resolution approving the exchange agreement (this being 17 years since its first resolution to this effect). This time, however, it made the approval subject to a condition that Shell pay in a sum of R262 200, which the Municipality said was the difference in value between the second property and the contested property.

[12] In its answering affidavit, Shell says that it rejected the Municipality's unilateral imposition of a new condition – ie, that Shell had to pay the difference in market value of the two properties. But, other than that, there is no detailed information about what happened between 2010 and 2017. Certainly, despite apparently rejecting the Municipality's attempt to extract a larger purchase price, Shell took no steps to assert its rights during that period.

[13] Umhlaba operated the Amandla Service Station for a time, from around 1996. Umhlaba entered into negotiations with the City, in 2001 and 2002, to purchase the contested property. This led to the conclusion of a sale agreement in 2003. Shell says that Umhlaba's sole member, the deponent to the founding affidavit, must have used information which he acquired during his tenure as an operator of Shell's petrol station to appreciate that transfer of the contested property to Shell had never been completed. It would seem that, armed with this knowledge, he approached the Municipality to purchase the contested property and exploited the fact that the official with whom he engaged was either ignorant of the agreement between the Municipality and Shell or was willing to overlook it.

[14] For a period of around nine years, Umhlaba took no legal action to enforce its rights under the 2003 sale agreement. However, in 2012, it demanded that the Municipality co-operate to give it transfer of the contested property. When the Municipality failed to do so, Umhlaba brought an application to compel transfer. The application was not opposed by the Municipality, which was the only party cited as a respondent. On 25 July 2012, Mr Justice Mabesele (“Mabesele J”) granted the order sought, and ordered the Municipality to take certain steps to effect transfer of the contested property to Umhlaba. Although it is not entirely clear to me what happened between 2012 and 2017, by 2017 the contested property had been registered in Umhlaba’s name (on 6 November 2017, to be precise).

[15] In 2017, having achieved this transfer, Umhlaba wrote to Shell to ask it to explain the basis on which it occupied the property. Umhlaba said that it was interested in concluding a long lease with an operator of a petrol station on the property, and was willing to enter into negotiations with Shell if it was interested. Umhlaba, in its letter to Shell, also explained that it was amenable to concluding a short-term lease pending the finalisation of any negotiations.

[16] It is not necessary for me to go into granular detail about what transpired in 2017 and 2018. The bottom line is that Shell is clearly a large company, which understandably has had staff turnover since the beginning of this saga in 1992 and (perhaps less understandably) inconsistent record-keeping and/or succession planning. This resulted in a scenario in which, when Umhlaba made its approach in 2017, none of Shell’s employees responsible for the property had proper knowledge of the history. This gave rise to a situation in which, for a significant period of time, the parties negotiated based on the commonly-accepted premise that Umhlaba was the owner of the contested property. It was only as a result of investigations conducted by Shell in parallel to these negotiations (and prompted by them), that Shell’s current employees (at least, as of the time when the affidavits in this matter were exchanged) began to piece together the history from various documents which they found or were given.

[17] It is common cause that, until Shell finally had sufficient information to dispute Umhlaba's ownership of the contested property, the negotiations were aimed at concluding a long-term lease agreement. What is in dispute is whether a short-term lease in respect of the Service Station portion was concluded to govern the relationship pending the finalisation of the long-term lease.

[18] On Umhlaba's version, a short-term lease agreement was concluded orally, and remained in force while the negotiations continued. When Shell decided to change tack, reject the premise that Umhlaba was the owner of the contested property, and decided to dispute Umhlaba's ownership, Umhlaba says that it cancelled the short-term lease because it took the view that Shell had repudiated it. The relief which it seeks in the notice of motion is primarily based on the premise that Shell is liable for the rental which was due under the short-term lease until the date of Shell's apparent repudiation (this is how it reaches the lump-sum figure of R1 539 510.00²) and then for the agreed monthly rental amount for the period between Shell's repudiation and the date on which it ultimately vacates the property. In almost a throwaway paragraph, at the end of the founding affidavit, Umhlaba says that, if this Court finds that no short-term lease was concluded between the parties, Shell has been enriched at the expense of Umhlaba Properties in the amount of R105 000 per month (exclusive of VAT) – which is the sum which, on Umhlaba's version, the parties agreed as the rental under the short-term agreement – and that Umhlaba "has been impoverished in the same amount".

The issues

[19] The overarching problem, which gives rise to this application, is that both parties claim a right to transfer of the property arising from agreements with the Municipality. It is common cause that, as things stand, Umhlaba has the stronger apparent claim, since it holds the title deeds. But, as may already be seen from the facts described above, the situation is not that simple (at least, according to Shell).

² The VAT rate changed from 14% to 15% during the time in which Umhlaba claims Shell occupied the premises under the short-term lease. It is not necessary for me to go into any detail about how this lump-sum is calculated.

[20] In Shell's counter-application, it seeks to have the registration of the property in the name of Umhlaba cancelled. It also seeks an order requiring the Municipality to transfer the property to it. Shell's claim that the transfer to Umhlaba should be set aside is based largely (but not exclusively) on the doctrine of notice. It says that Umhlaba was aware, when it concluded the agreement of sale with the Municipality, that Shell had already concluded an agreement with the Municipality to acquire the property. (This is the agreement, mentioned above, in which the Municipality agreed to exchange the contested property for the second property, subject to Shell paying a small sum reflecting the value by which the contested property exceeded the second property.)

[21] To identify the issues clearly, it is necessary for me to explain how it came to be that Shell did not assert its ownership claim earlier.

[22] As I mentioned above, Umhlaba obtained the order granted by Mabesele J in 2012, but the contested property was only transferred to it in November 2017.

[23] Shell was informed of the court order granted by Mabesele J in two letters, dated 25 April 2014 and 23 May 2014 respectively, by attorneys acting for the Municipality. In the first letter, the Municipality's attorneys recorded that "[f]or reasons unknown, most probably lack of communication", the Municipality did not oppose Umhlaba's application. The purpose of the letter, according to the author, was to bring the court order to Shell's attention, "to enable [Shell] to protect its interests (if any)". The second letter was sent to check whether Shell had received the first letter and to ask "whether we may proceed with the transfer of the portion of the erf to Umhlaba Properties CC or whether your company wishes to get legal advice to intervene in this matter".

[24] The deponent to Shell's answering affidavit says that Shell replied to the Municipality's letters to say that the person to whom the letters were addressed was no longer employed in the relevant department, but that the letters would be brought to the attention of the correct person. Unless I am missing something, this reply is not in the papers – this is not important, because this issue is not in dispute. Shell

says that “for reasons unknown to [it]”, these letters did not come to the attention of the correct department and, accordingly, no action was taken in respect of them.

[25] Shell was put on notice that Umhlaba claimed ownership of the property when Umhlaba wrote to it on 13 December 2017, asserting ownership of the contested property and initiating the negotiations which led, on Umhlaba’s version, to the conclusion of a short-term lease agreement. It was this letter which triggered a process in which Shell made various enquiries, asked its attorneys to get hold of the Court file in Umhlaba’s 2012 application, and pieced together the facts which it then set out in its answering affidavit. It seems clear from some of the correspondence attached to the answering affidavit that there was a mix-up (or something else) within the Municipality in which different officials were dealing with the engagements with Umhlaba, on the one hand, and Shell on the other, which led to agreements/commitments to sell the contested property both to Umhlaba (reflected in the 2003 agreement) and Shell (reflected in the 1993 and 2010 resolutions confirming the exchange agreement, albeit that Shell views the second of these resolutions as having unilaterally amended the terms of the original agreement by imposing a new condition).

[26] I have explained above how Umhlaba formulated its case, when it launched this application on 5 February 2019. By the time of the hearing, its position had changed, in so far as the claim based on the short-term lease was concerned. In the founding affidavit, it pleaded that a short-term rental agreement had been concluded at a meeting between Shell and Umhlaba on 24 January 2018. Its version is that the intention was for the short-term lease to apply until the parties agreed the terms of a long-term agreement in respect of the Service Station portion – but, on its version, a self-standing agreement, which was not conditional on any long-term lease agreement being concluded, was agreed on that date. It says that the agreement endured until it was terminated on 8 November 2018. That is the date when Shell took the position that Umhlaba was not the lawful owner of the property, which carried the implication that it refused to conclude a long-term lease agreement in respect of the contested property with Umhlaba.

[27] In its answering affidavit, Shell disputes that a self-standing short-term agreement had been concluded. Its version is that various references to a short-term lease, both in the meeting in January 2018 and correspondence exchanged during the negotiations, were always to a short-term agreement which was conditional on a long-term agreement being concluded. It says that, since no such agreement ever was, the short-term agreement was not binding either (a suspensive condition having never been fulfilled). For this reason, in its answering affidavit, it also disputes that there was any agreement on rental, and so it disputes the quantum of Umhlaba's monetary claim for unpaid rental, alternatively enrichment.

[28] Despite this, in Shell's heads of argument, it does not argue that the application (at least in so far as the unpaid rental component is concerned) should be dismissed because there were foreseeable disputes of fact. Rather, it argues that there are various disputes of fact which suggest that the matter should be referred to trial or oral evidence. It lists the dispute about whether a short-term lease agreement was concluded as one of the issues which should be referred to oral evidence or trial. During the hearing, *Mr Kairinos*, who appeared for Umhlaba, made clear that, in the light of Shell's response to the allegations in relation to the short-term lease, and the position it adopted in its heads of argument, Umhlaba no longer pressed for the rental relief. In response to a question from me, *Mr Smit* expressly agreed that Shell's position is that this issue, amongst other disputes relevant to its side of the case, should be referred to oral evidence or trial, depending on my overall view of the merits.

[29] As a result, by the time of oral argument (and confirmed after the hearing in a draft order proposed and uploaded on behalf of Umhlaba), it was common cause that, if the counter-application were to be dismissed and Umhlaba's claim to ownership (and consequential entitlement to Shell's eviction) confirmed, Umhlaba's claim in respect of the short-term agreement should be referred to trial (Umhlaba's primary contention, confirmed in its draft order) or oral evidence.

[30] So, from Umhlaba's perspective, its case is now relatively straightforward. It seeks the ejection of Shell from the contested property on the basis that it is the owner of that land. Its claim to ownership is based on the simple fact that it now

holds a deed of consolidated title, which was registered pursuant to Mabesele J's order described above. In addition to the ejection order, it wants the referral to trial which I have already described.

[31] The complexity arises from Shell's side of the case. It brings the counter-application because it says that it should be recognised as the true owner of the contested property having concluded a purchase agreement with the Municipality first, and in circumstances where Umhlaba knew that it had done so. Since Shell alleges that Umhlaba knew of Shell's right to the property, it argues that the doctrine of notice prevents Umhlaba from asserting ownership, notwithstanding the transfer of the contested property to it.

[32] In addition, for various reasons not relevant here, Shell says that the agreement between Umhlaba and the Municipality is void *ab initio* (ie invalid from the outset). So, on the basis of these arguments, it says that it is entitled to be granted the relief in the counter-application, which is the cancellation of the transfer of the contested property to Umhlaba, and the subsequent transfer of the property to it.

[33] However, by the time of the oral hearing it had proposed two draft orders, neither of which was premised on me granting the counter-application on the papers. Its primary contention, as reflected in these draft orders, was that various issues should be referred to oral evidence (first prize) or alternatively that the main application should stand as a simple summons and trial pleadings thereafter exchanged. As far as I understand the second of these draft orders, it envisages that the entire dispute between the parties be referred to trial.

[34] But this is not the end of the matter, from Shell's perspective, because it also has a defence to Umhlaba's application, even if I am against it on the counter-application. It says that it cannot be evicted from the disputed property, even if Umhlaba is found to be the true owner, because it has an improvement lien over the property. In its answering affidavit it says that it "at all times" was a bona fide possessor of the disputed property, believing that it had the consent of the Municipality to occupy it. It says that the service station was built on the assumption that the Municipality had consented to the transfer of the disputed property. It says

that it is entitled to claim the lesser of how much it spent to build the service station and how much the value of the land has increased as a result of its expenditure. It attaches a valuation report to its answering affidavit in which the view is expressed that the property has increased in value by R13 480 000.00. It says that it has spent R10 068 618.17 on building the service station and installing certain services. It therefore says that it is entitled to exercise its lien until it is paid the latter of these amounts. One of the issues which it wants referred to oral evidence is whether it has abandoned the improvement lien (since Umhlaba says that it did). Another is the determination of its “out of pocket expenses” for the improvements made to the disputed property.

[35] The seeming complexity of this matter is amplified by some of Umhlaba’s responses to the answering affidavit and counter-application. Some of them have fallen away, and some do not arise for determination in the light of my favoured approach to this matter. I shall therefore focus only on what, in my view, remains relevant.

[36] Umhlaba, picking up on some of the facts in the answering affidavit, argues that, on Shell’s version, Shell had a right to the transfer of the contested property from 1993 onwards. Also on Shell’s own version, various steps were taken between 2003 and 2010, including Shell almost, but not, bringing legal proceedings. Furthermore, Shell itself, in its answering affidavit, expressly acknowledges that, in 2014, the Municipality brought the 2012 court order to Shell’s attention and expressly suggested that it might wish to take steps to undo its consequences. Therefore, Umhlaba says that, on Shell’s own version of the facts (including its admission that various employees and representatives engaged with the Municipality over multiple years in an attempt to enforce Shell’s rights), its claim to the transfer of the property against the Municipality has long-since prescribed. Relying on the same facts, it also says in its papers that Shell is now estopped from relying on the exchange agreement. In a supplementary answering affidavit (which was initially subject to a rule 30 application which has now, thankfully, been resolved by agreement between the parties), Umhlaba says that, in order to assert its alleged rights under the exchange agreement, Shell ought to have applied to rescind the 2012 order when it became aware of it in 2014.

[37] Umhlaba also pleads prescription in respect of Shell's claim for damages based on unjustified enrichment (the premise of the enrichment lien).

[38] There are various other points, which I would describe as minor (without wishing to trivialise them), taken in the papers. There was, as I have already mentioned, also initially an opposed rule 30 application, relating to the admission of Umhlaba's supplementary answering affidavit. This was, essentially, settled as recorded in correspondence prior to the hearing, by the parties agreeing to let the affidavit in, and the conditional response to that affidavit too.

[39] So, as a result of the way in which the disputes unfolded in the papers, and also various concessions and reformulations of positions in oral argument, it seems to me that the relevant issues, which must be determined to resolve the disputes are:

- a. Whether Shell is legally capable of raising its argument, at this stage, that the agreement between Umhlaba and the Municipality is void, taking into account the 2012 order.
- b. Whether Umhlaba is correct that, even if Shell had a valid claim against the Municipality stemming from the exchange agreement, Shell's claim has now prescribed.
- c. Whether Umhlaba is correct that, even if Shell had an enrichment claim at some stage, it has now prescribed and, if so, the implications for the lien on which Shell relies.
- d. If I am with Umhlaba on its main application and the counter-application, whether the issues relevant to the short-term lease agreement should be referred to trial or oral evidence.
- e. If I am with Shell that neither its claim to insist on transfer now or its enrichment claim has prescribed and that it is legally capable of seeking transfer now despite the 2012 order, various issues in relation to whether both components of its case should be referred to trial or oral evidence.

[40] It is also necessary for me to say something briefly about the participation of the Municipality and the Registrar of Deeds in this application, because it was an issue which I raised with the parties and which was subject to debate in the hearing.

The validity of Umhlaba's agreement and the role of the court order

[41] A notable feature of this case is that, on Shell's own version, it was informed of the 2012 court order in 2014. Also on its own version, its attorneys uplifted the court file in that matter during 2018, when enquiries were being made to establish the true facts in relation to the contested property. Shell has not, at any stage, sought to rescind the 2012 order. This despite the fact that it devoted quite a lot of space in its answering affidavit to explaining why, on Umhlaba's own version in the 2012 transfer application, Shell ought to have been joined. If that is true, then it surely follows that Shell would (at least, in principle, and subject to other considerations such as the prospects of success) be entitled to rescind the order in terms of rule 42(1)(a) of this Court's rules³ or the common law.

[42] Shell takes the position that it was not obliged to rescind the 2012 order. Its argument is that the court order is, in essence, not binding on Shell because the dispute between the Municipality and Shell – and, indeed between Umhlaba and Shell arising from Shell's argument that the agreement between Umhlaba and the Municipality is void – is not rendered res judicata by the 2012 order. Shell says that this self-evidently must be so, because it was not a party to those proceedings. And, on its argument, once the issue is not res judicata between it and the other parties, it is entitled to dispute the validity of the transfer of the contested property to Umhlaba now, without setting aside the 2012 order.

[43] Umhlaba, for its part, says that the 2012 order carries the implication that “any defences to transfer which could have been raised by [the Municipality] (such as the alleged defects in the sale agreement) became res judicata between [Umhlaba and the Municipality] and it does not lie in Shell's mouth to rely on such to set aside the said sale agreement or to set aside the transfer based on such”. Shell's retort to this, if I understand it correctly, is that even if these defences are res judicata as between the Municipality and Umhlaba, they are not res judicata as between Shell and the Municipality. On this basis, so the argument goes, Shell is entitled to raise them now.

³ Rule 42(1)(a) of the Uniform Rules provides that a Court may rescind an order which was “erroneously sought or erroneously granted in the absence of any party affected thereby”.

[44] The parties raised multiple arguments in support of their competing claims of ownership, most of which do not speak to the 2012 order. However, it seems to me that the main issue which I must resolve is whether it is competent for Shell to seek the relief in its counter-application without setting aside the 2012 order.

The plea of res judicata and the concept of “privies”

[45] It has, with good reason,⁴ become somewhat unfashionable to use Latin in modern South African legal writing. But the fundamental principle underlying the res judicata plea is, understandably given its origins, best reflected in the Latin phrase: “*interest reipublicae ut sit finis litium*” – “it is in the interest of the State that there be an end to litigation”.⁵

[46] There are, by now, countless cases which tell us when the plea of res judicata is available, and the requirements. We know that if a matter is res judicata, it means that it has been finally determined between the parties to the litigation.⁶ We also know that, in order to succeed in showing that a matter is res judicata, the party raising the plea must show that a dispute was (a) finally determined in previous litigation involving (b) the same parties and (c) with respect to the same subject matter or thing.⁷ A further requirement – that there be the same cause of action – does not appear to be part of our law (although often recited as one of the elements of the plea). This is because the doctrine of “issue estoppel” is now clearly part of our law, and it is based (at least in part) on the notion that a plea of res judicata is

⁴ I mean no disrespect to my standard 6 (as it then was) Latin teacher, Mrs Wolf. Indeed, I mean no disrespect to the language itself. However, since so few modern lawyers (much less the general public, to whom judicial law is meant to be accessible) are schooled in it, excessive use of Latin terminology and maxims would only serve to undermine clarity.

⁵ See Clermont “Res Judicata as a Requisite for Justice” 68 *Rutgers University Law Review* (2016) 1066 at 1069.

⁶ See, for example, *Skog NO v Agullus* 2024 (1) SA 72 (SCA) at para 64.

⁷ *MV Silvergate; Tradax Ocean Transport SA v MV Silvergate Properly Described as MV Astyanax* 1999 (4) SA 405 (SCA) at paras 53 to 54.

available even where the cause of action in previous litigation was not identical, but where a dispute in respect of the same subject-matter was resolved.⁸

[47] In *Amalgamated Engineering Union*,⁹ the Appellate Division, as it then was, referred to a treatment of the topic of *res judicata* by Voet. Voet discussed various parties who, although self-evidently not the same, are considered in law to be the same for the purposes of determining whether a matter is *res judicata*. Such parties are described as “privies”. The Appellate Division pointed out that one of the categories mentioned by Voet was:

“purchaser and seller, if the seller has either won or lost the action; but not if it is the purchaser who has been sued and who has either won or lost, the *exceptio rei judicatae* passing from seller to purchaser but not from purchaser to seller, since the purchaser derives his right from the seller, not the seller from the purchaser; unless the seller has joined in the action commenced against the purchaser, or the seller has been notified by the purchaser of the action and the threat of eviction and has nevertheless, despite the notification, left the purchaser to fight the suit by himself, in which event the result of the suit would enure to the benefit or the loss of the seller as well, as he had not merely the opportunity, but also the duty of undertaking, along with the purchaser, the defence of the article which had been sold by him. The judgment of the Transvaal Court therefore stands merely as an application of Voet’s proposition that in the circumstances the seller and the purchaser are, for the purposes of the *exceptio rei judicatae*, regarded as being the same party.”¹⁰

[48] In *Royal Sechaba Holdings*,¹¹ the Supreme Court of Appeal (“SCA”) relied on the extract from *Amalgamated Engineering Union* which I have just quoted to say the following:

⁸ See the very helpful discussion in the judgment of Cameron J in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC) at paras 112 to 114, and the authorities cited there.

⁹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

¹⁰ *Amalgamated Engineering Union* (above n 9) at 654.

¹¹ *Royal Sechaba Holdings (Pty) Ltd v Cloete* 2014 (5) SA 562 (SCA) at para 14.

“It was contended by Royal Sechaba that one of the essential requirements for a successful reliance on either *res judicata* or issue estoppel, that the parties must be the same (*idem actor*), was not proven by the respondents. It is accepted that the *idem actor* requirement does not mean identical parties but that 'same parties' for the purposes of *res judicata* and issue estoppel includes their privies. The principle that a party's privies may also rely on an earlier judgment to found a defence of *res judicata* or issue estoppel originated from a statement in Voet's *Commentarius ad Pandectas* 44.2.5 where various illustrations are given of those who are 'deemed' to be the 'same person' or who are identified with one another for the purposes of *res judicata*, such as a deceased and his heir, a principal and his agent, a person under curatorship and his curator, a pupil and his tutor, a creditor and debtor in respect of a pledged article if the debtor gave the article in pledge after losing a suit in which a third party claimed it, and a purchaser and seller, if the seller has won or lost the action.”

[49] The concept of a privy, who is considered for the purposes of the *res judicata* rule to be the same entity as a party to litigation, was described succinctly by Wallis JA in *Caesarstone Sdot-Yam Ltd*¹² as a party “deriving [his or her] rights from that other person”.

[50] In *Aon South Africa*,¹³ Wallis JA quoted¹⁴ the following formulation of the parameters of issue estoppel, first stated by the Transvaal Provincial Division in *Boshoff*.¹⁵

“Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination,

¹² *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite* 2000 CC 2013 (6) SA 499 (SCA) at para 42.

¹³ *AON South Africa (Pty) Ltd v Van den Heever* NO 2018 (6) SA 38 (SCA).

¹⁴ *AON South Africa* (above n 13) at para 22.

¹⁵ *Boshoff v Union Government* 1932 TPD 345 at 350-1.

though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.”

[51] As pointed out, both by Wallis JA in *AON South Africa* and Scott JA in *Smith v Porritt*,¹⁶ this formulation in *Boshoff* applies to the requirement that the relief claimed and cause of action must be the same in the two proceedings for res judicata to apply. It did not serve as authority for the notion that the “same parties” requirement may also be relaxed.

[52] However, in *AON South Africa*, as in *Caesarstone Sdot-Yam Ltd*, Wallis JA also pointed to the concept of treating privies as the same parties for the purpose of binding them to previous judgments on the same issues.¹⁷ Wallis JA said that “Voet’s description of those who are the same parties for the purposes of res judicata goes well beyond those who are privies in the strict sense of deriving their rights from a party to the original litigation.”¹⁸ In fact, the SCA said in *Royal Sechaba* that there is no reason in principle why even the “same parties” requirement should not be relaxed.¹⁹ While that may or may not be taken up by the courts in due course, there is no doubt that the concept of privity of interest is not a departure from the “same parties” requirement. It serves, instead, to expand the category of “same parties” to include those who must in law be treated as party to previous litigation even though they were not, as a matter of fact.

Does the 2012 order render the ownership dispute res judicata?

[53] Framed in simple terms, a judgment *in personam* resolves a dispute between the parties to litigation, while a judgment *in rem* is binding on the world at large.²⁰ Since a judgment *in rem* is binding on the world at large, the question whether a

¹⁶ *Smith v Porritt* 2008 (6) SA 303 (SCA) at para 10.

¹⁷ See *AON South Africa* (above n 13) at para 27.

¹⁸ *AON South Africa* (above n 13) at para 27.

¹⁹ *Royal Sechaba Holdings* (above n 11) at para 19.

²⁰ See *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd* [2018] 3 All SA 605 (SCA) at para 28.

judgment *in rem* renders a subsequent dispute res judicata does not generally²¹ arise. Any party who was not joined to proceedings which resulted in an order which operates *in rem* would have to apply to rescind that order if he or she considered it to be prejudicial to his or her rights. So, the issues raised by the principles relating to privies apply, by definition, only to judgments *in personam*.

[54] A judgment *in rem* resolves the status of a person or a thing.²² The 2012 order arguably operates *in rem*, because it provides for the registration of the contested property in Umhlaba's name. I am mindful that Umhlaba's claim against the Municipality to obtain transfer of the property was based on a personal right (as to which, see further below). That does not, however, mean that the 2012 order does not operate *in rem*. This is because, having resolved the contractual question of Umhlaba's entitlement to the contested property, it also determined the property's status (it being impossible for two or more competing entities to be declared both/all to be the owner of one property (in the absence, of course, of a co-ownership arrangement)). If the 2012 order operates *in rem*, then it is clearly binding on Shell. For present purposes, I assume that it only operates *in personam* and everything which I say below proceeds from that premise.

[55] In my view, it seems unavoidable to conclude that Shell was a privy of the Municipality and is therefore bound by the 2012 order.

[56] As may be seen from my summary of the cases (which I assume, hopefully without excessive optimism, to be comprehensive), there has not yet been a detailed discussion of the concept of privies in the context of proceedings relating to the sale of property in South African law. However, as I have shown, one of the examples given by Voet of privies was "a purchaser and seller, if the seller has won or lost the action". How does this example work in practice? For convenience, one should break

²¹ An exception which occurs to me is issue estoppel. It might be argued in certain litigation relating to a personal dispute between the parties that one of them is bound by a finding in previous litigation between the same parties, even where the previous litigation resulted in a judgment *in rem*. The argument would not be based on the *in rem* character of the previous order, but on the fact that a dispute in the previous litigation between the same parties had been finally resolved.

²² See *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (1) SA 1 (CC) at para 2.

the statement down into its two categories: (a) where the seller has lost the action and (b) where the seller has won the action. Category (b), which is not applicable to the present case, would seem to refer to the following scenario: a dispute between A and B about who is the rightful owner of a thing is resolved in favour of B. B then sells the thing to C. If A then brings a claim against C on the basis that he or she is the true owner of the thing, C may successfully raise the plea of *res judicata* against A. This is because C is a privy of B and so the first matter is treated as *res judicata* between A and C as if C had been a party to the original litigation.

[57] Category (a) describes, essentially, the present case. On Shell's version, it bought the contested property from the Municipality and its counter-application is based on the premise that the Municipality is obliged to transfer that property to Shell. However, the Municipality has already, in substance, been determined in previous litigation to be unable to pass transfer of the contested property to Shell because it was obliged to transfer it to Umhlaba. This carries the implication that Shell is to be treated as the Municipality's privy and is bound by the 2012 order as if it were a party.

[58] My only cause for doubt in relation to this conclusion is the approach which seems to be followed in English law. There, the position when it comes to the sale of property appears clearly to be that a person who derives title from a seller is only considered to be the privy of the seller if that right was acquired after the previous judgment was given.²³ The application of this rule seems to go like this: A and B conclude a sale agreement in which A buys a house from B. A brings an application to enforce the agreement and the court rules that B must pass transfer to A. After judgment is handed down, B purports to sell the property to C. C will be bound by the judgment which determined A to be entitled to title on the basis of being the privy of B. The counter-factual is where B concludes a sale agreement with A. Proceeding on the premise that the agreement is invalid for some reason, B then concludes a sale agreement in respect of the same thing with C. In due course, A brings an application to enforce his rights against B, and does not cite C as a respondent because he is unaware of her. The application succeeds. C will not be treated as

²³ See *Powell v Wiltshire* [2004] 3 All ER 235 (CA).

bound by that order because C concluded an agreement with B before the order was handed down and is not therefore to be treated as B's privy.

[59] The justification for this rule appears to be that, if A sold the property to C before the litigation between A and B commenced (let alone was finalised by the making of an order), it is in fact C and not A who has an interest in defending the litigation. Once that is so, according to the reasoning, C and A cannot be treated as having a privity of interest.²⁴

[60] I have to admit to finding this approach hard to accept. The underlying philosophy of the *res judicata* plea is that finality requires that the status of a thing be determined once and for all when it is raised in litigation. The idea of privity of interest is not to be considered in the abstract. We should focus on why this class of litigant was recognised in the first place. The purpose, in the context of the sale of a thing, is to prevent endless litigation brought by parties who, on their own version, derive their entitlement to transfer solely from an agreement with a party whose rights to that thing have already been determined in litigation. This imperative cannot be made dependent on the question of which party concluded the agreement first, which necessarily relates to the merits. The whole purpose of the *res judicata* plea is to avoid the repeat litigation of a previous dispute, which necessarily precludes revisiting the merits. The mere fact that a seller has been held, in previous litigation, to be obliged to transfer a thing to the plaintiff in that litigation means that, in subsequent litigation, that seller cannot be held liable to transfer that thing to a new plaintiff. In the South African context, it should also be remembered that the SCA has pointed out that the categorisation of a litigant as a privy of another litigant is not limited to the examples given by Voet. At the level of principle, it would seem to me that the privity of interest of a buyer and seller cannot be considered to be dependent on the timing of litigation.

[61] We should also not forget that we are dealing here only with the question whether an order renders a dispute *res judicata* and not whether it is fair for a party to be deprived of his or her rights without being heard. If a privy of a party to litigation

²⁴ See *Powell* (above n 23) at 54-5.

knows of litigation and declines to participate, then it could hardly be described as unfair for that privy to be bound by the court's order. If, on the other hand, a privy is unaware of the litigation and finds out about it only after an order is made, then he or she would have the right to seek the rescission of the order. When saying that a buyer is a privy of a seller for the purposes of litigation, it is simply a statement of the principle that their interests in the subject of the litigation (ie, the property subject to the dispute) overlap sufficiently to be treated as the same.

[62] Logic therefore suggests that Shell should be treated as a privy of the Municipality. This would render the 2012 order *res judicata* between Shell and Umhlaba, just as it is *res judicata* between the Municipality and Umhlaba.

[63] Despite my puzzlement at the position in English law, it is appropriate for me to exercise caution. Neither party placed reliance on the notion that Shell is the Municipality's privy. I have considered it because Umhlaba pleaded *res judicata* as a defence to the counter-application and, in my view, one cannot consider whether that defence is available on these facts without considering the issue of privity of interest. However, because the parties did not address the issue, I am reluctant to make a firm finding on it, especially because there may be important issues relevant to the position in English law which I may have overlooked.²⁵ It is, in any event, unnecessary for me to do so because there is another reason, in my view, why Shell cannot impugn Umhlaba's ownership of the contested property in these proceedings without first rescinding the 2012 order.

The implication of registration

[64] The 2012 order required the Municipality to transfer the contested property to Umhlaba. It is common cause that, on 6 November 2017, the process of giving effect

²⁵ I have not been able to research the position in English law comprehensively. I have also not been able to conduct conclusive research of Voet's writings and the position under Roman and Roman-Dutch law. There are, almost certainly, various complexities in all of that material which could serve to explain why the English courts, possibly based on the Roman or Roman-Dutch writers, adopt the approach which I have summarised, briefly, based on the decision in *Powell* (see above n 23). There may also be important differences between our legal systems. I have not, for instance, researched the extent to which, in English law, a seller has a duty to protect a buyer from third-party attacks on its ownership. This may have some relevance to an assessment of privity of interest.

to the 2012 order was completed, and that Umhlaba's ownership of the contested property was registered on that date. In terms of our abstract system of property law, registration of immovable property passes ownership, regardless of the validity of the underlying contract.²⁶ All that is required for ownership of immovable property to pass is (a) registration and (b) a so-called "real agreement" between the parties, which is essentially a common intention for ownership to pass by transfer.²⁷ Once transfer of ownership of a property is effected by registration, a personal right to obtain transfer held by a buyer against a seller is converted into a real right, enforceable against the whole world.²⁸ In a case where registration results from a court order, the court order essentially replaces the real agreement requirement. Or, put differently, where a buyer has to obtain a court order to convert a personal right (ie, arising from her contract with the seller) into a real right (ie, reflected in the registration into her name of the property subject to the contract), the court order requiring registration confirms (by its mere existence) the validity of the real agreement.

[65] As I explained in the introductory paragraphs, Shell has, in its counter-application, sought an order setting aside the registration of the contested property in Umhlaba's name. But, instead of basing its claim for this relief on the invalidity of the 2012 order (which it could have attempted by seeking an order rescinding the 2012 order coupled with a prayer to condone the delay in seeking rescission), or even the real agreement facilitating registration, Shell chose to attack the validity of the underlying agreement between Umhlaba and the Municipality. For instance, it argues that the 2003 agreement between Umhlaba and the Municipality did not comply with section 79(18)(b) of Local Government Ordinance, 1939 (see paragraph [10] above). As noted earlier, it also argues that the agreement is invalid because of the doctrine of notice.

[66] I agree with *Mr Kairinos* that, by adopting this approach, Shell seeks to do the very thing which the abstract system of ownership precludes. Instead of attacking the basis for the registration of Umhlaba's ownership of the contested property, it directs

²⁶ *Legator McKenna Inc v Shea* [2009] 2 All SA 45; 2010 (1) SA 35 (SCA) at paras 21-4.

²⁷ *Legator McKenna* (above n 26) at para 22.

²⁸ See *eThekweni Municipality v Mounthaven (Pty) Ltd* 2019 (4) SA 394 (CC) at paras 8-20.

its fire at the underlying legal cause of the transfer of ownership. This is precisely what the SCA has said, in *Legator McKenna*, is precluded by the abstract theory of ownership.²⁹ In my view, therefore, Shell is precluded from seeking the cancellation of the registration of the contested property in Umhlaba's name without also seeking an order rescinding the 2012 order.

[67] What is the effect of the legal conclusion, for the reason just given, that Shell cannot dispute Umhlaba's ownership of the property without setting aside the 2012 order? It is the same, in practical terms, as a conclusion that the 2012 order renders the present dispute *res judicata*. On either construction, the 2012 order is an absolute barrier to the success of any argument advanced by Shell in the present application which is inconsistent with the premise that Umhlaba is the owner of the contested property. In other words, the only way that Shell could attack the premise of Umhlaba's claim to ownership was to seek to rescind the 2012 order.

[68] The question is whether the judgment in *Yellow Star Properties*,³⁰ on which Shell sought to rely, changes the conclusions which I have reached. In my view, it does not. The facts of that matter are somewhat complicated, so I hope that I shall be forgiven for stating them in a simplified form. The appellant had concluded a sale agreement with the provincial government of Gauteng in respect of certain suburban land. When the appellant sought to enforce its rights under the agreement by compelling transfer, it turned out that the land was not owned by the Gauteng government, but by the national government. The only way that the appellant could compel transfer was if the national government could be persuaded to issue a specific type of certificate which reflected the Gauteng government as the owner of the land. The national government refused to do so. It emerged, in due course, that the Minister of Public Works was the member of the national executive with the delegated power to transfer the property. In its application to compel transfer, the appellant had cited a different Minister, the Minister of Land Affairs, as one of the respondents. Nevertheless, the court granted the appellant's application and made an order which required transfer to be effected as soon as the relevant certificate

²⁹ See *Legator McKenna* (above n 26) at para 23.

³⁰ *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA).

was issued. For reasons unimportant here, the court expressly declined to order the national government to furnish the certificate.

[69] When it became clear that the national government would not issue the certificate, and after the appellant heard a rumour that the land was about to be subdivided, the appellant brought a new application, in essence to obtain an order compelling transfer. In that matter the Minister of Public Works applied to intervene and successfully argued that the agreement between the appellant and the Gauteng government was void *ab initio* (ie, lacking a lawful basis and invalid from the outset) because the Gauteng government was not authorised to sell the property. The second court therefore dismissed the appellant's application.

[70] The appellant then brought an action against the Gauteng government for damages arising from breach of the sale agreement. The Gauteng government argued that the issue of the validity of the sale agreement had been determined in the second application and was therefore *res judicata* as between the appellant and the province. Since damages cannot be claimed for breach of a void agreement, that finding would have knocked out the damages claim. In response to this, the appellant argued that it was not open to the second court to conclude that the agreement was void *ab initio* because the first court had held the agreement to be valid and enforceable. This was the main question decided by the SCA, and Shell relies on the SCA's approach to the matter as authority that it is not bound by the 2012 order.

[71] The SCA rejected the appellant's argument for two reasons. First, it held that the "same parties" requirement was not satisfied. The Minister of Land Affairs had been a respondent in the first application but not the second, and the Minister of Public Works in the second, but not the first. The Minister of Public Works, as the entity responsible for administering the property, was not party to the first application and was therefore not bound by any finding that the agreement was valid. Secondly, the SCA held that the first judgment had not, in fact, held the agreement to be valid. Rather, it presumed it to be valid and granted an order which was premised on its validity only because, having dismissed a *locus standi* point, no other arguments to support the agreement's invalidity were advanced to it. Therefore the same issue –

ie, the validity of the agreement – had not arisen in the first and second applications. Put differently, the validity of the agreement was not at issue in the first application, and so the first application could not render that issue *res judicata* in the second proceedings.

[72] The judgment in *Yellow Star* is distinguishable in relation to the two issues which, as identified above, are, in my view, dispositive of the attacks by Shell on Umhlaba's ownership and its attempt to assert ownership itself. First, there was no suggestion that (and therefore the SCA did not consider whether) any of the parties to the first litigation were privies of parties to the second application. That being the case, any parties to the second application who were not party to the first, could not be bound by findings in the first application. Secondly, *Yellow Star* did not concern, at all, the question of the circumstances in which registration of ownership can be undone. Because of the conditional nature of the order in the first proceedings (ie, that registration had to be facilitated on condition that the national government issued the necessary certificate), any personal right found to have been held by the appellant was never converted to a real right.

[73] It follows that the 2012 order is an insurmountable obstacle to the relief sought by Shell in these proceedings.

The implications

[74] But what of the fact that Shell was not joined as a respondent in the 2012 application? When Wallis JA explained the principle justifying binding privies in *Caesarstone Sdot-Yam Ltd* (*supra*), he said the following:

"It may be that the requirement of 'the same persons' is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. *Subject to the person concerned having had a fair opportunity to participate in the initial litigation*, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same

evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.”³¹

[75] This statement gives effect to what ought to be axiomatic. The principle of finality in litigation cannot trump the fundamental right to a fair hearing. It is an essential bedrock of the principles discussed above that, to bind a party to an order, that party must have been given an opportunity to participate in the proceedings which had the potential to lead to the making of that order. It seems to me to be incontestable – despite Umhlaba’s submissions to the contrary – that Shell ought to have been joined to the 2012 litigation. The 2012 litigation seems to have commenced as an urgent application. In Part A of the notice of motion, the very first substantive prayer was an interim interdict restraining the Municipality from transferring the contested property “either as is or as a bigger consolidated property to Shell South Africa Marketing (Pty) Ltd or any other person, natural or juristic but excluding the applicant itself”. Part B of the notice of motion sought the relief subsequently reflected in the 2012 order. It is not clear to me what became of the urgent application – it was set down, according to the notice of motion, on 3 July 2012 but the 2012 order (reflecting the Part B relief) was ultimately granted on 25 July 2012. I can only assume that, given the failure of the Municipality to oppose the application, the matter was moved to the ordinary unopposed roll. All of this, though, is beside the point. The relief sought in Part A clearly foreshadowed the possibility of the contested property being transferred to Shell. That, in and of itself, ought to have warranted Shell’s joinder.

[76] But the position is even clearer if one considers the founding affidavit in support of the 2012 application. In it, the deponent annexed a letter from Umhlaba’s attorney, sent to the Municipality on 14 May 2012, in which the possibility of a competing claim from Shell is set out. True, the letter clearly explained why, on Umhlaba’s version, there could never be a lawful transfer to Shell. However, it is hard for me to understand how, in the face of these allegations, Shell was not considered to be a party with a direct and substantial interest in the relief sought. Umhlaba’s stance, including in argument to me, appears to have been that Shell

³¹ *Caesarstone Sdot-Yam* (above n 12) at para 43. My emphasis.

could not possibly have had a valid claim to the contested property and therefore had no substantial and direct interest in the relief claimed in the 2012 litigation. It seems to me to be self-evident that the merits and the issue of joinder cannot be conflated in this way.³² Shell's direct and substantial interest in the 2012 litigation did not flow from its ownership of the contested property. It flowed from its claim (whether good or bad) to the contested property and the fact that the 2012 order, if granted, would prejudice that claim.

[77] I appreciate that, for some time in this protracted litigation, Umhlaba appears to have been in the dark about the relationship between various Shell entities and which, if any, had a claim to the contested property. The nature of that relationship was only cleared up in the papers in the application before me in Shell's replying affidavit to Umhlaba's answering affidavit to the counter-application. But that is also beside the point. Shell's relevant predecessor company should have been joined as a respondent in the 2012 litigation. Umhlaba clearly knew, when it launched the 2012 litigation, that Shell had a possible conflicting claim to the contested property. Knowledge of that fact was sufficient to impose on Umhlaba a duty to join Shell. (I should say that I take the point, made by Umhlaba in one of its affidavits, that it was totally transparent, in the founding affidavit in the 2012 litigation, about the position of Shell. This is correct, and I do not mean to suggest that Umhlaba was underhanded in any way, in relation to the 2012 litigation. Objectively, though, one of the Shell entities ought to have been joined in the 2012 application.)

[78] But Shell's simple remedy to cure this injustice was to seek to rescind the 2012 order. I do not think it is inaccurate of me to distil Shell's stance in argument before me to the following, simple position: Shell was not a party to the 2012 litigation but should have been joined. Since it should have been joined but was not, it is free to disregard the 2012 order. But, if this were to be accepted as correct, then there would never be a need for a non-party to seek rescission of an order, even in cases of privity of interest or where the order creates real rights.

³² See, for example, *Hlophe v Freedom Under Law and other matters* 2022 (2) SA 523 (GJ) at para 42.

[79] The question that then arises is this: would it be to put form over substance to dismiss the counter-application on the basis that no rescission of the 2012 order was sought? Would it not be possible to interpret the counter-application generously, and to treat it, in substance, as a rescission application?

[80] It seems to me that the answer to both questions must be no. Rescission is a discretionary remedy,³³ which is not there simply for the asking.³⁴ Regardless whether the application is brought under rule 42 or the common law (or both), the basis for the application must be pleaded and a proper explanation given for the delay.³⁵ Because it did not see the need to seek rescission of the 2012 order, Shell did not plead its case in this way. Because it decided not to apply for rescission, it did not attempt to justify its delay. Indeed, one might speculate that Shell's stance in this matter is motivated by the appreciation of its legal team that it would have been hard to justify not seeking rescission in 2014.

[81] This brings me to a separate argument raised by Umhlaba, which from my perspective is in fact inextricably linked to the status of the 2012 order: the contention that any claim which Shell has to the contested property has now prescribed. As I show next, I agree with this contention. That being so, it is hard to

³³ See *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* 2021 (3) SA 1 (CC) at para 54. In *Williams v Shackelton Credit Management* 2024 (3) SA 234 (WCC), Bishop AJ suggested (at para 23) that, if a previous court order was granted erroneously, a court hearing a rescission application under rule 42(1)(a) has no discretion and must grant rescission. However, read in context, Bishop AJ appears to have meant that, when it comes to the question of the nature of the previous order (ie, whether it was erroneously granted or not), there is no discretion; but, when it comes to the issue of delay (and other considerations of justice and equitability), there may be. It seems to me that there is no doubt that rescission is a discretionary remedy. Of course, there can be no discretion as to whether a previous order was erroneous – it either was or was not, which is an objective question of law. If it was not (not only as to substance but, more importantly, as to whether it was erroneously granted in the absence of a party (as an example of one of the circumstances envisaged by rule 42)), then that is the end of the matter and there would be no basis for rescission. But, if it was, the court would have to decide whether to exercise its discretion in favour of rescission, taking into account factors such as delay and the interests of justice. This seems clear from the fact that, in *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA) at para 13, the SCA approved the holding in *Theron NO v United Democratic Front* 1984 (2) SA 532 (C) at 536G that a court considering a rescission application under rule 42 has a discretion whether to grant the application. Self-evidently, this discretion only comes into play if the previous order was erroneously granted. That being so, I cannot see any room for the conclusion that a court which concludes that a previous order was erroneously granted has no discretion to refuse rescission (some remarks in other cases to the contrary, notwithstanding).

³⁴ See *Tom v Minister of Safety and Security* 1998 JDR 0225 (E) at p 32.

³⁵ See *Ekurhuleni City v Rohlandt Holdings* CC 2025 (1) SA 1 (CC) at para 94.

imagine a court exercising its discretion in favour of rescission, even if Shell had asked it to do so.

Prescription of the right to claim transfer

[82] On the facts, as I have described them above, it may be seen that Shell, on its own version of the history, acquired the right to the contested property more than fifteen years before the 2012 order was granted. On its own version, it contemplated, but then abandoned, the idea of litigating against the Municipality in around 2006 to compel it to transfer the contested property to it. It is true that it was not cited in the 2012 application brought by Umhlaba. And, if it had been, perhaps it would have raised the objection that it was Umhlaba's claim which had prescribed. After all, there was a delay of roughly ten years between when Umhlaba says that it acquired the right to claim transfer of the contested property and when it launched the 2012 application. But, again on Shell's own version, it was informed in 2014 of the 2012 order, but still chose to do nothing.

[83] Shell says that Umhlaba has no right to plead prescription against Shell's counter-application because only the Municipality may do so. This is clearly wrong.³⁶ Once that is so, then it seems to be relatively straightforward to conclude that Shell's claim to the contested property has prescribed. There is a subtle, but important, distinction between an order which determines the status of a property (ie by determining that the property is owned by X and must be transferred into its name) and a right to claim transfer of that property. The latter relates only to a personal right, because it arises from a contract binding only on the parties to it. That being so, it falls within the category of a "debt", which prescribes after three years.³⁷

[84] Where does that leave us? Even if one were to try to construe the counter-application as an implicit rescission application, it would not be in the interests of justice to grant it. Let us leave aside the fact that Shell has failed to plead a proper

³⁶ See *Lipschitz v Dechamps Textiles GmbH* 1978 (4) SA 427 (C) at 430-1. See also *Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd* 1990 (2) SA 693 (A) at 699; *George Singh & Co v Ensor* NO 1981 (1) SA 1190 (N) at 1196-7.

³⁷ See *eThekweni Municipality v Mounthaven* (above n 28) at para 8.

case for rescission. The bigger issue is that, on these facts, it could never make out a case to rescind the 2012 order. If its claim underpinning the counter-application has prescribed, as it has, then what possible purpose would be served by rescinding the 2012 order? If Shell's claim to the contested property has prescribed, then it has no further legal interest in overturning the 2012 order. This is clear from Shell's own papers, in which the claim for the cancellation of the registration of the property in Umhlaba's name is inextricably linked to Shell's insistence that it is the true owner. If it is precluded from advancing the latter argument, then it has no discernible self-standing basis for setting aside the 2012 order which facilitated the registration in Umhlaba's name.

Umhlaba's ownership must be treated as unassailable

[85] It follows from what I have said above that the counter-application cannot be granted. But what about Shell's defences to Umhlaba's eviction application, based on the premise that Umhlaba's legal right to the property is built on faulty foundations? These arguments must, necessarily, also be rejected in the light of what I have said above. Everything which I have said which precludes Shell from ventilating its counter-application applies with equal force to its defences to the main application. If the 2012 order is binding unless and until it is rescinded, then it must be accepted as correct. Once that is so, Umhlaba's eviction application rests on the simple proposition that it has taken transfer of the contested property – and holds a title deed as proof of this – pursuant to the 2012 order. That proposition entitles it to assert its ownership of the property and precludes Shell from raising any arguments attacking the underlying basis of the sale of the contested property by the Municipality to Umhlaba.

[86] I should add for completeness that, even if I am wrong in my entire analysis of the status of the 2012 order, the fact that the counter-application is precluded by prescription is also a complete and self-standing reason why Shell's opposition to the main application must fail. Once one accepts that the cause of action underpinning the counter-application has prescribed, one has to accept that Shell's interest in the contested property has permanently come to an end. That being so, I cannot see how Shell has any standing to oppose the main application (subject, at least in

principle, to its lien argument which I address below). It has no legal interest in doing so and has not remotely made out a case to establish any form of public-interest standing.

Enrichment

[87] Shell's fall-back position, which is intended to apply in circumstances in which I dismiss the counter-application and is premised on the confirmation of Umhlaba's ownership of the contested property, is that it cannot be evicted because it holds an enrichment lien. It says that it improved the value of the property substantially by building a service station on it, which means that, as a bona fide possessor, it is entitled to be compensated for improvements. It says that, unless and until it is compensated for the improvements which it made to the contested property, it is entitled to remain in possession pursuant to its lien.

[88] In explaining the basis of its enrichment claim in the answering affidavit (which, it must be emphasised, also constitutes a pleading in motion court), Shell says that the value of the contested property is now, as a result of the construction of the service station, roughly R13.5 million. It says that it has spent R10 068 618.87 "building the service station and installing services". Shell then says that it "is entitled to exercise its lien up to and until it is paid an amount of R10 068 618.87". Shell does not say, in the answering affidavit, who has been unjustifiably enriched and therefore is obliged to pay this sum to it.

[89] In its reply to these allegations, Umhlaba has disputed multiple factual premises of the entitlement of Shell to exercise its claimed lien, most notably that Shell has been in uninterrupted possession of the contested property since the improvements were made. As a point *in limine* in the replying affidavit, it also pleads prescription of any enrichment claim which Shell might have. As Umhlaba put it, "[m]ore than 3 years have thus expired since [Shell] knew or ought to have known of the said sale and pending transfer and of its alleged enrichment claim, and failed to enforce either claim by legal proceedings".

[90] Because Shell's answering affidavit in this matter also stood as its founding affidavit in the counter-application, Umhlaba's replying affidavit in which it took the prescription point also stood as its answering affidavit in the counter-application. Shell therefore took the opportunity to deal with Umhlaba's allegations about the lien, in Shell's replying affidavit. It denied that it had vacated the property and thereby given up the lien. It did not, as far as I understand the affidavit correctly, grapple with the prescription point at all. In a different context, it denied that Umhlaba had locus standi to raise prescription in respect of Shell's claim to the contested property. But I do not understand its replying affidavit to have denied that its enrichment claim has prescribed.

[91] Be that as it may, in supplementary written argument filed by *Mr Smit* on behalf of Shell, in response to a directive which I issued, Shell argues that prescription is not applicable to an improvement lien. In support of this contention, *Mr Smit* relies on the decision of *MEC, Department of Public Works and Infrastructure, Eastern Cape Province v Pretorius*.³⁸ There, the Court expressed the view that it is "doubtful" that sections 10(1) and 11(d) of the Prescription Act 68 of 1969 can terminate an improvement lien, which is a real right.

[92] The Court's statement, on which Shell relies, was obiter. This is because the ratio of the decision was that the first respondent had not pleaded the enrichment lien (or the underlying claim) adequately and could not therefore rely on an enrichment lien as a defence to the eviction proceedings brought by the applicant (on behalf of the provincial government). It was therefore not necessary for the Court to decide whether a lien prescribes, which is presumably why the court was content to use the term "doubtful", rather than anything stronger.

[93] In any event, binding authority, including of the SCA, clearly provides that all rights of real security, including, a lien are accessory to a *valid* underlying claim.³⁹ It is true, as the Court pointed out in *Pretorius*, that an improvement lien is a real right

³⁸ 2022 JDR 2144 (ECM) at para 33.

³⁹ See *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] 3 All SA 42 (SCA) at paras 24 and 28 and the authorities cited there; see Silberberg and Schoeman *The Law of Property* 6 (ed) at para 16.2.1 p 429.

(as opposed to a debtor-creditor lien, which is not). But all that this means is that it operates against the world at large. An occupier may therefore invoke the lien as a defence to eviction, even if the occupier has an enrichment claim not against the applicant for eviction but someone else. But if it may be shown that the underlying claim to which the lien is an accessory is invalid, then the lien cannot be invoked any longer. It would be absurd for the conclusion to be otherwise. It would mean that, even though it had been unequivocally demonstrated that there is no underlying claim to protect, an occupier could hold onto the property indefinitely simply by invoking the lien's status as a real right. It also has the effect of artificially hiving off part of the enquiry into the merits and ignoring the rest. On Shell's construction, all that the holder of an improvement lien must establish is that it improved the relevant property, as a matter of fact (in addition to the uncontentious requirement of retained possession, which need not detain us here). However, to succeed in the underlying claim for damages, the party who made the improvements would have to establish all of the requirements of the relevant enrichment action, as well as locus standi. It would also have to address, and defeat, any claim of prescription. It makes no sense that a lien could entitle an occupier to hold onto a property, possibly forever, despite only establishing one of the many requirements necessary to sustain an enrichment claim. It may be that possession and evidence of work done could alone constitute sufficient evidence to support the granting of an interim interdict to protect a lien to preserve the status quo. But when the underlying claim is finally shown to be invalid, the lien may no longer be invoked.

[94] The Amandla Service Station was operational by no later than 1996. Some of the improvements which Shell says that it made to the property were made by Shell on the assumption that it would soon take transfer of the property. On its own version, it came to appreciate, in around September 2003, that the Municipality had not complied with its obligations under the agreement which it had concluded with Shell. Also on its own version, Shell resolved to litigate to enforce its rights under the agreement in 2006 but chose not to do so. For the purposes of section 12(3) of the Prescription Act, prescription in respect of its enrichment claim began to run, at absolute best for Shell, no later than 31 December 2006 (because Shell gives no date in 2006 on which it resolved to litigate). Arguably prescription began to run even earlier. But, at best for Shell, prescription of the enrichment claim began to run when,

in 2006, Shell appreciated that it might never be given transfer of the contested property without bringing, and then winning, an application to compel transfer. Once it appreciated that, then it ought reasonably to have appreciated (even if it did not, as a matter of fact have this realisation, an issue not canvassed on the papers) that it had incurred expenses to improve a property which it did not own. However, it took no steps to seek compensation for those expenses. That being so, it cannot resist Umhlaba's eviction application on the basis that it holds an enrichment lien. The accessory nature of that lien means that, once the underlying claim cannot be pursued, the lien loses its teeth.

[95] There is another reason why the enrichment lien defence must fail. As in *Pretorius* (see above), Shell has not adequately pleaded the legal basis of its enrichment claim. It has pleaded, in some detail, the costs which it incurred in building the service station. However, it has never clearly identified the defendant in the enrichment claim which its lien is meant to protect. It could only ever be the Municipality or Umhlaba. But the claim is not clearly pleaded in relation to either. Furthermore, Shell is clearly aware of the trite rule that a plaintiff in a claim based on unjustified enrichment may only obtain compensation for the lesser of the plaintiff's impoverishment and the defendant's enrichment. However, it has misapplied it. It seems to see the figure of approximately R13.5 million (reflecting the alleged increased value of the land) as the (unidentified) defendant's enrichment. But that cannot be.

[96] Although Shell disputes the validity of the 2003 agreement between Umhlaba and the Municipality, it is common cause that the purchase price was R400 000. If the enrichment claim is against the Municipality, then its enrichment has to be the difference between the purchase price which it actually achieved in respect of the property (ie, the R400 000) and the value of the property before the service station was built. That assessment would have to be undertaken in respect of what the Municipality received in terms of the 2003 agreement with Umhlaba. Self-evidently, it could never be enriched to the sum of R13.5m (reflecting what Shell says is the value of the property now), when it has long-since lost any interest in the property. Its true enrichment, if any, was the difference between what it achieved for the property with a service station on it (R400 000) and what it would have achieved if there had

been no service station on it (which, for there to have been any enrichment, would have had to have been less than R400 000). This is not remotely canvassed in Shell's papers.

[97] If the enrichment claim is against Umhlaba, then it is equally defective. Any claim against Umhlaba would have prescribed no later than three years after the dates in 2014 when Shell was informed that Umhlaba had obtained an order confirming its ownership of the property. And the claim would face the further obstacle that Umhlaba bought the property with the service station already built. It could, as a result, never have been enriched by Shell's construction of the service station because the improvements which Shell made were undertaken, on the common cause facts, before Umhlaba became the owner of the property.

[98] Some of the expenses on which Shell relies to support its lien argument were incurred long after Umhlaba and the Municipality concluded their sale agreement in 2003 and at a time (2017) when it is common cause that Shell had long-since been alerted to the 2012 order. These expenses do not relate to the core construction of the service station, but rather to maintaining it. In its answering affidavit, Shell says that it "was at all times a bona fide possessor believing that it owned/or was in lawful occupation of the [contested] property with the consent of the City". It is not clear to me whether Shell appreciates the difference between a bona fide possessor and a lawful occupier. The former occupies a property in the genuine but mistaken belief that it is the owner. The latter occupies a property in terms of some lesser right (such as lease).⁴⁰ On its own version, Shell could only ever have been a possessor of the contested property because it has never been suggested that it occupied the property in terms of a lease agreement (or something similar) with the Municipality. But, by 2014, it was not a *bona fide* possessor because it knew about the 2012 order.⁴¹ In these circumstances, there is no explanation in Shell's answering affidavit of how it could ever be entitled to claim against Umhlaba for expenses which were incurred after it became aware of an order awarding ownership to Umhlaba. The claim in respect of those expenses has, in any event, long-since prescribed.⁴²

⁴⁰ See *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at para 13.

⁴¹ See *Frankel Pollak Vinderine Inc v Stanton NO* 2000 (1) SA 425 (W) at 436 and the authorities cited there.

⁴² One could become embroiled in an arcane debate about whether the counter-application served to interrupt prescription in respect of the few expenses which were incurred less than

[99] Put simply, Shell has not adequately pleaded any basis for its core contention that it has an improvement lien arising from a valid enrichment claim. It cannot escape this circumstance by having the whole matter referred to trial (as envisaged by one of the draft orders which it submitted). It is well-accepted that, before an application may be referred to trial or oral evidence, there has to be a properly pleaded claim (or defence) on the merits.⁴³ The purpose of a referral to trial is to address factual disputes which require oral evidence and not to cure defective pleading. The omissions I have described above do not flow from disputes of fact. They arise from Shell's failure to plead a proper basis for its enrichment claim.

[100] Therefore, as in *Pretorius*, Shell cannot invoke the lien, even if it is somehow correct that prescription cannot defeat it. It has not gotten out of the starting blocks in demonstrating that it has a valid basis for asserting a lien in the first place. It follows that Shell cannot resist the eviction application by relying on the enrichment lien defence.

Summation of my conclusions on the merits

[101] The implication of everything which I have said above is that Umhlaba must be treated, on a final basis, as the owner of the contested property. This is so, even if Shell is correct that the underlying agreement in terms of which Umhlaba acquired that ownership was invalid and even if Shell is correct that, when that agreement was concluded, Umhlaba knew that Shell had already acquired a right to obtain transfer of the property. Because, in my view, Shell cannot invoke an improvement lien to resist eviction, Umhlaba should succeed in its application and, for the reasons already given, Shell's counter-application cannot be granted.

The Municipality and the Registrar of Deeds

three years before the counter-application was brought. Since no damages claim has ever been instituted, I am sceptical that such an argument could prevail.

⁴³ See, for example, the judgment of Broster AJ in *Voltex (Pty) Ltd v EP Inland (Pty) Ltd* 2024 JDR 3346 (KZD) at para 32 and the judgment of Dippenaar J in *Maredi Telecom & Broadcasting (Pty) Ltd v PDEV Professional Development Institute (Pty) Ltd* 2020 JDR 0905 (GJ) at paras 19 to 29.

[102] When I was allocated this matter and first looked at the papers, I could not understand how it came to be that the Municipality and the Registrar of Deeds came to be the third and fourth respondents. The notice of motion and founding affidavit do not mention or cite them, but they make an appearance for the first time in the heading of Umhlaba's replying affidavit. I therefore issued a directive in which I asked the parties, amongst other things not relevant here, whether there was an order joining the Municipality and Registrar of Deeds as respondents and whether they abided the decision of this Court in the main application and/or counter-application (to paraphrase what I asked in the directive).

[103] Before the hearing, a copy of a joinder application brought by Shell in March 2019 and the order of this Court granting the application were uploaded to Caselines. In addition to this confirmation that this Court did indeed join the Municipality and Registrar of Deeds as respondents, there is evidence that both the joinder application and the notice of set down were served on the Municipality and the Registrar of Deeds. However, on the morning of the hearing *Mr Smit* pointed out to me that there is no evidence that the court order joining the Municipality and the Registrar of Deeds was ever brought to their attention.

[104] I debated with the parties what should be done about this state of affairs. It was ultimately agreed that I should hear argument and address the issue in due course, either in this judgment or in an interlocutory directive of some kind.

[105] I have already said, in a different context (earlier in this judgment), that the merits of a dispute should not be conflated with the test for joinder. Even though Shell's counter-application must ultimately fail, that cannot carry the implication that the Municipality and the Registrar of Deeds did not have to be joined as respondents. The conclusion that they will not be prejudiced by the order granted in this matter has only been reached as a result of a detailed consideration of the merits, and cannot answer the prior question of whether they ought to have been joined in the first place.

[106] However, it seems to me that I am now confronted with a slightly different issue. There is no doubt that both the Municipality and the Registrar of Deeds were made aware that an order could be granted joining them as respondents and even the date on which that order could be made. Despite having that knowledge, they elected not to oppose the joinder application. They also took no other steps which indicated an intention to participate in this matter, despite having been served the joinder application (which succinctly sets out the basis of their interest in the counter-application) and the papers in the main application. So, the question which faces me is not whether they ought to have been joined (which is clear and which happened). The question is whether I ought to have declined (and therefore must now decline) to make a final determination of the merits of Umhlaba's application and Shell's counter-application without first making completely sure that neither the Municipality nor the Registrar of Deeds has anything to say.

[107] In this context, it seems unavoidable to me to allow the merits to play some role. If I thought that there was any merit in the counter-application, prudence would have obliged me to ask the parties to make a further effort to ensure that the Municipality and the Registrar of Deeds were content to abide this Court's order. On the morning of the hearing, when *Mr Smit* brought the issue of the non-service of the joinder order to my attention, I did not yet have sufficient information (not least because I had not yet heard oral argument) to determine conclusively whether the Municipality or Registrar of Deeds could possibly be prejudiced by any order which I was likely to make (again, in circumstances where there is clear evidence that they were made aware both of the main application (including the counter-application) and the joinder application)). I was therefore faced with a choice. I could have declined to take any step further, for fear that to do so would have harmed the Municipality and Registrar of Deeds. Or, I could have heard argument and decided, on a more complete picture of the case, what to do. I opted for the latter course. In doing so, I was motivated by the desire to avoid a profound waste of resources. The parties had prepared for argument in a voluminous matter, which has been pending since 2019. I had read the papers and was concerned about the possibility of another judge having to deal with the matter from scratch, in circumstances where the strained resources of this Court are well-known. Again, flowing through all of this

was the fact that the Municipality and the Registrar of Deeds were well-aware of the application and its implications.

[108] Having adopted this course of action, I began the process of preparing this judgment. That process necessarily put me in a position to understand the issues fully (or at least as fully as I am able). Once it became clear to me that the counter-application could not be granted, it struck me as an exercise in futility to postpone the final resolution of this matter by trying to give the Municipality and Registrar of Deeds a further opportunity to participate.

[109] *Mr Smit*, on the morning of the hearing when we were debating what to do, expressed concern about what might happen on appeal, if I did not postpone argument on the grounds summarised above. His point being that even if I were to dismiss the counter-application (something obviously unclear at that stage), an appeal court might be minded to grant it, which potentially meant that it was necessary to ensure service of the joinder order on the Municipality and the Registrar of Deeds before going further. After reserving judgment I reflected on this stance, which is reasonable and persuasive. However, I have ultimately concluded that it is not sufficient to change my view on how to handle this issue. The fact that I am firm in my belief that the counter-application could never succeed is not something which should necessarily motivate me when considering the position of a potential appeal court. However, whether this judgment will ever go on appeal is speculative at this point. If it does, and if the appeal court decides that the Municipality and the Registrar of Deeds should be afforded a further opportunity to participate, the appeal court will have various remedies at its disposal to address the matter.⁴⁴ This speculative set of circumstances was not enough, in my view, to justify delaying the final resolution of this matter.

[110] The bottom line is this: by virtue of the approach which I take to this matter, there is no prejudice to the Municipality or the Registrar of Deeds arising from my order. To have delayed this matter further to give them a further opportunity to

⁴⁴ See, for example, *Eden Village (Meadowbrook) (Pty) Ltd v Edwards* 1995 (4) SA 31 (A) at 46-6; *Lottostar and others v Ithuba Holdings (Pty) Ltd and others* [2023] ZASCA 119 (5 September 2023).

participate would have been an unnecessary elevation of form over substance. I am accordingly satisfied that it is appropriate for me to make the order set out below without requiring any further steps to be taken in respect of those respondents.

Appropriate relief

[111] Both parties uploaded various draft orders to Caselines. I am indebted to them for doing so, especially given the way in which the terrain shifted by the time of the hearing (which would have made formulating an order without their assistance somewhat challenging).

[112] In the light of the substantive findings which I have made above, the main issue which now confronts me when deciding on appropriate relief is how to handle the relief sought by Umhlaba in prayer 4 of its notice of motion (ie, the prayer for compensation flowing from Shell's occupation of the contested property). Arising from the approach adopted by the parties as summarised above (in particular, Umhlaba's abandonment, for now, of its claim to final relief based on Shell's occupation of the contested property), the narrow question which confronts me is whether to refer the dispute about the rental/holding-over damages to trial or oral evidence. Ordinarily, an applicant who brings an application when he or she ought to have foreseen material disputes of fact should not be rewarded by the get-out-of-gaol-free card of a referral to trial or oral evidence.⁴⁵ If Shell had taken the position that this part of the application ought to be dismissed on the basis that Umhlaba ought to have foreseen disputes of fact, then the question of what order to make would have been more complicated. But since it is common cause that the dispute about rentals/holding-over damages should not be decided on the papers, I am relieved of the burden of confronting that complexity.

[113] I agree with *Mr Kairinos* that it would be preferable to refer the dispute to trial, rather than to oral evidence. The relief envisaged in prayer 4 of the notice of motion is not capable of being compartmentalised in a way lending itself to a referral to oral evidence of narrow factual issues. Essentially the whole question relating to the

⁴⁵ See *Mamadi v Premier, Limpopo* 2024 (1) SA 1 (CC) at para 42.

financial implications of Shell's occupation is in dispute. There is a dispute about whether a short-term lease was concluded in the first place. There is a dispute about the quantum of holding-over damages, if no short-term lease was agreed (and, even if one was, the dispute applies to the period after which Umhlaba says that it cancelled that lease). Had it been common cause that a short-term lease was concluded and there was only a narrow dispute about holding-over damages, I might have seen things differently. But, for present purposes, I must proceed on the basis that only prayer 4 remains alive. And, since every issue relevant to that prayer remains in dispute, a trial would be a more convenient mechanism to resolve the matter.

[114] As mentioned briefly in the introduction, both parties agreed that there was no need for me to resolve the rule 30 application. They agreed that the simple way of addressing the issues in that application is for me to admit all of the affidavits which were the subject of that dispute, since both parties had a full opportunity to respond to each other's allegations. I commend them for this approach, and intend to give effect to their agreement in the order below. All that I must add here is that, in response to a directive which I issued, the parties recorded their agreement that the costs of the rule 30 application should be costs in the cause. Since no agreement is recorded as to the scale, I intend to make clear that scale A is applicable. (I appreciate that this is the default position anyway. However, since the main costs awards are, as explained below, on scale C, I consider it prudent to distinguish between the different cost orders expressly.)

[115] There is one issue which was not addressed in argument: the period of time which should be given to Shell and the second respondent to vacate the property. In Umhlaba's draft order, it seeks a period of 15 days, which mirrors the notice of motion. Because there was no focus on this issue in argument, I am reluctant to acquiesce in the 15 days proposed by Umhlaba. In a commercial context, it is not unreasonable. Rather, my reluctance stems from the fact that I do not have any information about the position of the second respondent (which chose not to participate in this litigation) or anything else relevant to prejudice. Of course, since this is a commercial dispute and nobody is at risk of losing his or her home, this is not the type of eviction application in which I am expected to be hyper-cautious in

order to protect constitutional rights. However, it seems to me to be appropriate to afford Shell and the second respondent a longer time to vacate, especially because this dispute has dragged on for so long. Given that it is now more than seven years since Umhlaba obtained registration, I have to assume that it can wait a bit longer to obtain possession of the property.

[116] There is no need for me to address the issue of costs in any detail, other than to say what follows. Umhlaba seeks the costs of the main application and the (dismissed) counter-application on Scale C. Because Shell's entire approach was premised on the need for this matter to be referred to trial or oral evidence, its draft orders make no provision for a costs order to be made at this stage. It has not, as a result, addressed me on what scale is appropriate. In terms of rule 67A(3)(b), I am entitled to have regard to the complexity of the matter and the value of the claim or importance of the relief sought when I determine which scale should apply. There is no evidence on the papers to suggest that this matter is significantly important, in the noteworthy way envisaged by the rule, to the parties (ie, in a way which is different to the importance which all litigants attach to their disputes).⁴⁶ However, I am satisfied that this matter is sufficiently complex to justify a departure from the default position (ie, in which Scale A is applicable). Certainly, from my perspective, it raised issues which, although superficially straightforward, turned out to be complicated, requiring careful research and consideration. Whether judges care to admit it or not, the determination of whether to adopt Scale B or C will often be no more than a thumb-suck. Perhaps, as in the case of hardcore pornography, we have to be satisfied with a simple rule that we know it when we see it.⁴⁷ While my own labour is not, perhaps, a comprehensive yardstick, I can at least appreciate from my work on this judgment, and the detail in the papers, that this was not a run-of-the-mill matter. In this case, I therefore take the view that the complexity justifies a costs award on Scale C.

[117] I accordingly make the following order:

Order

⁴⁶ See *Mashavha v Enaex Africa (Pty) Ltd* 2024 JDR 1686 (GJ) at para 20.

⁴⁷ See the judgment of Stewart J in *Jacobellis v Ohio* 378 US 184 (1964) at 197.

- (1) The first respondent and all persons occupying 1 Twelve Road (a portion of Portion 6 of Erf 2[...], T[...] Extension 12 Township, Registration Division IR, Gauteng) (“the property”) through the first respondent, including the second respondent, are ordered to vacate the property within two calendar months from the date of this order.
- (2) Should any party or person described in paragraph (1) above fail to vacate the property in the timeframe envisaged by paragraph (1) above, the Sheriff of this Court is authorised and directed to enter upon the property and take all steps necessary to eject such party or persons from the property.
- (3) The applicant’s costs in relation to its application reflected in prayers 2 and 3 of its notice of motion are to be paid by the first respondent on Scale C in rule 69(7) of the Uniform Rules.
- (4) The first respondent’s counter-application, reflected in its notice of motion dated 11 March 2019, is dismissed.
- (5) The first respondent is to pay the applicant’s costs in relation to the counter-application described in paragraph (4) above, with Scale C in rule 69(7) being applicable to those costs.
- (6) The applicant and first respondent are granted leave to file their respective supplementary affidavits (being the applicant’s supplementary answering affidavit dated 26 September 2019, and the first respondent’s supplementary replying affidavit dated 13 July 2022).
- (7) The costs of the rule 30 application brought by the first respondent are to be costs in the cause. Scale A in rule 69(7) applies to those costs.
- (8) The applicant’s claims to rentals and/or holding over damages are referred to trial.
- (9) The applicant’s notice of motion is to stand as a simple summons.
- (10) The applicant must deliver its declaration within 20 (twenty) court days from the date of this order.
- (11) After delivery of the applicant’s declaration, the further exchange of pleadings, notices and documents will be governed by the provisions of the High Court Rules and applicable practice directives of this division.
- (12) The costs of the applicant’s claims to rentals and/or holding over damages are reserved for determination in the trial action.

ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines and by release to SAFLII. The date for hand down is deemed to be 14 January 2025.

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Date of hearing: 11 October 2024

Date of judgment: 14 January 2025