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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case No: **AR132/2024**

In the matter between:

**TROPICAL WINTER TRADING (PTY) LTD
KRUGER ATTORNEYS AND CONVEYANCERS**

**FIRST APPELLANT
SECOND APPELLANT**

and

**HENDRIKA PETRONELLA FOURIE
KARIEN KRUGER
REGISTRAR OF DEEDS: PIETERMARITZBURG**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Coram: Radebe, P Bezuidenhout and Mossop JJ

Heard: 6 June 2025

Additional written argument submitted on: 18 July 2025

Delivered: 1 August 2025

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Z P Nkosi J, sitting as the court of first instance):

The appeal is dismissed with costs on the attorney and client scale, which the first and second appellants are to pay jointly and severally, the one paying the other to be absolved.

JUDGMENT

MOSSOP J (RADEBE and P BEZUIDENHOUT JJ concurring):

Introduction

[1] The farms Glen Ashton (Glen Ashton),¹ Twyfelhoek (Twyfelhoek) and Moeders Rus (Moeders Rus) are located near the town of Newcastle in KwaZulu-Natal and their ownership is at the core of this appeal. When referring to them collectively, I shall refer to them as ‘the three farms’ and when speaking of them individually, I shall refer to them by their respective abbreviated farm name just mentioned. It is common cause that all three farms appear on a single Deed of Transfer bearing number T1752/1962 (the Title Deed). In the same area where the three farms may be found is the Vulintaba Country Estate (the Vulintaba Estate), which consists of a rural housing estate, a hotel, and a golf course. The Vulintaba Estate was pioneered and developed by the first appellant, which also owns several parcels of land in its vicinity.

[2] The first appellant, represented by the second appellant who are its attorneys, initially brought an ex parte application (the ex parte application) before this court to gain access to one of the three farms, Glen Ashton, for the declared purpose of constructing a firebreak or firebreaks thereon. When the ex parte application was ultimately finalised several months later, the first appellant had not only been granted leave to access Glen Ashton for the stated purpose, and had accessed it, but it had also been declared to be entitled to acquire ownership of the three farms and subsequently had acquired such ownership. All of this was achieved

¹ The first and second respondents have consistently referred to this farm in their respective affidavits as ‘Glen Aston.’ However, the Title Deed reveals that its correct name is ‘Glen Ashton.’

without notice being given to the owners of the three farms and without the first appellant's notice of motion in the ex parte application ever being varied from simply claiming a right of access to Glen Ashton, to claiming a right to acquire ownership of the three farms.

[3] Upon finding out what had occurred, the first and second respondents, who have an interest in the three farms, sought leave to intervene in the ex parte application and sought the rescission of the decision to permit the first appellant to acquire ownership of the three farms (the joinder and rescission application).

[4] The first and second respondents succeeded on both scores and this court, through Z P Nkosi J (Nkosi J), permitted them to join the ex parte application and then rescinded the order permitting the first appellant to take ownership of the three farms and directed that the transfer of the three farms to the first appellant be reversed (the judgment). It is against the judgment, which included a costs order granted against the second appellant, that this appeal has been brought.

Ownership history of the farms

[5] It is convenient to set out the ownership history of the three farms at the outset of this judgment. Nothing that is stated in this regard is in issue.

[6] Insofar as this appeal is concerned, Hendrik Petrus Geldenhuys (Hendrik) may be considered to be the original owner of the three farms. He was the first respondent's father, was twice married and his wives collectively bore him twelve children, with an equal number of sons and daughters. Hendrik passed away on 31 December 1960 and he bequeathed the three farms to his six sons and the husbands of his six daughters, in undivided shares. Approximately two and a half years after he died, the three farms were transferred, in undivided shares, into the names of Hendrik's 12 nominated heirs.²

[7] The first respondent's name appears as one of Hendrik's heirs on the Title Deed and, thus, as a co-owner of the three farms. Mr *Vorster*, who appeared for the

² Transfer occurred on 16 March 1962.

first and second respondents on appeal, candidly acknowledged that he could not explain how the first respondent's name came to be on the Title Deed, given Hendrik's apparent philosophy that only males should inherit the three farms. But the fact that Hendrik's daughter's name appears on the Title Deed is common cause and is not disputed.

The first appellant's ex parte application

[8] The first appellant approached this court on 6 June 2019 with its ex parte application. Not only was it brought ex parte, but it was also brought as an urgent application.

[9] It is necessary to state the terms of the order sought by the appellant in full in its notice of motion:

- '1. That the Applicant is entitled to bring this application on an ex parte basis;
2. That the Applicant be granted full access and possession of the property known as Farm Glen Ashton 8589HS, P.O (Pietermaritzburg), Kwazulu-Natal held under Title Deed 1752/1962 measuring 191.447 HA for the purposes of creating and maintaining fire breaks on the Property for the duration of the interim order in terms of the National Veld and Forest Fire Act 101 of 1998 at the Applicant's own cost;
3. That the Applicant shall within 14 (fourteen) days after the granting of the interim order publish the said order in 1 (one) national and 1 (one) local newspaper in circulation in the Magisterial District of Newcastle for a period of 30 (thirty) days to inform the owners of the Property of the interim order;
4. The applicant shall within 15 (fifteen) days after the granting of the interim order attend to the Master of the High Court as well as the Department of Home Affairs to establish the status of the owners or successors in title of the Property;
5. The applicant shall within 12 (twelve) months after the granting of the interim order file Supplementary Affidavits with the above Honourable Court to provide (sic) necessary information regarding the ownership of the Property and attempts to trace the owners and their successors in title and shall enroll the matter for adjudication at the first available date wherein the Applicant may either request extension of the interim order or such relief that is appropriate after information is gathered;

6. That any interested party may at any time for the duration on the interim order anticipate the return date by giving due notice to the Applicant
7. The costs for this application to be paid by the Applicant.'

[10] A copy of the order granted on 6 June 2019 forms part of the appeal record.³ There are, however, two different versions of the order in the appeal record. One version of the order, which I shall refer to as 'the first order', is typed in the usual form employed by the registrar of this court: it bears the insignia of 'The Judiciary Republic of South Africa', is signed by the registrar (Ms R J Jooste) and is marked with the stamp of the registrar's office, dated 6 June 2019. It records that the relief set out in the notice of motion was granted, save for the fact that the period of 12 months mentioned in paragraph 5 of the order quoted above was reduced to a period of six months.

[11] The second version of the order⁴ is largely identical to the first order, save for paragraph 5 thereof. That paragraph now has manuscript amendments made to it, which are not initialled or dated. Paragraph 5 now reads as follows, with the words excised from the first order identified with a strikethrough line and the added manuscript amendments highlighted in bold italic print:

'The applicant shall ~~within 12 (twelve) months after the granting of the interim order~~ **on 26 February 2020** file Supplementary Affidavits with the above Honourable Court to provide ***the*** necessary information regarding the ownership ***sworn valuation*** of the Property and attempts to trace the owners and their successors in title and shall enroll the matter for adjudication at the first available date (wherein the Applicant may either request extension of the interim order or such relief that is appropriate after information is gathered;'

I shall refer to this order as 'the amended order'.

[12] On first consideration, it appears difficult to determine which of the two orders is the true order granted. But, in my view, this ostensible dilemma is simply resolved. The first clue to resolving the issue is the previously mentioned fact that both orders are laid out in the format favoured by the registrar of this court and bear

³ Appeal record at pages 92-94.

⁴ Appeal record at pages 117-119.

the devices of this court. They were thus typed by a member of the administrative staff of this court and were therefore not handed up to the presiding judge on 6 June 2019 by the first appellant's counsel. When the two orders are further considered, it is evident that the amended order is simply a copy of the first order and must have been produced after the first order was typed. This is evident from the fact that a grammatical error in the first order has been corrected in the second order (the insertion of the manuscript word 'the' at the end of the second line in the typing referred to above).

[13] That the true order is the first order is placed beyond doubt by the fact that there was another court appearance before the appearance of 26 February 2020 referred to in the amended order, namely an appearance on 4 December 2019. The matter was thus never simply adjourned directly from 6 June 2019 to 26 February 2020. Finally, in its answering affidavit in the joinder and rescission application, the first appellant stated that the:

'... period of 12 months was reduced to 6 months at the suggestion of the Honourable Acting Justice Jikela.'

[14] If that is so, as it appears to be, then the amended order is not the order handed down by Jikela AJ, because it does not contain a reference to the reduced period of six months. The reference to that period of time has been excised from the amended order and replaced with the fixed date of 26 February 2020.

[15] It must therefore be that the manuscript additions evident in the amended order are the later work of a person not performing the functions of a judge or registrar of this court and the amended order does not reflect the order actually granted by the court on 6 June 2019. I must find, therefore, that there was no suggestion of a valuation report being permitted, or ordered, when the matter first served before this court.

[16] That impacts upon the appellants' submissions on appeal regarding what the court knew and when it came to know it. The mention of a 'sworn valuation' in the amended order appears, on the face of it, to be an attempt to introduce the prospect of a valuator becoming involved far earlier than it actually occurred. Mr *Marais* SC,

who appears for the appellants, relied upon the amended order in formulating his argument before us, when he stated in his heads of argument that the amended order must have come about through an oral amendment made by counsel, then appearing for the appellant, from the bar.⁵

[17] Before this judgment was delivered, the parties were invited to submit further written argument on an issue that was not addressed at the appeal hearing. I shall return to that issue in due course. Both parties took up the invitation (the first and second respondents only belatedly). Mr *Marais*, for the appellants, delivered additional written argument. For purposes of the current issue under consideration, the following submission in that written argument needs to be highlighted:

‘... on 6 June 2019, Jikela AJ granted Tropical Winter access to Glen Ashton and gave leave to it to file supplementary affidavits to provide a sworn evaluation of the property ...’.⁶

[18] I do not think that this submission is correct, nor is the earlier submission of an oral amendment being made from the bar. No basis for the granting of the amended order appears in the founding affidavit of the ex parte application, for there is no mention whatsoever of a valuation report being necessary or being sought: why should there be, when all that was being sought was access to Glen Ashton to construct the required firebreaks? No court could reasonably grant relief that was not claimed in the founding affidavit or in the notice of motion. I must find, therefore, that on 6 June 2019, there was no mention of a valuation report being required and that the concept of the valuation report was introduced by the first appellant at a later stage.

[19] As to the reason advanced by the first appellant for the bringing of the ex parte application, it explained in its founding affidavit that Glen Ashton posed a fire risk to the properties that it owned, and to the Vulintaba Estate itself, because its owners had allegedly not complied with their statutory duty to construct firebreaks on it in terms of the provisions of s 12 of the National Veld and Forest Fire Act 101 of

⁵ See the appellants’ heads of argument at page 2, para 4, where the following is stated: ‘The relief sought was presumably orally amended to provide for Tropical Winter to obtain a sworn valuation of Glen Ashton.’

⁶ See appellants’ written argument para 11(b)(i).

1998.⁷ The first appellant alleged that it had previously suffered damage to its properties by runaway fires that had either originated on, or crossed, Glen Ashton. It, however, did not identify which of its properties had been damaged, when they had been damaged or where exactly the fire, or fires, had originated. It also did not explain why it had not turned to the courts when such a loss was allegedly sustained. The only detail that it did provide was that it had allegedly suffered damage of R550 000. How, and by whom, that amount was calculated was also not disclosed.

[20] The ex parte application was allegedly urgent, so explained the deponent to the first appellant's founding affidavit, Mr Jacobus Lamprecht (Mr Lamprecht), because at the time that it was brought, the fire season was fast approaching. Explaining why it had brought the application on an ex parte basis, Mr Lamprecht stated that the first appellant had:

‘... no way of currently contacting the various owners of the Property for reasons set out here under and it is respectfully submitted that the Applicant's vested interest and a statutory duty in and regarding the subject matter of this Application bestows on it the *locus* to bring this Application on an *ex parte* and urgent basis.’

[21] The only explanation that then followed from Mr Lamprecht was that the first appellant had not been successful in establishing whether any of the first eight of the 12 co-owners whose names appear on the Title Deed were still alive (the co-owners). The reason for the uncertainty about whether the co-owners were alive was that the first eight heirs would all be 100 years or older if they were alive, given their respective dates of birth which also appear on the Title Deed.⁸ According to Mr Lamprecht, the ninth and tenth co-owners mentioned on the Title Deed, Pieter George Slabbert van Zyl (born 14 July 1911) and Hermanus Christiaan Michiel Geldenhuys (born 8 August 1931) (Hermanus), were unquestionably deceased because the first appellant had managed to acquire a copy of each of the the final liquidation and distribution accounts of their respective estates and those documents were appended to the founding affidavit. However, nothing at all was said about the

⁷ Section 12(1) of the National Veld and Forest Fire Act 101 of 1998 reads as follows: ‘Every owner on whose land a veldfire may start or burn or from whose land it may spread must prepare and maintain a firebreak on his or her side of the boundary between his or her land and any adjoining land.’

⁸ The dates of birth mentioned in the Title Deed ranged from 2 November 1897 (Willem Daniel van Niekerk) to 4 June 1941 (the first respondent).

11th and 12th co-owners. The first respondent was the 12th co-owner. She was not 100 years old, having been born on 4 June 1941, and the conclusion drawn in respect of the likely continued existence of the other co-owners accordingly could not be safely drawn with respect to her.

[22] It is important to note that the phrase ‘the Property’ mentioned in the extract above was a term defined by the first appellant itself. It did not mean the three farms. It meant only Glen Ashton, as reflected in the following statement in the founding affidavit:

‘8.1 The property known as Farm Glen Ashton 8[...] H[...], P:O (Pietermaritzburg), KwaZulu-Natal held under Title Deed 1752/1962 measuring 191.447 HA (hereinafter referred to as “the Property.”)’

[23] Mr Lamprecht went on to state in the founding affidavit that:

‘Since the Title Deed only contains dates of birth and no Identity Numbers it has proven most challenging to trace the owners or to establish whether or not they have next of kin. In the event where some or all of the owners are deceased it has been impossible to establish how their estates were concluded save for those established in “FA9” and “FA10”.’

I shall revert to annexure ‘FA9’ again shortly.

[24] It was abundantly clear from the founding affidavit that the first appellant only sought access to a single farm, namely Glen Ashton. This was, perhaps, understandable because the first appellant had included a sketch as an annexure to the founding affidavit, which set out the location of the three farms and the location of the parcels of land owned by it. That sketch revealed that only Glen Ashton bordered on any land owned by the first appellant. There was, however, no suggestion at all that any right of access was sought, claimed, or granted in respect of Twyfelhoek or Moeders Rus or that the first appellant sought to construct firebreaks on either of those two farms. Nor was there any expressed intention indicating that ownership of the three farms was the first appellant’s true goal.

The hearing on 4 December 2019

[25] The first order having been granted, the ex parte application was re-enrolled for hearing on 4 December 2019, ostensibly for the purpose of the first appellant reporting to this court on the steps that it had taken to locate the owners of Glen Ashton. This date was within the span of the period of six months ordered in terms of paragraph 5 of the first order.

[26] On that day, the first appellant delivered a supplementary affidavit (the supplementary affidavit). The deponent, who was again Mr Lamprecht, dutifully reported that the first appellant had complied with the first order:

‘I specifically state that the Applicant has attended to the fire breaks as stated in the order and that the fire breaks consist of a width of approximately 400 metres which constitutes 200 metres on the farm of the property (sic) and a further 200 metres on the property of the applicant.’

Mr Lamprecht did not disclose, as he later would do, that the first appellant had also gained access to Twyfelhoek and Moeders Rus and had constructed firebreaks on those two farms without any authorisation from the court permitting it to do so.

[27] As regards any attempts made to locate the owners of the three farms, very little was said about what the first appellant had done. Mr Lamprecht, however, made the following further representations:

‘22. I further state that it is my respectful submission that due to the age of these individuals, it is highly likely that there are no people to act for and on behalf of these individuals.

23. I again respectfully refer the above Honourable Court to the Title Deed and state as the dates of births are contained on the Title Deed and no identity numbers, there is no way of tracing any of the owners as per the title deed (sic) nor is there any way of establishing whether or not there are any next of kin.’

[28] Annexure ‘FA9’ was referred to earlier: It is the final estate account of Hermanus, an heir of Hendrik. It was obviously in the possession of the first appellant and was put up by it and it forms part of the appeal record. While it may be correct for Mr Lamprecht to state that no identity numbers appeared on the Title

Deed, Hermanus's identity number appeared in the heading to annexure 'FA9'.⁹ The first appellant had, thus, at least, one identity number of the 12 co-owners whose names appeared on the Title Deed. In the game of cricket, the phrase 'one brings two' is often used to highlight the possibility of the fall of one wicket immediately leading to the fall of a second wicket. In this instance, it is likely that if the identity number of Hermanus had been utilised, it may have led to the discovery of another identity number, or numbers, of the other co-owners of the three farms.

[29] From the contents of the supplementary affidavit, it is evident that the first appellant lost sight of the requirements of paragraphs 4 and 5 of the first order. Paragraph 4 required the first appellant to approach the Master of the High Court and the Department of Home Affairs to conduct further investigations concerning the co-owners of the three farms and paragraph 5 required it to set out what steps it had taken to trace the co-owners of Glen Ashton. The supplementary affidavit was entirely silent on what the first appellant had done in compliance with these two paragraphs of the first order.

[30] At this stage, inexplicably and astoundingly, the application morphed in effect, if not in form, from an application to gain access to Glen Ashton to an application by the first appellant to acquire ownership, not just of Glen Ashton, but also of Twyfelhoek and Moeders Rus. Mr Lamprecht, after describing the placing of adverts in the media designed to attract the attention and response of the co-owners of Glen Ashton, none of which had achieved that effect, proposed that a valuator be appointed to value 'the Property' and that the first appellant:

'... be allowed to proceed with the transfer of the property.'

[31] The value of 'the Property' was to be the value arrived at by the valuator to be appointed and that value would be paid by the appellant into the Guardian's Fund to allow:

'... any potential owners and/or their heirs, legates (sic) or beneficiaries' to lodge a claim against the amount so deposited.

⁹ The heading to annexure 'FA9' reads as follows: 'Eerste en finale likwidasie en distribusierekening in die boedel van wyle Hermanus Christiaan Michiel Geldenhuys identiteitsnommer 310808 5037 081 ongetroud pensionaris van Daisalaan 21 Newcastle'.

[32] What was the justification for this sudden and extraordinary development? The motivation for it was explained as follows by Mr Lamprecht:

‘In amplification of the above, I respectfully state that the risk that the Applicant has each and every single year due to the excessive veld fires in the Newcastle area far outweighs any potential rights that any potential owners may have to the property.’

[33] The thinking of the first appellant appeared to be that whilst it had never previously regarded it as being necessary to bring an application in the form of the ex parte application because of the potential threat of veld fires, it now believed that it would be prejudiced by the need to bring such an application each year going forward if it was not permitted to acquire the three farms. It is difficult to comprehend what was intended by the first appellant’s submission that its rights ‘far outweigh’ the co-owners’ ownership rights in the three farms. But what is perfectly plain from this statement is that the first appellant acknowledged the existence of the co-owners’ rights in respect of the three farms. This was thus not a situation, on the first appellant’s version, where the co-owners had abandoned their rights to the three farms, as would later be argued on appeal.

[34] On 4 December 2019, E Bezuidenhout AJ granted the following order:

- ‘1. The access of the Applicant to the Property as per the order dated 6 June 2019 at paragraph 3 of the said Order is extended until 26 February 2020;
2. The Applicant is granted consent to file further Supplementary Affidavits upon receipt of a valuation report regarding the valuation of the Property, which valuation will be attached to the Supplementary Affidavit;
3. The Notice of Set Down as well as a notice calling upon intended parties related to the owners of the property to contact Applicant’s attorney of record will be published in one local newspaper circulated within the district of Newcastle at least two weeks prior to the date of hearing in (sic) 26 February 2020.
4. The costs for (sic) the ex parte application be paid by the Applicant.’

I shall refer to this order as ‘the second order’.

[35] It is to be appreciated that the second order again referred to the defined term of 'the Property'. Moreover, it will be further appreciated that this order is not the amended order referred to earlier.

The hearing on 26 February 2020

[36] On 26 February 2020, the ex parte application came before Seegobin J and the first appellant delivered the further supplementary affidavit contemplated in paragraph 2 of the second order (the further supplementary affidavit). Nothing was said in the further supplementary affidavit about what had been done to establish whether all the owners of Glen Ashton were, in fact, dead or what steps had been taken to attempt to trace them or their descendants.

[37] From the wording used in the founding affidavit, it is perfectly plain that the first appellant did not know whether all the co-owners of the three farms were dead. Because of this, it was required to vaguely speculate regarding the possibility that 'some or all of the owners are deceased'. That statement itself conceded the possibility that some of the co-owners may still be alive. Notwithstanding this, it appeared that the first appellant assumed that they were all dead. Indeed, counsel for the first appellant (not Mr *Marais*) confirmed as much when he appeared before Seegobin J, when the following interchange between the bench and counsel for the appellant occurred:¹⁰

SEGOBIN J: ... It looks like everyone who was involved in this matter has died.

MR SWIEGERS: Indeed so.

...

MR SWIEGERS: ...M'Lord, the simple fact is that the names and the title deed, every single one of them would be in the Guinness World Book of Records if they were still alive today, M'Lord.

SEGOBIN J: Yes.'

[38] This, of course, was an incorrect understanding by both the court and counsel. The first respondent was but a youthful 78 years of age, which would not have earned her an entry in the Guinness Book of Records because of her

¹⁰ The transcript was put up by counsel for the appellants, Mr *Marais*, as an annexure to his supplementary heads of argument.

exceptional antiquity. Thus, not every co-owner was dead. However, even if all the co-owners were, in fact, dead, that would not have amounted to a hill of beans,¹¹ for their heirs would have taken their places as persons with an interest in the three farms. Neither the court nor counsel appeared to contemplate that the original heirs may themselves have had heirs.

[39] Seegobin J accordingly granted the following order:

- ‘1. The applicant shall make payment in the amount of R1,254,687.03 into the Guardians Fund within a reasonable time.
 2. The funds deposited by as (sic) per paragraph 1 hereto into the Guardian’s Fund will be for the benefit of all interested parties yet unknown in relation with (sic) the transfer of the immovable property as ordered herein.
 3. A copy of this Order will be served by way of Sheriff of the High Court on the Master of the High court (sic) of South Africa within 7 (seven) days after the granting of this Order.
 4. The Registrar of Deeds will upon confirmation of the payment of the funds as per paragraph 1 hereto, as well as service of this Order by the Sheriff of the High Court, transfer the property held under title deed 1752/1962 measuring 871.36 HA (“the Property”) into the name of the Applicant or its nominee which transfer will be attended to by Kruger Attorneys & Conveyancer with telephone number (011) 766 1428.
 5. The Registrar of Deeds is here by authorised to do all such things and the Applicant is authorised to sign all such documents as is necessary to transfer the Property into the name of the Applicant.
 6. No order as to costs.’
- I shall refer to this as the ‘third order’.

[40] The third order was sought, and granted, without the first appellant drawing the court’s attention to the fact that it had not, in truth, exhausted all attempts to locate the co-owners of the three farms, nor was it specifically drawn to the court’s attention that the effect of the third order was that the first appellant was acquiring ownership of not one farm, Glen Ashton (throughout defined as being ‘the Property’),

¹¹ Something that has little or no value: Merriam-Webster Online Dictionary (<https://www.merriam-webster.com/dictionary/hill%20of%20beans>).

but of all three farms. There was no express mention by the first appellant of the fact that it intended to acquire two additional farms, which on its own version did not border on any of its land and were never the focus of the ex parte application. Furthermore, the notice of motion was never changed at all and still simply sought access to Glen Ashton. It hardly bears mentioning that it is not for the court to decode an applicant's cryptic intention: in ex parte applications, it is the applicant's duty to be excessively forthright and explain everything in granular detail.

[41] After placing advertisements in two newspapers that only drew attention to Glen Ashton, the first appellant obtained the right to acquire all three farms from this court. In achieving this, it is disturbing that the reference to 'the Property', defined to mean Glen Ashton by the first appellant, suddenly fell away in the third order. The reference was now not to 'the Property' (as defined) but was to 'title deed 1752/1962'. The first appellant had that Title Deed. It knew that it dealt with all three farms, but it did not specifically draw this to the attention of the court. It is difficult to see this in any other way as being a form of deception.

[42] On 6 August 2020, the disputed farms were transferred into the name of the first appellant on the strength of the third order.

The first respondent's knowledge of the legal proceedings

[43] The focus of this judgment must now shift from what the first appellant did to how the first and second respondents came to realise what it had done. Because the initial application was brought on an ex parte basis, neither the first nor the second respondent was served with any of the founding, or subsequent papers, filed by the first appellant. However, both the first and second respondents, ultimately, did acquire knowledge of what had happened. This happened fortuitously and not through any effort made on the part of the first appellant. How this occurred merely served to highlight how abysmal and desultory the first appellant's attempts at locating the co-owners of the three farms were, if there were, in fact, any such attempts made.

[44] On 11 March 2020, a Ms Zelda Strauss (Ms Strauss), who is employed by Mulilo Renewable Project Developments Proprietary Limited (Mulilo), made inquiries

at the Vulintaba Estate about who owned Moeders Rus. She was directed to a company located in the town of Newcastle called Ni-Da Transport. The owner of that business was apparently well informed about local matters, and after consulting with the owner, Ms Strauss was then referred to a Ms Gerda Greyvenstein (Ms Greyvenstein), a niece of the first respondent. Ms Greyvenstein referred Ms Strauss to a nephew of the first respondent who, in turn, referred her to the first respondent's son, Mr Phillipus Fourie (Mr Fourie). On 13 March 2020, barely two days after her quest to locate the co-owners of Moeders Rus commenced, Ms Strauss contacted Mr Fourie, who referred her to the second respondent.

[45] Ms Strauss informed the second respondent that Mulilo was in the business of developing renewable sources of electricity through the erection of wind turbines on rural land. Ms Strauss, according to the second respondent, explained to her that Mulilo wanted to erect 30 wind turbines on Moeders Rus and was prepared to pay a rental of R10 000 per month per wind turbine erected for a period of 25 years. Not surprisingly, this generated considerable interest and excitement in the second respondent, and she sought the approval of the first respondent to negotiate further with Mulilo. Permission was given by the first respondent who, prior to approving of what was to happen, had also allegedly ascertained the wishes of the progeny of the deceased co-owners. She was told by them to proceed. A draft option and draft notarial lease¹² were prepared for signature by the soon-to-be contracting parties, but just before these documents were signed, Mulilo caused a Deeds Registry check to be performed and ascertained that Moeders Rus was no longer owned by the first respondent and the other co-owners but was now owned by the first appellant consequent upon the granting of the third order.

[46] Shocked and surprised by this discovery, the first and second respondents brought the joinder and rescission application.

The joinder and rescission application

[47] The first respondent explained in her founding affidavit in the joinder and rescission application that after transfer of the three farms had occurred from the late

¹² The draft notarial lease does not reveal the same rental terms as understood by the second respondent and as narrated above.

Hendrik's estate to his heirs, the new co-owners let them to a tenant farmer, a Mr Danie du Toit (Mr du Toit). The rental income received from Mr du Toit was used to maintain the three farms and to pay the imposts, if any, levied upon them. The lease with Mr du Toit was ultimately terminated to permit a sibling of the first respondent, the already mentioned Hermanus, to take up farming on the three farms. As previously noted, his name also appears on the Title Deed as a co-owner. He grazed cattle on the three farms from 1991 until his death in December 2012. He retained his undivided share in the three farms at the time of his death and, as he died intestate, his undivided share in them was inherited by his two daughters. The second respondent is one of his daughters and she was formally appointed as the executrix of her father's estate upon his death.

[48] The first respondent went on to state that following upon the death of Hermanus in 2012, her son, Mr Fourie, and her two great-nephews, one of whom is Mr Paul Geldenhuys (Paul), sought, and obtained, her permission to graze their cattle on the three farms. The first respondent was approached for her consent because of the 12 persons named in the Title Deed, she was by then the only one still alive. According to the first respondent, since 2012, her son and her two great-nephews had been grazing their cattle on the three farms, as the late Hermanus did, and she asserted that the three farms were being put to this very use at the time that the appellant's ex parte application was brought before this court. This was confirmed by Mr Fourie in an affidavit that he delivered. Mr Fourie explained that a part of the three farms was used for summer grazing and a part for winter grazing. He stated that neither he nor the first respondent's two great-nephews resided on the three farms but that their farm hands did in their own dwellings and the farm hands also kept their own livestock on the three farms.

[49] The first appellant was in no position to dispute the distant history of the three farms, as it possessed no direct knowledge thereof. It did, however, dispute some of the more recent history: it disputed that the first respondent's son and great-nephews are presently using the three farms to graze their cattle and asserted that there was currently no farming activity taking place on the three farms. The first appellant did, however, concede that it had from time to time encountered 'local labourers' tending to cattle that cross onto various properties. This appears to be

largely in conformity with what Mr Fourie stated. The first appellant also denied the first respondent's allegation that there were dwellings on Moeders Rus and that those dwellings have been used from time to time to accommodate the first respondent's family's gatherings.

The judgment

[50] Having heard both parties, Nkosi J delivered his judgment on 22 May 2023 and granted the first and second respondents' joinder application and rescinded the third order, ordering the retransfer of the three farms.

[51] A large portion of the judgment was devoted to considering three points in limine taken by the first appellant in its answering affidavit resisting the relief claimed by the first and second respondents. Remarkably, it was submitted by the first appellant in one of those points that the first respondent, a living co-owner of the three farms, and the second respondent, the formally appointed executrix of her late father's estate which contained his undivided share in the three farms, lacked locus standi in judicio to bring the joinder and rescission application. The right to own property is, after all, protected in terms of s 25(1) of the Constitution and an owner of property is entitled as of right to protect their rights to the property when it is claimed.¹³ All the points in limine were rightly rejected by Nkosi J.

[52] In his judgment, Nkosi J dealt with the history of the matter with great thoroughness and concluded that the facts of this case placed it squarely within the purview of Uniform rule 42(1) in that the third order was granted erroneously in the absence of the first and second respondents. He concluded, further, that it was not legally competent for the third order to have been granted, particularly if the way in which the relief claimed was considered. Thus, the third order could not be sustained, and it fell to be rescinded, and the status quo ante revived, which included the retransfer of the three farms.

[53] In framing their relief in the joinder and rescission application, the first and second respondents sought an order of costs *de bonis propriis* against the first

¹³ *Katha v Pillay N.O. and Others* [2025] ZASCA 106 para 18.

appellant's attorneys, the second appellant. Nkosi J observed that, in his opinion, there was a legitimate case to be made for such an order, as attorneys should not be permitted to 'sneak' applications past a court by failing to make a full and frank disclosure of all the relevant facts. He concluded that had the necessary disclosures been made by the first appellant, the prospects of the relief sought by it being granted were non-existent. He opined, further, that:

'In this instance, it appears to me there is more than mere negligence. There was a deliberate and conscious attempt, if not a reckless one, to conceal information and mislead the court. This conduct is close, if not equivalent to acquiring someone's property through fraudulent means, which cannot, and should not be countenanced.'

[54] Nkosi J accordingly granted an order in the following terms:

1. The applicants be joined in the ex parte application of Tropical Winter Trading (Pty) Limited (Case Number: 3635/19P) as first and second respondents respectively.

2. The order granted by Seegobin J, on 26 February 2020, in the ex parte application of Tropical Winter Trading (Pty) Limited (Case Number. 3635/19P), is rescinded and set aside.

3. The registration and transfer of the following properties (collectively referred to as "the farms") to the first respondent is set aside:

3.1 the Remainder of the Farm Glen Ashton, No. 8589, Registration division HS, Province of Kwazulu-Natal, held under title deed number: T2380/2020, in extent 191,6466 (one hundred & ninety-one comma six four) hectares, first registered by Crown Grant Number G8589/1914 and previously held by Deed of Transfer Number: T1752/ 1962;

3.2 Portion 6 (of 3) of the Farm Twyfelhoek No. 3[...], Registration Division HS, Province of Kwazulu-Natal, held under title deed number: T23804/ 2020, in extent 192, 6811 (one hundred & ninety-two comma six eight one) hectares, first transferred by Deed of Partition Transfer Number: T2420/1927, and previously held by Deed of Transfer Number: T1752/1962; and

3.3 The Farm Moeders Rus No. 11657, Registration Division HS, Province of Kwazulu-Natal, held under title deed number: T23804/2020, in extent 487, 7306 (four hundred & eighty seven comma seven three zero six) hectares,

first registered by Crown Grant Number G11657/1930 and previously held by Deed of Transfer Number: T1752/1962.

4. The first respondent be ordered to take all steps necessary, within one month of service of this order upon it, to effect transfer of the farms to the erstwhile owners, or their successors in title.
5. In the event of the first respondent failing, refusing, or neglecting to comply with prayer 4:
 - 5.1 that the applicant(s) be authorized to instruct a conveyancer to prepare the necessary documents to effect transfer of the farms to the erstwhile owners, or their successors in title;
 - 5.2 that the first respondent be ordered to sign the documents referred to in prayer 5.1, within 5 (five) days of demand; and
 - 5.3 that the Sheriff be authorized to take all steps contemplated in prayer 5.2 in and on the first respondent's stead and behalf, should the first respondent failed to do so.
6. The cost of the application, and the cost associated with giving effect to the relief prayed for in the preceding paragraphs, be paid by the first respondent, jointly and severally with its attorneys, Messrs. Kruger Attorneys and Conveyancers of 3[...] M[...] Street, Horizon, Roodepoort, the one paying, the other to be absolved, on the scale as between attorney and client.
7. The Registrar of this Court forward a copy of this judgment to the Legal Practice Council to investigate the conduct of the attorneys referred to in paragraph 6.'

The notice of appeal

[55] The appellants sought leave to appeal the judgment from Nkosi J. The application was refused. An application was then made to the Supreme Court of Appeal for leave to appeal. On 29 November 2023, this application was, surprisingly in my view, granted.

Is the matter appealable?

[56] The reason why it was so surprising that leave to appeal was granted was because what was essentially being appealed against was the rescission of the order permitting the first appellant to acquire the three farms. The direction that the

three farms be retransferred followed as a necessary consequence of the decision to order rescission. The Supreme Court of Appeal has, in a long line of cases, determined that the rescission of an order is not appealable because it is, essentially, interlocutory in nature. In *De Vos v Cooper & Ferreira*,¹⁴ Grosskopf JA stated that:

‘Hierdie appèl gaan in die eerste plek oor die vraag of ’n landdroshofbevel vir die tersydestelling van ’n vonnis by verstek appelleerbaar is of nie. Die vraag na die appelleerbaarheid is vir die eerste maal pertinent deur lede van hierdie hof geopper. Beide partye aanvaar nou, na my mening tereg, dat so ’n bevel nie vir appèl vatbaar is nie. So ’n bevel het immers nie enige finale of beslissende uitwerking op die geskilpunte in die hoofgeding nie...’

[57] Thereafter, in *HMI Healthcare Corporation (Pty) Limited v Medshield Medical Scheme and Others*,¹⁵ Ponnann JA observed that

‘It is plain that a rescission order does not have a final and definitive effect... The rescission order simply returns the parties to the positions which they were in prior to the ex parte order being granted.’

[58] *FirstRand Bank Ltd v McLachlan and Others*¹⁶ followed this line of reasoning and in *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse and Another*¹⁷ the court stated that:

‘The order of the full court is plainly wrong because it is trite that a rescission order is not appealable. It is interlocutory in nature and does not deal with the definitive rights of the parties.’

[59] Before us, none of the parties considered whether the granting of a rescission order was appealable, and this issue was consequently not debated when the appeal was heard. Having come to the view that the judgment may not be appealable, we thought it advisable to invite counsel to deliver written argument on the issue.

¹⁴ *De Vos v Cooper & Ferreira* [1999] 4 All SA 432 (A) para 1.

¹⁵ *HMI Healthcare Corporation (Pty) Limited v Medshield Medical Scheme and Others* [2017] ZASCA 160 para 18.

¹⁶ *FirstRand Bank Ltd v McLachlan and Others* [2020] ZASCA 31; 2020 (6) SA 46 (SCA) para 21.

¹⁷ *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse and Another* [2023] ZASCA 162 para 2.

[60] The appellants acknowledged that it was settled law, as evidenced in the authorities to whom the parties' attention was drawn by this court (mentioned above), that a rescission order is not appealable. However, it was submitted that, in the light of recent judgments of the superior courts of this country¹⁸ that appeared to have moved away from the well-known approach postulated in *Zweni v Minister of Law and Order*,¹⁹ it would be in the interests of justice to accept that the judgment was appealable. Our attention was drawn to the following extract from *Consortium Comprising KC Cottrell Co Ltd and Others v Santam Ltd and Others*,²⁰ where Opperman J stated the following:

'To sum up: in general a litigant should advance a constitutional interest or assert and demonstrate that she will suffer irreparable harm if the application for leave to appeal were refused, in order for a Court to conclude that, despite non-compliance with *Zweni*, the interests of justice dictate that leave be granted.'

[61] Counsel for the first and second respondents, Mr Vorster, submitted that it was clear that orders rescinding previous orders were not appealable, but properly agreed that even where the prerequisites set out in *Zweni* were not met, then in terms of *Cyril and Another v Commissioner for South African Revenue Service*,²¹ leave to appeal could still be granted if it was in the interests of justice that the order be regarded as an appealable decision. He submitted that on the facts of this matter, the judgment should not be regarded as an appealable order because it was not in the interests of justice to view it as appealable.

[62] I can discern no constitutional issue at play in this instance nor is any irreparable harm suggested. It is plain to me that the judgment by Nkosi J set matters right by reversing what had previously been ordered and no more. The judgment did not determine anything insofar as the relief claimed in the ex parte application was concerned. That being the case, by rights the judgment was not

¹⁸ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 53; *Eskom Holdings SOC Ltd and Another v Sonae Arauco (Pty) Ltd* [2024] ZASCA 177; 2025 (3) SA 78 (SCA) para 34.

¹⁹ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) (*Zweni*).

²⁰ *Consortium Comprising KC Cottrell Co Ltd and Others v Santam Ltd and Others* [2024] ZAGPJHC 598 para 29.

²¹ *Cyril and Another v Commissioner for South African Revenue Service* 2024 ZASCA 32.

appealable. However, this court is required to follow the directions of the Supreme Court of Appeal, for not to do so would be to invite selectivity and, perhaps, chaos into the appeal system with lower courts choosing which orders of the Supreme Court of Appeal to follow and which to disregard. The matter will thus be approached on the basis that it is properly before us on appeal.

The abandonment of relief on appeal

[63] There is, however, a further unsatisfactory aspect to this appeal. What was stated in the appellants' application to the Supreme Court of Appeal to secure leave to appeal is not known, as their application to that court does not form part of the appeal record before us. But, presumably, they must have advanced reasons in respect of which it was contended that Nkosi J had erred in setting aside the third order, ordering the retransfer of the three farms and determining the issue of costs. It is safe to infer that what was stated in the appellants' notice of appeal filed with this court, after being granted leave to appeal, mirrored its submissions to the Supreme Court of Appeal.

[64] In its notice of appeal, the appellants claimed that Nkosi J had erred in:

- (a) Granting the rescission of the third order;
- (b) Fixing a period of a month within which retransfer of the three farms was to occur to their erstwhile co-owners;
- (c) Permitting the first respondent to instruct a conveyancer if the appellant failed to attend to the retransfer of the three farms as ordered;
- (d) Permitting the sheriff to take steps if the appellant failed to comply with the judgment;
- (e) Ordering costs against the appellants; and
- (f) Failing to refer the matter to oral evidence.

[65] The grounds set out in sub-paragraphs (b), (c) and (d) above were not persisted with by counsel for the appellants and were not argued and shall not be considered further.

[66] Before us, in keeping with the metamorphosis of the ex parte application from the claiming of a right of access to a single farm to a right to acquire ownership

of the three farms, there was a significant sea change in the relief claimed on appeal by the appellants.

[67] Firstly, and most significantly, it was no longer claimed that Nkosi J had erred in rescinding the third order. Secondly, there was a further concession that Nkosi J had not erred in directing that the retransfer of the three farms should occur.

[68] What the appellants now claimed on appeal was set out as follows in the heads of argument prepared by Mr *Marais*:

‘In these circumstances it is respectfully submitted that the appeal should succeed, at least partially and that the judgment and Order granted be set aside and replaced with the following relief:

- (a) the Order granted by Seegobin J on 26 February 2020 [the third order] is set aside;
- (b) the Third Respondent is directed to do all things necessary to set aside the transfer of the three farms;
- (c) the matter is referred back to the Court a quo for determination of the first application launched by Tropical Winter under case number 3635/19P [the ex parte application], with leave given to the parties to exchange further affidavits in the course of that application;
- (d) the Respondents are directed to pay the costs of the Second Appellant;
- (e) the remaining costs in both the initial application [the ex parte application] and the appeal shall be costs in the cause of the matter referred back to the Court a quo.’

[69] Mr *Marais*, quite correctly in my view, also conceded that the points in limine raised by the first appellant before Nkosi J lacked any legal merit. He further, fairly, conceded that the first and second respondents were clearly entitled to act with regard to the three farms without the consent of the other co-owners (although it was the first and second respondents’ contention that they, in fact, had that consent) and that the joinder of the other co-owners to the joinder and rescission application was not necessary.²²

²² *Snyman and Others v African Mines Corporation, Ltd* 1907 TS 996.

[70] Whether even the reduced relief proposed by Mr *Marais* should be granted to the appellants is thus now the true focus of this appeal. I now consider each of the component parts of that proposal.

The setting aside of the judgment

[71] Given the nature of the concessions made by the appellants, it is difficult to understand upon what basis it can be submitted that the judgment is flawed and falls to be set aside. The significance of the judgment was that it had the effect of rescinding the third order and it directed that the transfer of the three farms to the first appellant be reversed. By making the concessions mentioned above, Mr *Marais* conceded that such relief was properly granted, yet he nonetheless still proposed that the judgment be set aside.

[72] The basis of the argument for the setting aside of the judgment now appears to be that Nkosi J impermissibly found that the three farms had not been abandoned by their co-owners. The appellants' heads of argument expanded upon this and stated that the issue of abandonment:

'... ought not to have been dealt with finally but ought to have formed the subject matter of enquiry and determination after the Seegobin Order had been set aside and referred back to the Court.'

[73] This is an interesting argument, but it faces certain difficulties. The proposition supposes that the appellant had always contended that the three farms had been abandoned and that this was an issue that fell to be determined by the court. But this is not the case, because the *ex parte* application sought a right of access to Glen Ashton only, and the issue of the abandonment of that farm simply did not arise in the founding affidavit. It is uncontroversial to acknowledge that an applicant's case must be made out in its founding affidavit.²³ If there was no allegation that Glen Ashton had been abandoned, then there was no possibility of a suggestion that Twyfelhoek and Moeders Rus had also been abandoned, for those farms were intentionally, and by design, not the focus of the *ex parte* application.

²³ *Standard Bank of South Africa Ltd v Jwara and Others* [2012] ZAGPJHC 5 para 12.

[74] That abandonment of the three farms was not alleged in the ex parte application is placed beyond doubt when the following extract from the founding affidavit in that application is considered:

‘12.4 It is submitted that the balance of convenience favours the Applicant in that the Declaratory Order requested will not in any way prejudice any owner of the Property currently living or otherwise. There are no cost orders sought against any of the owners of the Property.

12.5 It is further submitted that any access or possession granted by the above Honourable Court to the Applicant on a temporary basis will not disrupt any of the owner's rights and as such any interested party can anticipate the interim order should sign be granted.’

[75] From this it is clear that the first appellant acknowledged the existence of the co-owners and their rights to the three farms and did not hold the view that they had abandoned them. The fact that it was submitted that the co-owners would not be prejudiced by the order sought can only mean that it was never the first appellant's case that the co-owners had abandoned their ownership interests in the three farms.

[76] The only express mention of the notion of the abandonment of the three farms appeared in the first appellant's answering affidavit in the joinder and rescission application. In that document, the first appellant blew both hot and cold. It firstly argued, as one of its previously mentioned points in limine, that the joinder and rescission application should fail because the first and second respondents had not joined the other co-owners of the three farms in the application. That proposition therefore acknowledged that the three farms had co-owners. But then it argued that the first and second respondents only took an interest:

‘... in the farms long since abandoned, when a commercial opportunity seems likely.’

[77] The first appellant cannot have it both ways: either the three farms had co-owners who ought to have been joined in the joinder and rescission application, or the three farms had been abandoned and therefore had no co-owners, who therefore did not need to be joined. In agreeing before us that Nkosi J correctly ordered the

three farms to be retransferred, the first appellant leaves very little room for the argument that they had been abandoned by their co-owners.

[78] The death knell for the abandonment argument is to be found in the first appellant's answering affidavit in the joinder and rescission application. As already mentioned, the first and second respondents' case was that the three farms were being used for the purpose of grazing cattle belonging to the first respondent's son, Mr Fourie, and her two great-nephews. In the answering affidavit, the following appears:

'As stated, the farms have no infrastructure or roads leading to them and therefore is (sic) not inhabited. While the farms may be used for cattle grazing they are without any commercial value.'

This is a concession that the three farms are being used, as alleged by the first and second respondents, and therefore could not possibly have been abandoned.

[79] But, assuming for the sake of argument that a case for abandonment had been made out, where would that leave the first appellant? In some considerable difficulty and in no better position, in my view. In the past there may have been a debate about what happens to land abandoned by its owner: Voet was of the view that such land could be acquired through occupation,²⁴ while Grotius²⁵ and Van der Keessel²⁶ were of the view that such land accrued to the State. It is the latter view that generally prevails today in our law, and abandoned land is regarded as having accrued to the State automatically without any form of delivery.²⁷ The prevailing view would mean that there is no easy way for the first appellant to acquire ownership of the three farms, for it made out no case whatsoever for occupation by it of the three farms. Indeed, the whole purpose of the ex parte application was to secure access to Glen Ashton, which points to the fact that the first appellant did not claim to already have been in occupation of it or the other two farms.

²⁴ Voet 41.1.10; See also *Reck v Mills en 'n Ander* 1990 (1) SA 751 (A) at 757C-D.

²⁵ Grotius 2.1.54.

²⁶ Van der Keessel *Praelectiones ad Gr* 2.1.

²⁷ *De Villiers and Others v GJN Trust and Others* [2018] ZASCA 80; 2019 (1) SA 120 (SCA) para 7; *Rainbow Diamonds (Edms) Bpk en Andere v Suid-Afrikaanse Nasionale Lewensassuransie-maatskappy* 1984 (3) SA 1 (A).

[80] We were not directed to any authority that indicated that abandoned property could simply be purchased, nor have I found any such authority. To whom would such payment be made? Given the prevailing view mentioned above, it could only be made to the State. But in this instance, the first appellant paid a sum of money into the Guardian's Fund to enable anyone with an interest in the three farms to claim his or her share of that payment. The obvious question that must be asked is if the first appellant truly believed that the three farms had been abandoned, why would any compensation be payable to anyone? A true abandonment would have to have been accompanied by an intention to claim no further benefit from that land. No right to compensation would arise, or be payable, or claimable, in the event of a true abandonment.

[81] Rather than making out a case for abandonment, it appears to me that that what the first appellant sought, and was granted, was a form of private expropriation unknown in our law.

The setting aside of the third order

[82] In my view, the third order should simply never have been granted. In any event, the relief that was granted was not the relief that was sought in the notice of motion. Ordinarily, relief that goes beyond what is claimed in a notice of motion cannot be granted²⁸ because a court may only decide issues that have properly been raised before it for decision.²⁹ Mr *Maraïs* suggested in his written argument that: '... despite absence of any formal amendment of the Notice of Motion it cannot be disputed that, ultimately, the Notice of Motion was orally or tacitly amended to provide for transfer of the property.'

[83] Such an argument may be capable of being sustained in a commercial setting between two independent contracting parties, but it is not an argument in my view that can be confidently advanced in an ex parte application before a court in the absence of one party. If an amendment is to be sought to the relief claimed in such an application, it must be done openly and on record and should not be made

²⁸ *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd and Others* 2014 (6) SA 286 (KZP) paras 80-82.

²⁹ *Magistrates Commission and Others v Lawrence* [2021] ZASCA 165; 2022 (4) SA 107 (SCA) paras 78-79.

subject to speculation as to whether the relief claimed had been tacitly varied. The acquisition of the three farms was not the issue before the court in the ex parte application. In my view, where notice has not been given to the other side, the requirement to only determine the issue before the court becomes even more compelling.

[84] By virtue of the concessions made by the appellants that the setting aside of the third order was correctly ordered by Nkosi J, it is not necessary to determine whether he correctly found that Uniform rule 42(1) was of application.

The ordering of the retransfer of the three farms

[85] That the retransfer of the three farms was correctly ordered by Nkosi J is also now common cause following the appellants' concessions and all necessary steps should be taken as expeditiously as possible to restore the three farms to their co-owners.

The ex parte application should be allowed to proceed

[86] The appellants propose that the ex parte application should be allowed to proceed, with each side entitled to deliver further affidavits. The suggestion is unappealing to me for several reasons.

[87] The purpose for bringing the ex parte application has been overtaken by the passage of time and events and has become moot. The first appellant sought access to one farm to construct firebreaks thereon and was given that access and has constructed whatever firebreaks it wanted to construct. In fact, on its own admission, it impermissibly went even further and created firebreaks on Twyfelhoek and Moeders Rus without ever seeking permission to do so, and it appears to have taken the view that it could do as it wished. There is nothing left in dispute in the ex parte application. For it to proceed, the relief claimed would have to be significantly amended. The ex parte application would have to be transformed into something that it presently is not. I can see no point in that.

[88] In addition to this, I have a fundamental difficulty in accepting that the appellants are entitled to this relief. The ex parte application was flawed in its very

essence, for it is reasonably certain that the first appellant made no attempt to trace the co-owners of the three farms, yet it informed the court that it had made those efforts. I come to that conclusion for four reasons:

(a) Firstly, not a single piece of evidence was put up to establish what the first appellant actually did to locate the co-owners. The conventional way of finding difficult to find people is to instruct a tracing agent. Was this done in this instance? If so, who was instructed to trace the owners? When were they instructed? What was the tracer able to ascertain? None of this has ever been disclosed by the first appellant;

(b) Secondly, the fact that the first appellant had obtained the final estate accounts of two of the deceased co-owners would have made finding their living relatives a matter of some simplicity: the Master of the High Court could have been approached to provide the necessary information. The persistent complaint of the first appellant that it did not know the identity numbers of any of the co-owners has already been demonstrated to be false in relation to Hermanus;

(c) Thirdly, the fact that Ms Strauss of Mulilo had no difficulty in finding the second respondent in two days renders it entirely probable that the first appellant itself made no effort at all to locate the co-owners. Had it done so, it is likely that what it discovered would inexorably have led it to the first respondent; and

(d) Fourthly, had the first appellant made inquiries at the Vulintaba Estate, its own creation, it would have been led directly to one of the first respondent's great-nephews, Paul, who was issued with a gate pass to enter the Vulintaba Estate for the specific purpose of allowing him to access the three farms. A copy of the gate pass is attached to the appeal record. It records the date that it was issued on, being 13 June 2019, and it contains Paul's identity number.

[89] It seems to me, therefore, that the unyielding conclusion that must be drawn is that no steps were taken at all by the first appellant. In my view, that ought to have been disclosed to Seegobin J. But it was not. In addition to that, the first appellant ought to have disclosed that it was no longer interested merely in Glen Ashton but also in the other two farms. Given that those two farms do not border on the appellant's land, an extremely convincing case would have had to be presented to justify the relief ultimately claimed by the first appellant and granted to it. No such case was made out, in my opinion.

[90] Where a litigant chooses to commence proceedings without notice to the intended opponent, the law visits upon that litigant a 'heavy responsibility'³⁰ as Mr *Vorster* pointed out in his heads of argument. A particular form of altruistic and selfless conduct is required from such a litigant. This was acknowledged by the Supreme Court of Appeal in *National Director of Public Prosecutions v Basson*,³¹ where it held that:

'Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide*.' (Authorities omitted.)

[91] In *Recycling and Economic Development*,³² Cachalia JA expanded upon these requirements when he stated that:

'The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking *ex parte* relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the *ex parte* applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.'

[92] The giving of notice is a vital act intended to fully permit participation in the imminent legal proceedings and conforms to the principle of *audi alteram partem*.³³

³⁰ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* [2019] ZASCA 1; 2019 (3) SA 251 (SCA) (*Recycling and Economic Development*) para 46.

³¹ *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para 21.

³² *Recycling and Economic Development* para 47.

As was said by Sutherland J in *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others*:³⁴

‘The principle of *audi alteram partem* is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute and must be flexible enough to prevent inadvertent harm, the only times that a court will consider a matter behind a litigant's back are in exceptional circumstances. The phrase “exceptional circumstances” has regrettably, through overuse and the habits of hyperbole, lost much of its impact. To do that phrase justice it must mean “very rarely” - only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed.’

[93] Where notice ought to have been given but was not, as in this case, the court has a discretion as to whether to set the proceedings aside or not. In *Schlesinger v Schlesinger*,³⁵ the court remarked that:

‘. . . [U]nless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.’

[94] The court in *Schlesinger* mentioned further that the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission.³⁶ This approach, it seems, is also adopted in English law. In *Brink's-Mat Ltd v Elcombe and Others*,³⁷ the court observed that where there has been a material failure in *ex parte* proceedings to disclose facts that ought to have been disclosed, the court will be:

‘... astute to ensure that a plaintiff who obtains [an *ex parte* order] without full disclosure, is deprived of any advantage he may have derived by that breach of duty.’

³³ It means to ‘hear the other side’ - see R C Claassen and M Claassen *Claassen's Dictionary of Legal Words and Phrases* (June 2025 - SI 28). See also *Psychological Society of South Africa v Qwelane and Others* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) paras 33-34.

³⁴ *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ) para 22.

³⁵ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) (*Schlesinger*) at 350B-C.

³⁶ *Ibid* at 348E-349B.

³⁷ *Brink's-Mat Ltd v Elcombe and Others* [1988] 3 All ER 188 (CA) at 193.

[95] The concept of private ownership of property, and the certainty of what such ownership brings, is a fundamental tenet of our society and its legal system. It permits individuals the right to own, use and dispose of their property as they see fit. If they wish to develop the land that they own, they may do so. Equally, if they choose not to develop it and are content to merely allow cattle to freely roam it, that too, is their right. It follows that a failure to develop land, a fact relied upon by the first appellant to bolster its submissions in claiming the third order, does not mean that ownership thereof has been abandoned, for abandonment of land is not easily inferred. Ownership is only lost when the owner gives up the property with the intention that it should become an unowned thing. That requires a convergence of the owner's intention and the consequent relinquishing of physical control of the property.³⁸ One without the other will not establish a true case of abandonment.

[96] There is nothing here to suggest that the first respondent ever possessed the necessary intent to give up the three farms.³⁹ Even if it is accepted that she personally had shown no interest in the three farms that, to my understanding, would have been insufficient, for as was stated in *Minister van Landbou v Sonnendecker*:⁴⁰ 'Geen verdere gesag hoef aangevoer te word nie om te toon dat by verlatting of by prysgee daar 'n bedoeling moet wees deur die eienaar om die eiendom prys te gee. Namens appellant is aangevoer dat die bedoeling in hierdie saak afgelei moet word van die volgende feite: dat die grond reeds in 1942 in die naam van Firmin geregistreer is, dat die grond slegs een morg groot is, dat tot onlangs die grond nie veel werd was nie, dat sedert 1942 Firmin nie in die grond belang gestel het nie, dat in 1942 die grond in 'n toestand van verwaarlosing was en dat Firmin van 1925 tot 1934 nie belasting op die grond betaal het nie. Hierdie feite toon ongetwyfeld dat die eienaar oor 'n lang tyd nie aktief belang in die grond gestel het nie maar dit is nie voldoende nie om te bevind dat hy die bedoeling gehad het om die grond prys te gee.'

[97] Thus, something more than a lack of involvement with the land is required to establish its abandonment in the true sense. That this is lacking in this matter is

³⁸ *Meintjes NO v Coetzer and Others* [2010] ZASCA 32; 2010 (5) SA 186 (SCA) para 16.

³⁹ *Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd and Others* 1985 (3) SA 575 (ZH) at 580F.

⁴⁰ *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) at 947A-C.

reinforced by the first respondent's assertion in her affidavit in the joinder and rescission application that there was an agreement between herself, her son, and her great-nephews, confirmed under oath by her son, that they could use the three farms for the grazing of cattle. In *Ruigtevlei Farm Labour Tenant Association v Harbich and Others*,⁴¹ the court observed that:

'It is axiomatic that if an owner of land concludes a lease in respect of his/her immovable property it is to be concluded that there is still an intention to deal with the property *qua* owner.'

That being the case, there can be no doubt that the agreement referred to by the first respondent evidences her continued intention to deal with the three farms as a co-owner.

[98] To the extent that Nkosi J found that the three farms had not been abandoned, he was, in my view, entitled to come to that conclusion on the facts of this matter.

[99] The ownership of property, which would include land, is an issue that attracted the attention of the drafters of the Constitution, the supreme law of this country. Section 25(1) of the Constitution was mentioned earlier in this judgment and provides as follows:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[100] When considering the potential violation of a constitutional right, Southwood AJA in a judgment that supported the majority judgment in *Powell NO and Others v Van der Merwe and Others*,⁴² observed as follows:

'In my view, this approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out in the application for the order (compare, *Hall and another v Heyns and others*) or, as in this case because they have not been sufficiently investigated. And it should be rigorously applied where a right in the Bill of Rights has been violated.' (Citation omitted.)

⁴¹ *Ruigtevlei Farm Labour Tenant Association v Harbich and Others* [2020] ZAWCHC 182 para 26.

⁴² *Powell NO and Others v Van der Merwe and Others* 2005 (5) SA 62 (SCA) para 75.

[101] Those words apply neatly to the facts of this matter. The first appellant conducted no investigations but asserted that it had done all that it could to locate the co-owners. That was false. That led directly to an order that deprived the co-owners of the three farms of their lawful rights of co-ownership of the farms. The first appellant now knows that not all the co-owners are dead, and that a living co-owner opposes what it proposes to achieve. If the only basis upon which the ex parte application is to proceed is on the issue of the alleged abandonment of the three farms (which was never the relief claimed formally), then a dispute of fact will immediately arise for, as explained earlier, the first respondent asserts that the three farms have not been abandoned and are being put to use by members of her family.

[102] Motion proceedings are not designed to deal with disputes of fact and probabilities.⁴³ There can therefore be very little purpose in permitting the ex parte application to be resuscitated again and be transformed, only to refer it to trial or to oral evidence. That this is the likely consequence was acknowledged by the appellants when they raised, as one of their grounds of appeal, the allegation that Nkosi J had erred in not referring the matter to oral evidence. On this topic, I am unable to find any reference to this being sought by the first appellant in the appeal record, other than in the notice of appeal.

[103] It seems to me that if the first appellant wishes to pursue this matter further, it should commence proceedings afresh, utilise action proceedings from the outset and give due and proper notice to all those with an interest in the three farms.

[104] In the light of the authorities mentioned earlier regarding the forfeiture of any benefits derived from commencing legal proceedings without making the full disclosure that the law requires, there can be no suggestion that the first appellant should be permitted to acquire any benefits from its conduct. Allowing the ex parte application to remain alive and to be proceeded with in a significantly modified form would be such an advantage.

⁴³ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

[105] Finally, the ex parte application was commenced on the basis that it was urgent. Such urgency was justified by the first appellant because of the approaching fire season. It must therefore have known when the fire season would commence. It would, looking backwards, have known when the fire season had commenced and ended the previous year, and the years prior to that year. It did not bring any application premised upon urgency then. It appears that it delayed bringing its application so that it could argue that the fire season was about to occur. With its claimed knowledge, the first appellant should have brought its application well before the onset of the fire season. In *Mlezana and Others v South African Civic Organisation*,⁴⁴ Plaskett J observed as follows:

‘The judicial system, not unlike the private individual, does not take kindly to people who push to the front of the queue. The doctrine of urgency was developed and encapsulated in the rules of court in order to allow those for whom the wait in the queue would not be worth it unless they push in front, to do just that without attracting dirty looks from those behind them.’

[106] In its most basic element, it seems to me that no proper case was made out for urgency by the first appellant and if any vestige of urgency could be identified, it was entirely self-created. The ex parte application ought not to have been entertained on the grounds of urgency.

Costs

[107] In his judgment, Nkosi J found that:

‘From the new facts which have since emerged in this application, it appears to me that the first respondent/or its directors or attorneys failed to “exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte relief” relating to the final order which fundamentally violated ownership and/or possessory rights of the applicants. It seems they were guided by a “notion of doing the bare minimum.”’

⁴⁴ *Mlezana and Others v South African Civic Organisation* [2018] ZAE CGHC 114 para 5, quoting with approval N Manoim ‘Principles Regarding Urgent Applications’ in N Haysom and L Mangan (eds) *Emergency Law* at 79.

[108] Nkosi J concluded that while the first appellant, assisted by the second appellant, was guilty of committing a 'comedy of errors', those 'errors':

'... seem to have been geared to surreptitiously obtain transfer of the farms into its name, taking advantage of and/or abusing the regular court system to achieve its aims.'

[109] In the view that I take of the matter, I am not inclined to agree that a comedy of errors fully describes what the appellant did, and I must respectfully differ with the views of Nkosi J in that regard. It appears to me that the conduct of the first appellant, and its legal representative, the second appellant, was far more calculating than comedic.

[110] Having chosen not to attempt to locate any of the co-owners and having elected to proceed without the giving of notice, the second appellant, and perhaps even Mr Lamprecht himself, who, after all, describes himself as being the first appellant's legal advisor, would have known of the necessity to be entirely candid in proceeding in this fashion. Neither was.

[111] There were other unsatisfactory aspects to the conduct of the appellants. It was represented by the first appellant that Glen Ashton (which both it and the second appellant well knew was actually a reference to the three farms) had no commercial value when that was not true at all. The valuator who was appointed by the first appellant found that the combined value of all three farms was R1 254 687.03. It appears that this valuation failed to take notice of the Newcastle Municipality's valuation of the three farms, which came to a total of R7 090 000.

[112] It appeared to me that, following the concession before us that the third order should be set aside, and the three farms retransferred, the issue of costs ordered by Nkosi J was the true reason for the appeal. Mr *Marais* was asked whether this was so. His response was that leave to appeal is seldom given when the only issue is one of costs. In that, he is correct. The substantive grounds upon which the appellants claimed that Nkosi J had erred have, ironically, been abandoned by them, leaving only the flimsy ground of the ex parte application being permitted to limp on having, in truth, already run its course, and the issue of costs.

There is something deeply unsatisfactory about this. It appears that a stratagem was developed and applied to attack the issue of costs when an appeal directed only at the costs awarded by Nkosi J would not have succeeded, as the appellants well knew.

[113] The decision to proceed on an ex parte basis would not have been a decision taken by the first appellant alone. It would also have been a decision of the second appellant, whose function it is to guide, advise and direct the first appellant. It is inconceivable that the second appellant would not have asked the first appellant what steps had actually been taken by it to locate the owners of the three farms. Had they done so, as they must have, they would immediately have realised that an ex parte application was simply not available to their client. The ex parte application transmogrified itself from claiming a right of access to one farm to a right to acquire ownership of all three farms. Such conduct does not occur by chance: it occurs by design. The way that the matter was handled, as previously observed, was deceptive both in what was done and what was submitted to this court.

[114] Nkosi J further made the following considered remarks on the issue of costs:

‘[97] The first respondent’s attorneys launched an application, which was vacuous in obvious respects, and in which, to the knowledge of the attorney, the deponent deliberately omitted to disclose material facts. The attorney must have known that the only way in which the first respondent could have succeeded with the application (for the final relief) was to prosecute it in a stealthy and opaque manner.

[98] The attorney would have been aware of the fact that there was no evidence to establish the necessary factual basis for the transfer of the farms to the first respondent. Should the attorney and his client have made a frank disclosure of all relevant facts, the application would’ve had no real prospect of success. This alone is a sufficient ground for an award of costs de bonis propriis.’

[115] I agree with these comments.

Conclusion

[116] An appeal court may only interfere in a judgment of a court of first instance where that court has improperly exercised a discretion that it possesses or where

that court has erred either on the facts or on the law, or where it has come to a decision to which a court acting reasonably could not have come.⁴⁵ None of these aberrations appear to be present in the judgment delivered by Nkosi J.

[117] In my view, the judgment was not appealable and even if I am incorrect in that conclusion, it is not in the interests of justice to allow the appeal. Nkosi J arrived at the correct conclusion in a well-considered judgment. This has, belatedly, been recognised by the appellants in the form of their concessions. There can be no purpose in permitting the grotesquely inaccurate ex parte application to live on in the hope that it can be transformed into something useful and beautiful. The purpose of the ex parte application has been served and there is nothing else to be achieved from it.

Costs on appeal

[118] Nkosi J ordered costs on the attorney and client scale against the appellant and its attorneys, the second appellant, jointly and severally. Having secured leave to appeal, the appellants jettisoned the core of their objections that had seen them acquire that leave. It seems proper to me that in such circumstances, a similar cost order to that granted by Nkosi J should be ordered insofar as the costs of appeal are concerned.

Order

[119] I would in the circumstances propose the following order:

The appeal is dismissed with costs on the attorney and client scale, which the first and second appellants are to pay jointly and severally, the one paying the other to be absolved.

MOSSOP J

⁴⁵ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC) para 11.

I agree:

P BEZUIDENHOUT J

I agree and it is so ordered:

RADEBE J

APPEARANCES

Counsel for the appellants:

Mr J Marais SC

Instructed by:

Kruger Attorneys and Conveyancers
Roodepoort

Locally represented by:

Grant and Swanepoel Attorneys Inc.
Suite 1, The Mews
Redlands Estate
George Macfarlan Lane
Pietermaritzburg

Counsel for the first and second respondents: Mr A Vorster

Instructed by:

Boshoff Incorporated
Pretoria

Locally represented by:

Shepstone and Wylie Attorneys
15 Chatterton Road
Town Hill
Pietermaritzburg