

Encroachers beware, ownership rights are still sacrosanct

A LAND owner has the right to the full use and enjoyment of his property without disturbance caused by any permanent physical intrusion or encroachment onto the property.

There has been contention in our law on what the appropriate remedy is for an owner whose property is encroached upon, for instance, by his neighbour's building works without the owner's consent.

In the absence of agreement between the owner and the offending neighbour, the owner could approach the court for an order directing the neighbour to demolish the portion of the structure encroaching onto the owner's property or evicting the neighbour from the portion of the structure encroaching onto the owner's property, against payment of compensation by the owner to the neighbour, or permitting the neighbour to use the portion of property encroached upon against payment by the neighbour to the

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Thabo Vilakazi
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owner of compensation for the encroachment. The court would have the discretion to determine which would be appropriate.

The Supreme Court of Appeal in Fedgroup v Capital Property Trust recently dealt with whether the court could order an encroaching neighbour to be granted the right to take transfer of the portion of property belonging to the affected owner.

The court held that it does not have the power to compel an owner who does not want to

“give up” that portion of his or her land affected by the encroachment and transfer the portion to the neighbour.

The court reaffirmed the position that an order for transfer does not necessarily have to be made when a court exercises its discretion to grant compensation rather than order removal. The court further noted that compelling an owner to transfer his or her property potentially would offend the provisions of the Constitution as

such an order would result in a deprivation of property.

It would have to comply with section 25(1) of the Constitution and would be tantamount to an order of expropriation of the owner's land; therefore the provisions of section 25(2) and (3) of the Constitution relating to expropriation would be applicable.

In reaffirming the significance of the rights of property ownership, the court held that the right to property is “the most important and extensive right”.

The court found that an encroacher had the “negative right” to request the court to exercise its discretion to refuse to order the demolition of an encroaching structure. However, that did not translate to a “positive right” to compel transfer of the encroached-upon land.

After extensively considering the legal and academic authorities, the court held that

“an encroacher does not have an independent cause of action. He or she cannot offensively compel another to part with rights of ownership”.

This case underlines the importance of the rights of an owner in land and makes it clear that in the absence of agreement between an encroacher and the land owner and provided the encroacher has not become vested with ownership of the land by prescription, a court will not compel the transfer of encroached-upon land to the encroaching party.

● *Thabo Vilakazi is an associate at Cox Yeats Attorneys practising in the property law team. He attends to a wide variety of property and conveyancing matters, including acting for commercial and residential property owners, acting on behalf of commercial and retail banks, and attending to township and sectional title developments. He can be contacted on 031 536 8500; e-mail: tvilakazi@coxyeats.co.za*