

SUMMARY OF THE JUDGMENT

CAN ENCROACHING OWNER CLAIM TRANSFER OF LAND?

Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust (20165/2014) [2015] ZASCA 103 (30 June 2015)

Can someone encroaching on another's land, in the absence of an action or an application by the owner of the encroached-upon land for a removal order, approach a court for an order compelling the owner to transfer, not only that part of the land on which there is encroachment, but also to seek transfer of additional vacant land? This was the claim presented for adjudication in this appeal, and the outcome is a clear exposition of our law in this regard.

The Judgment can be viewed [here](#).

FACTS

Fedgroup Participation Bond Managers (Pty) Ltd (Fedgroup) and the Capital Property Trust Collective Investment Scheme in Property (CPT) are the respective registered owners of contiguous commercial erven.

In July 2006 Fedgroup and CPT entered into a written agreement in terms of which CPT acquired a total of 27 income-producing properties and associated businesses, as letting enterprises, for some R308 million. One of the properties acquired by CPT was Erf 990. A substantial but incomplete structure on Fedgroup's property partially encroached on this erf. The encroachment was discovered by Fedgroup in 2008, almost two years after the conclusion of the written agreement of sale. The incomplete encroaching structure had been erected when Fedgroup acquired the property from a predecessor in title. The structure was erected unlawfully; no building plans had been submitted for approval.

A fence that was erected on the property caused Fedgroup's misapprehension about the cadastral boundaries of the property it disposed of to CPT. Upon discovering the real state of affairs, Fedgroup approached CPT to discuss a possible resolution regarding the encroachment. Communications between the parties ensued but ultimately negotiations broke down. This was unsurprising since the land concerned was prime commercial property with each party probably seeking to extract maximum benefit for itself.

There was a clause in the written agreement of purchase which included a seller's warranty against encroachment.

Because of the breakdown in negotiations, Fedgroup went on the offensive and brought

an action for an order that the land on which the building works encroached, be transferred to it. (The order sought included land additional to that on which the partially erected structure was situated. Fedgroup asserted that it needed the additional vacant land for optimal development of its own property. It alleged that CPT would have no use of the undeveloped additional piece of land it sought to have transferred into its name and that, without which, the transfer it sought would be worthless.)

CPT resisted the application and raised three preliminary (*in limine*) points, being that:

- Fedgroup had no cause of action in that there was no justiciable dispute. It contended that it was the owner of the property concerned and unwilling to dispose of it by way of sale, and that a land owner could not be compelled to sell property it was unwilling to part with;
- Fedgroup first became aware of the encroachment during April/May 2008 and that even if it had a cause of action, more than three years had lapsed before it launched proceedings and the claim had therefore become prescribed; and
- there were material disputes of fact that could not be resolved on the papers.

The court *a quo* refused the application (although finding that, in principle, a court was empowered in South African law to make such an order). Fedgroup appealed.

HELD:

- Where a structure encroaches on another property, the relevant land owner's default remedy is to claim removal of the offending structure. Courts do however have a discretion to award compensation instead of ordering the removal of encroaching structures. In the latter instance, typically within the court's discretion in the context of building encroachments, is a separate power that is dependent on the willingness of the affected land owner to give up his property.
- The history of our law in relation to an aggrieved land owner's right to seek removal of an encroachment has its roots in Roman law. The point of departure in Roman Law was that an encroachment should be removed and, despite the remedy undergoing significant development and modification when it was received into South African case law, it does not appear that our law has changed to include, as remedy, a power of a court to order transfer of the encroached-upon land to the encroacher.
- Similarly there is no mention of such a power in Roman-Dutch law. There the point of departure was the same as in Roman law.

- According to academic writers, *“there is no authority in either common law or legislation in terms of which a court can sanction a forced sale of land in the context of building encroachment, against the will of the affected landowner. It should be kept in mind that South African courts only have the powers granted to them by common law or legislation. In this regard, there is no common law principle or legislation that grants them the authority to order compulsory transfer of land. Furthermore, if the affected landowner does not want to give up his property, the involuntary transfer of property that the court authorises with a transfer order may be problematic in light of section 25 of the Constitution. The order will result in a deprivation of property, which will have to comply with section 25(1).”*
- In the present appeal, Fedgroup had an insuperable difficulty. No court has ever gone as far as ordering the transfer of land greater than the area of encroachment. Such an order is just not competent. In addition, in Fedgroup’s instance, the encroachment that it sought to have transferred to it was erected unlawfully. A court will not countenance or be party to perpetuating unlawful conduct.

For all the aforesaid reasons, the appeal did not succeed.

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