

THE DISCRETION OF COURTS IN ENCROACHMENT DISPUTES

[DISCUSSION OF *PHILLIPS V SOUTH AFRICAN NATIONAL PARKS BOARD* (4035/07) [2010] ZAECGHC 27 (22 APRIL 2010)]

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1 Introduction

In one of the most recent cases dealing with encroachment in South Africa, the Eastern Cape High Court had to decide whether it had the discretion to refuse an interdict for the removal of an encroaching fence.¹ In *Phillips v South African National Parks Board*² (“*Phillips*”) a predator-proof fence was erected on the property of the applicant, instead of on the cadastral boundary between the property of the applicant and that of the respondent. The fence had been erected on the applicant’s property before he had purchased the property and it resulted in a substantial portion of the property (the SANParks portion) being incorporated as part of the respondent’s land. The applicant sought an interdict to compel the respondent to remove the fence and relocate it to the cadastral boundary or onto the respondent’s property.

Three defences were raised against the application. In the first instance, the respondent contended that it had purchased the SANParks portion from the applicant’s predecessor in title (Van Rooyen) and had subsequently acquired ownership of the SANParks portion. Furthermore, the respondent argued that the applicant had purchased the property knowing that there had been an agreement between the respondent and Van Rooyen for the sale of the SANParks portion and was therefore not a *bona fide* purchaser. The second defence was that the applicant had been aware of the agreement between Van Rooyen and the respondent about the placement of the fence, specifically that the applicant knew that Van Rooyen had consented to the encroachment. For that reason it was argued that the fence did not result in an encroachment but was lawfully erected. Thirdly, the respondent argued that even if the fence resulted in an encroachment, fairness dictated that the encroachment should remain in place. In the counter-application, the respondent claimed that if the court were to find against him on the three defences it should grant a

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¹ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) SAFLII <<http://www.saflii.org/za/cases/ZAECGH/2010/27.html>> (accessed 13-06-2012)

² (4035/07) [2010] ZAECGHC 27 (22 April 2010) SAFLII.

declaratory order in terms of which the applicant would be entitled to damages instead of removal of the encroachment and that the respondent be entitled to transfer of ownership of the SANParks portion.³

The court considered these defences raised by the respondent. With regard to the alleged sale between Van Rooyen and the respondent and the apparent knowledge of the sale ascribed to the applicant, the court found that there initially had been an agreement between Van Rooyen and the respondent for the sale of the SANParks portion; however, the agreement was cancelled and the sale never took place. As a result of inadequate proof of the sale, the court rejected the contention that the fence was there lawfully or that the SANParks portion was sold to the respondent.⁴ This resulted in the second defence also failing. The court found that the agreement to erect the fence on the property (between Van Rooyen and the respondent) was dependent on the valid agreement of sale. Therefore, because the sale was found to be invalid, the court stated that the condition was not fulfilled. Consequently, the court had to determine whether the fence that resulted in the encroachment should be removed or remain in place. Therefore, the court set out the law regulating encroaching structures in South Africa, specifically with regard to the discretion that courts have to leave encroaching structures intact in exchange for compensation.

The aim of this discussion is to highlight the law regulating encroachments with reference to the way in which the court in *Phillips* dealt with the problem. There are two aspects that will be highlighted and addressed here. The first concerns the fact that although the default remedy in the case of encroaching structures is removal, it was again stated in *Phillips* that courts have the discretion to award compensation instead of removal in certain instances. The court considered in which circumstances it will exercise such a discretion and stressed that it will follow a balancing-of-interests type of approach. Therefore, it is necessary to first discuss how courts go about exercising their discretion in the context of encroaching structures with reference to the *Phillips* judgment.

The second interesting aspect that arises from *Phillips* regarding the way that courts currently deal with encroachment disputes relates to the fact that courts in reaching a discretion-based outcome simply brush over or do not even consider the question of transfer of the encroached-upon land. Of specific importance is whether courts actually have the power to order transfer of the encroached-upon land to the encroacher. In *Phillips*, the respondent claimed that if the court were to leave the encroaching fence in place, it should additionally make an order in terms of which ownership of the SANParks portion is transferred to the respondent. The court actually considered but eventually rejected this claim, without adequately determining whether it in

³ The respondent also claimed a final defence, namely that the court does not have jurisdiction concerning the dispute because the dispute falls to be determined in terms of s 29 of the second Schedule of the Fencing Act 31 of 1963. See *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) *SAFLII* para 3

⁴ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) *SAFLII* para 7

fact had the authority to make such an order. Without the necessary authority, there may be serious questions surrounding the forced sale of land that results in these instances.

The *Phillips* judgment gives us an insight as to how South African courts are currently dealing with encroachment disputes. However, it will also become evident that the discretion-based outcome may result in uncertainties due to the fact that policy considerations are taken into account to determine which outcome would be the most appropriate.

2 The discretion to replace removal with compensation: A policy-driven approach

In terms of the South African common law, the affected landowner can demand that the encroaching structure be removed in the case where a building is erected on the land of another. This is traditionally explained as being the default remedy in the case of encroachments.⁵ This remedy is essentially based on the right to prevent interference with the use and enjoyment of one's property.⁶ Milton describes this as follows:

“The right of an owner to demand removal would, in theory, seem to be absolute for he is vindicating the freedom of his property from unlawful interference.”⁷

Similarly, Van der Merwe and Cilliers explain that “[t]he right to insist on the removal of the encroachment is consistent with the concept of ownership, which is potentially the most extensive real right which a person can have in respect of an object, whether movable or immovable”.⁸

Therefore, a landowner is entitled, upon becoming aware of the encroachment, to demand removal thereof. However, the law regulating encroaching structures in South Africa has developed in a different direction recently. In *Rand Waterraad v Bothma*⁹ (“Rand Waterraad”) and *Trustees, Brian Lackey Trust v Annandale*¹⁰ (“Brian Lackey Trust”) it was emphasised that courts have the discretion (in as yet undefined instances) to award compensation instead of removal of encroaching structures. This was accepted in the *Phillips* judgment.¹¹ Therefore, it seems as though it is no longer possible to think about removal as the default remedy in the case of encroaching structures without adding the all-important *caveat* that it is likely

⁵ CG van der Merwe *Sakereg* 2 ed (1989) 202; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006) 121; JRL Milton “The Law of Neighbours in SA” (1969) *Acta Juridica* 123 237; CG van der Merwe & JB Cilliers “The ‘Year and a Day Rule’ in South African Law: Do our Courts Have a Discretion to Order Damages Instead of Removal in the Case of Structural Encroachments on Neighbouring Land?” (1994) 57 *THRHR* 587 588. See further *Pike v Hamilton* 1853-1856 2 Searle 191 196, 198, 200; *Van Boom v Visser* 1904 21 SC 360 361; *Stark v Broomberg* 1904 CTR 135 137

⁶ Van der Merwe *Sakereg* 201; *Wade v Paruk* 1904 25 NLR 219 225; *Smith v Basson* 1979 1 SA 559 (W) 560

⁷ Milton (1969) *Acta Juridica* 241

⁸ Van der Merwe & Cilliers (1994) *THRHR* 588

⁹ 1997 3 SA 120 (O). *Rand Waterraad v Bothma* 1997 3 SA 120 (O) provides a good illustration of how the rigid enforcement of the primary remedy of removal was refused because of the possibility that it could produce unjust results

¹⁰ 2004 3 SA 281 (C)

¹¹ (4035/07) [2010] ZAECGHG 27 (22 April 2010) *SAFLII* para 21

that courts may *not* order the removal of an encroachment in certain instances due to the discretion that the court has in this regard.

However, having established this, it now becomes important to consider how courts will go about exercising this discretion. In other words, it needs to be established in which circumstances courts are likely to deviate from the remedy of removal and award compensation instead. The decision in *Phillips* illustrates this nicely. Relying on *Rand Waterraad* and *Brian Lackey Trust*, the court first confirms that it indeed has the discretion to award compensation instead of removal in the case of encroaching structures and then proceeds to determine how the discretion should be exercised in the particular case.¹² From *Phillips* it can be deduced that a court will follow an essentially policy-driven approach when exercising its discretion in encroachment disputes. A court will balance the interests of both parties to determine whether removal or compensation would be the most appropriate remedy. In doing so, it will take cognisance of the right of removal, but keep in mind that this right is by no means conclusive anymore.¹³ Courts may refuse to grant an order for removal if policy reasons dictate that the most appropriate remedy is compensation instead of removal. The crucial question then is in what circumstances policy reasons will most likely dictate that the encroachment should be left in place. Stated differently, when can it be expected that removal will be refused and compensation awarded instead?

In *Rand Waterraad*, the main policy reason relied upon by the court as justification for leaving the encroachments in place was acquiescence or delay in bringing the application.¹⁴ The court found that the time period between becoming aware of the encroachment and filing the complaint for its removal indicated that the detriment suffered by the affected landowner on account of the encroachment was insignificant. The court reasoned that the applicant would have approached the matter with greater urgency had the encroachment caused as great a disadvantage as alleged by the applicant.¹⁵ The court also stated that justice and equity dictated that the tardiness with which the applicant had approached the removal process should result in the order for removal being denied. Therefore, the court concluded that the loss that the applicant would suffer if the encroachment were left intact was less than the loss that the defendant would suffer if the encroachment were removed.¹⁶ Based on all these considerations, the court ordered that the encroachment should remain in place.

The application of the notions of fairness and the balancing of the interests as formulated in *Rand Waterraad* was illustrated more pertinently in the subsequent case of *Brian Lackey Trust*.¹⁷ In this case the court reasoned that two considerations played an important role in determining the most just and equitable outcome in a given case; namely, the possible prejudice to be suffered

¹² Para 21

¹³ Para 24

¹⁴ *Rand Waterraad v Bothma* 1997 3 SA 120 (O) 138

¹⁵ 138-139

¹⁶ 139

¹⁷ *Trustees, Brian Lackey Trust v Annandale* 2004 3 SA 281 (C)

by the respective parties and the principles of neighbour law.¹⁸ The court acknowledged that the court order could lead to the loss of the defendant's property, but stated that the loss that would be suffered if demolition were granted would be far greater for the plaintiff than the loss for the defendant should damages be awarded. Furthermore, it stated that, unlike the plaintiff, the defendant would be fully compensated if the encroachment were left in place. If the encroachment were demolished the plaintiff would lose his home without being compensated for his loss. Furthermore, the court assessed the degree of prejudice by considering the fact that courts are generally reluctant to order removal of economically valuable building works.¹⁹ With regard to the principles of neighbour law, the court indicated that it was not willing to make an order that would potentially cause further disharmony in the relationship between the neighbours.²⁰ Moreover, due to the fact that the defendant was initially willing to accept monetary compensation, the court reasoned that a demolition order would increase his superior bargaining power, which could allow him to extort large sums of money from the plaintiff. The court in *Brian Lackey Trust* therefore concluded that the remedy of compensation would fully meet the equitable notion of justice in this case and that the encroachment should remain in place.²¹ In reaching this conclusion, the court balanced the interests of both parties, took various policy considerations into account and decided that justice demanded that the encroachment should not be removed. The court in the *Phillips* case relied on the manner in which *Brian Lackey Trust* balanced the prejudice of the respective parties based on policy considerations in order to determine which outcome would be the most appropriate in the particular case.²²

In *Phillips*, the potential prejudice suffered by the respective parties was balanced by looking at the loss that would be suffered by the encroacher if the fence were removed and the loss for the affected landowner if the fence was left intact. The applicant argued that if he were deprived of the SANParks portion the potential prejudice suffered by him would be substantial: he would be precluded from conducting his intended eco-enterprise and the property would be deprived of the spectacular viewing decks and tented accommodation on,

¹⁸ Para 34

¹⁹ Para 38 The argument raised is that courts have a natural aversion to deny demolishing economically valuable building works See *Van Rensburg v Nelson Mandela Metropolitan Municipality* 2007 4 All SA 950 (SE), where the court found that it did have the discretion to award compensation instead of removal but, based on the conduct of the respondent, amongst other things, demolition would be the appropriate remedy There have also been other recent decisions in which the impression has been created that courts are not shy to order the demolition of unlawfully erected, but nevertheless so-called "economically valuable buildings" See further *Barnett v Minister of Land Affairs* 2007 6 SA 313 (SCA); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* 2007 4 SA 26 (C); *PS Booksellers (Pty) v Harrison* 2008 3 SA 633 (C); *Transnet Ltd v Proud Heritage Properties* (405/08) ZAECHC 42 (20 March 2008) SAFLII <<http://www.saflii.org/za/cases/ZAECHC/2008/42.html>> (accessed 05-07-2012) See also AJ van der Walt "Regulation of Building Under the Constitution" (2009) 42 *De Jure* 32 34-42

²⁰ *Trustees, Brian Lackey Trust v Annandale* 2004 3 SA 281 (C) para 40

²¹ Para 44 See also *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) SAFLII para 21

²² *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) SAFLII para 21

and walking trails through the forested areas.²³ The applicant also emphasised the fact that he had purchased the property subject to the condition that the SANParks portion was included as part of the property he bought.²⁴ On the other hand, the respondent contended that it would be impractical to remove the predator-proof fence and relocate it at the cadastral boundary. He pointed out that it would be impossible (or at least very costly) to effectively maintain a fence that was relocated to the cadastral boundary and erecting a fence of that nature on the boundary would result in the destruction of large tracts of forest which would have adverse consequences for the conservation of biodiversity.²⁵ Moreover, the respondent argued that if it were to carry out its functions in terms of the National Environmental Management: Protected Areas Act 57 of 2003 it was essential that the fence remained at its current location.²⁶ However, the main argument relied upon by the respondent was the fact that removing and relocating the fence would be impractical and inexpedient in this case. The court relied on the language in *Brian Lackey Trust* to balance the potential prejudice to the respective parties and concluded that removal of the fence and its relocation on the cadastral boundary would not result in a striking disproportionality of prejudice that may potentially be suffered by the respective parties.²⁷ Therefore, it seems as though courts may be persuaded to exercise their discretion in favour of leaving the encroachment in place if policy reasons convince the court that there may be a disproportionate prejudice suffered by the affected landowner if the encroachment were removed. This decision is of course context-sensitive, based on the policy considerations prevailing in the specific case, and cannot be prejudged unless circumstances are relatively similar.

Having decided against exercising its discretion in favour of leaving the encroachment in place, the court in *Phillips* avoided having to answer the very important question of what would happen in terms of the rights of the respective parties to the encroached-upon land if the court were to exercise its discretion in favour of leaving the encroachment in place. This could very well have happened if policy reasons in *Phillips* favoured the encroacher, as it did in the earlier *Rand Waterraad* and *Brian Lackey Trust* judgments. The judgment proves that the court considered this possibility seriously.

In the case of encroaching structures, it is clear that the purpose of the remedy of removal is to restore the situation to the *status quo ante*. In other words, removal is ordered in order to eliminate the unlawful encroachment. By contrast, if the court decides that the encroachment should be left in place, the court, based on policy reasons, legitimates the continuance of the encroachment. The encroacher is allowed to continue occupying the part of the neighbour's property affected by the encroachment. This situation raises a number of questions, such as whether there should be a rearrangement or

²³ Para 30

²⁴ Para 29

²⁵ Para 36 There appears to be a mistake in the *SALIL* text of the judgment. The word "tracks" appears in the judgment; however, the word should be "tracts"

²⁶ Paras 18, 39

²⁷ Para 51

reallocation of rights with regard to the encroached-upon land. In the *Phillips* case, the question would have been who would own the SANParks portion if removal were denied and replaced with a compensation award? To my mind, this question needs to be addressed adequately in cases where policy reasons dictate that compensation instead of removal is a serious option.²⁸

It should be kept in mind that if the encroachment is allowed to continue and the court additionally orders that the encroached-upon land should be transferred to the encroacher, the affected landowner would be forced to give up his property against his will. The court in *Phillips* seriously considered whether, in addition to leaving the encroachment in place, it should order that the SANParks portion be transferred to the respondent.²⁹ However, in my view, the decision to order transfer of the encroached-upon land should be kept separate from the discretion to replace injunctive relief with compensation. This issue is addressed in the following section.

3 Transfer of the encroached-upon land

The contentions of the respondent in the *Phillips* case demonstrates the confusion surrounding the question whether a court has the power to order that the encroached-upon land should be transferred to the encroacher.³⁰ In this case, the respondent argued that if the court exercised its discretion in favour of leaving the encroachment in place, it should also make an order in terms of which the respondent would be entitled to transfer of the encroached-upon land.³¹ The court considered the claim for transfer without probing the question of whether the court is authorised to make such an order. It simply assumed that the discretion in the context of encroachments to deny removal of the encroachment includes the power to order transfer of the encroached-upon land.³² However, it seems as if this assumption is misplaced.

If the court in this case decided to order transfer of the encroached-upon land to the respondent, it would have been against the affected landowner's will. Therefore, the court would have enforced a compulsory transfer of the affected land to the encroacher. Such an involuntary transfer needs to comply with section 25 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The court in *Phillips* did recognise that the loss of property that would occur if such an order was made would result in a deprivation of property. It stated:

²⁸ The court in *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) SAFLII does not mention what would happen in terms of the rights of the parties to the encroached-upon land if the court were to exercise its discretion in favour of leaving the encroachment in place. Fortunately, it was unnecessary in this case because the court in fact did order removal of the encroachment. In this discussion, I deliberately refrain from going into too much detail with regard to the rights of the respective parties if removal is denied, because it was not an issue in this case. For an explanation of the potential doctrinal implications and the arguments raised to possibly address the doctrinal equivocation, see Z Temmers *Building Encroachments and Compulsory Transfer of Ownership* unpublished LLD dissertation Stellenbosch University (2010) ch 4.

²⁹ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) SAFLII para 9

³⁰ Para 3

³¹ Para 3

³² Para 51

"It is indisputable that an encroachment of the nature in issue in the instant case constitutes an interference with the applicant's property rights such as to constitute a deprivation in terms of the provisions of section 25 of the Constitution."³³

The deprivation in this case would have consisted in the loss of ownership of the portion of the property affected by the encroachment, in other words, loss of the SANParks portion.³⁴ The question is whether this deprivation would have been consistent with section 25 of the Constitution.

In terms of section 25(1) of the Constitution, there are two requirements that need to be met. In the first instance, the deprivation must be in terms of law of general application and secondly, the law may not allow for an arbitrary deprivation of property.³⁵ The law of general application regulating encroachments is the common law.³⁶ The common law allows in certain instances that a court may deviate from the default remedy of removal and award compensation instead. The deprivation caused by merely awarding compensation instead of removal may therefore in principle be authorised by the common law. However, it is not so clear that the common law authorises the further deprivation caused by the order for transfer of the encroached-upon property. Therefore, it is necessary to determine whether a court has the common-law power to order transfer of the encroached-upon land against the affected landowner's will.

On a closer examination of early South African case law, my argument is that the discretion to replace injunctive relief with compensation should be kept separate from the power to order transfer of the encroached-upon land. Early South African case law did not always keep these two issues separate and this led to confusion as to the extent of the discretion.³⁷ There are four decisions that may be helpful when scrutinising the scope of the courts' discretion in the case of encroachments. The decision that is typically used to support the argument that a court has the discretion to order transfer of the encroached-upon land to the encroacher is *Christie v Haarhoff*.³⁸ In this case the plaintiff applied for the removal of a substantial encroachment erected

³³ Para 24

³⁴ In the case where transfer of the affected land is ordered, it is clear that the affected landowner loses ownership of the portion of the property affected by the encroachment. Therefore, it needs to be determined whether the loss of ownership that results in these instances complies with s 25(1) of the Constitution. However, a deprivation can also result in the instances where the court merely replaces injunctive relief with compensation. I have argued before that in these instances a distinction needs to be drawn between significant and insignificant encroachments, because the extent of the interference with the affected landowner's property differs. In the case of significant encroachments, the continued presence of the encroachment results in a significant limitation on the affected landowner's right. Therefore, stronger justification is required for the loss of property rights that occurs in these instances. When dealing with insignificant encroachments, there is still a limitation on the affected landowner's property, but the limitation is trivial because the affected landowner only loses the use and enjoyment of a small portion of his property. See Temmers *Building Encroachments* ch 5.

³⁵ S 25(1) of the Constitution

³⁶ Both *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 44 and *S v Thebus* 2003 6 SA 505 (CC) paras 64-65 provide authority for the fact that the common law is law of general application. In *Phillips v South African National Parks Board* (4035/07) [2010] ZAACGH 27 (22 April 2010) *SAFLII* it was reiterated that "law of general application includes the common law" (para 23).

³⁷ *Christie v Haarhoff* 1886-1887 4 HCG 349; *Van Boom v Visser* 1904 21 SC 360; *De Villiers v Kalson* 1928 EDL 217. See also AJ van der Walt "Replacing Property Rules with Liability Rules: Encroachment by Building" (2008) 125 *SALJ* 592 605.

³⁸ 1886-1887 4 HCG 349

on his property. The plaintiff alternatively claimed compensation instead of removal. Therefore, it seems as though the plaintiff was willing to accept compensation instead of removal and the inevitable loss of property that would accompany the continued existence of the encroachment. The court described the situation as follows:

“In this case, however, the plaintiff very properly does not press his strict rights [to removal of the encroachment] to the extreme point; and it is *practically agreed* that the proper course will be for the plaintiff to transfer to the defendants the ground built upon, upon their paying all expenses of and incidental to the transfer, together with reasonable compensation for depriving him of the ground.”³⁹

Consequently, there is reason to believe that the court in this case merely facilitated a bilateral agreement between the plaintiff and the defendants and that the transfer was not ordered against the affected landowner’s will. Both parties were amenable to the transfer. Similarly, in *Van Boom v Visser*⁴⁰ the plaintiff did not press his rights either, but was willing to accept 100 pounds to tolerate the encroachment. The court gave judgment in favour of the plaintiff, reiterating that removal was the default remedy in the case of encroachments. However, the court stated that as an alternative the defendant could pay 25 pounds for the transfer of the piece of property on which the encroachment stood. Although the end result in this case was that transfer was ordered, a very important qualification should be added. The transfer of the encroached-upon land was dependent on the willingness of the affected landowner to give up his property and it was not a unilateral involuntary transfer of the affected land.

In another case where the issue of transfer of the encroached-upon land arose, *Meyer v Keiser*,⁴¹ the defendant argued that the court has a discretion to order that the encroached-upon land be transferred to him. Therefore, the defendant directly claimed that the court should enforce the sale of the encroached-upon land. The court rejected the defendant’s claim and stated that his argument was based on a misconception of the nature and extent of the court’s discretionary authority.⁴² The court emphasised that an order for transfer of the encroached-upon land is merely incidental to the damages award, which is the primary remedy in terms of a court’s discretionary power. The court relied on the earlier case of *De Villiers v Kalson*⁴³ to emphasise that the order for transfer of the encroached-upon land does not always have to accompany a compensation order.⁴⁴ In *De Villiers v Kalson*, the court had to determine whether an encroaching structure should be removed or remain in place. The court exercised its discretion in favour of leaving the encroachment in place and said nothing about transfer of the encroached-upon land to the encroacher. Therefore, this case illustrates that an order for transfer does not necessarily have to follow if removal is not ordered.

³⁹ 354 (emphasis added)

⁴⁰ 1904 21 SC 360

⁴¹ 1980 3 SA 504 (D)

⁴² 507

⁴³ *De Villiers v Kalson* 1928 EDL 217

⁴⁴ *Meyer v Keiser* 1980 3 SA 504 (D) 507

Such an order is ancillary and it should not be given if it is impractical or impermissible by law to do so.⁴⁵ My guess is that the practicality and permissibility of giving a transfer order will in most cases depend on the willingness of the affected landowner to surrender the property. Therefore, it would probably be unacceptable in cases where the transfer is ordered against the will of the affected landowner.

The power to order transfer of the encroached-upon land in the context of building encroachments is therefore a separate power that should be entirely dependent on the willingness of the affected landowner to give up his property. The judgments that seemingly endorse the idea that such a power exists as a self-evident result of a decision not to order removal of the encroachment in fact do not provide authority for the view that a court may order transfer of the affected land against the will of the landowner. At best, the cases indicate that where there was consent or at least willingness to give up the property a court may, in addition to replacing removal with compensation, facilitate the transfer of the encroached-upon land to the encroacher.

It is evident from *De Villiers v Kalson* and *Meyer v Keiser* that the order for transfer of the encroached-upon land does not have to be made and that the alternative remedy in terms of the discretion is compensation.⁴⁶ Consequently, the encroacher will always have to claim compensation instead of removal as the remedy and she cannot argue that the court should always as an incidence of the remedy of compensation order transfer of the affected land.⁴⁷ The court may determine that transfer should be ordered in addition to damages, but as is evident from the older cases mentioned above, this will depend on the willingness of the affected landowner to sacrifice his property. The primary remedy in favour of which the court must exercise its discretion is a compensatory award instead of injunctive relief and the transfer of the encroached-upon land is not a necessary incidence of a compensatory award. As the matter stands, there is no authority in either common law or legislation in terms of which a court can order a forced sale of land in the context of encroachments. If the affected landowner does not want to give up his property, the involuntary transfer of property that a court order to transfer the property implies will be problematic in the light of section 25 of the Constitution, specifically with regard to the requirement of law of general application. The deprivation that results in these instances may prove to be unconstitutional on the basis that the common law does not authorise the deprivation.

An interesting question is whether the deprivation could amount to an expropriation that would need to comply with section 25(2) and (3) of the Constitution. The deprivation that results when courts leave the encroaching structure in place may look like an expropriation, especially in cases where the court decides not to order removal and orders transfer of the land. The alternative relief ordered by the courts in these cases, namely compensation, may create the illusion that this is indeed an expropriation. Therefore, it

⁴⁵ *De Villiers v Kalson* 1928 EDL 217; *Meyer v Keiser* 1980 3 SA 504 (D) 507

⁴⁶ *De Villiers v Kalson* 1928 EDL 217; *Meyer v Keiser* 1980 3 SA 504 (D) 507

⁴⁷ *De Villiers v Kalson* 1928 EDL 217

needs to be determined whether an order that the encroachment should remain in place and that the encroached-upon land should be transferred to the encroacher amounts to expropriation of ownership of the land on which the encroachment is erected. The crucial consideration is that expropriation is not possible in these cases because the common law does not authorise expropriation and there is no legislation that authorises expropriation by court order either. Considering the fact that there is no common law authority for the expropriation, it may be concluded that the compulsory transfer of property or property rights that results when an encroachment is not demolished can never amount to an expropriation. Leaving the encroachment in place may in some cases effectively result in a forced transfer of a right to use and enjoyment, and it may purport to effect a forced transfer of ownership if transfer of the land is ordered, but it would never amount to a valid expropriation. Therefore, in encroachment cases, expropriation should not come into the picture at all.

4 Conclusion

The *Phillips* case that formed the centre of this discussion provides a good (and most recent) illustration of how we can expect South African courts to deal with building encroachment disputes. It is clear that removal is no longer the automatic remedy in the case of encroachments. Courts may in certain cases refuse removal and award compensation instead. The Eastern Cape High Court decision shows that the decision to replace removal with compensation is reached on the basis of a policy-driven approach dictated by the circumstances of the particular case.

The court seems to accept that the ideal method is to balance the interests of both parties in order to reach a solution that does not result in striking disproportionality of the potential prejudice suffered by the respective parties. Based on this principle, courts exercise their discretion in the context of encroaching structures and reach a policy decision either in favour of the encroacher (by denying removal) or in favour of the affected landowner (in which case the encroachment will be removed).

Furthermore, the *Phillips* case creates the impression that the discretion is stretched to include not only replacing of injunctive relief with compensation, but also to transfer of the encroached-upon land to the encroacher. The court considered such an order but refrained from making it on account of its decision on the preliminary issue, namely to order removal of the encroachment. However, as illustrated, there is no authority in either common law or legislation in terms of which the court can sanction a forced sale of land in the context of building encroachments. In fact, judging from precedent, the issue of whether the encroached-upon land should be transferred, is a separate issue that should be dependent entirely on the willingness of the affected landowner to give up his property. The early South African cases are ambiguous and do not provide conclusive answers to the questions concerning the ambit of the courts' discretion. At best, the cases show that where there was consent by the affected landowner or at least the willingness to give up the property a court may, in addition to replacing removal with compensation,

facilitate the transfer of the encroached-upon land to the encroacher. If the affected landowner would not want to give up the encroached-upon part of his property and the court orders the transfer, the involuntary transfer may be problematic in light of section 25(1) of the Constitution because it is not duly authorised.

It seems inappropriate to use expropriation language in the context of encroachment. Where a court decides to leave an encroaching structure intact, it may look like an expropriation of ownership of the affected land where transfer of the encroached-upon land is ordered. However, an expropriation in the context of encroachment is not possible. The reason why the deprivation could not be considered an expropriation of the encroached-upon land in the case of encroachment is that the common law does not authorise the expropriation and there is no legislation to authorise such an order either. Therefore, the possibility that this could amount to an expropriation is excluded.

To my mind, a clear distinction needs to be drawn between the exercise of the discretion to replace injunctive relief with compensation and the power to transfer the land to the encroaching landowner. Courts fail to draw this distinction, resulting in obscure and confusing precedents in respect of the question of transfer of the encroached-upon land. Fortunately, the court in *Phillips* ordered removal of the encroaching fence, and the remarks on the transfer of the encroached-upon land are therefore *obiter*. However, the fact that the court considered transfer is troubling. In my view, courts should refrain from orders for the transfer of the encroached-upon land because they may be unconstitutional.

SUMMARY

The main focus of this note is *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) SAFLII <<http://www.saflii.org/za/cases/ZAECGH/2010/27.html>> (accessed 13-06-2012), which was a case dealing with the erection of a fence that encroached on the applicant's property. The note explores the current way that courts deal with encroachment disputes in light of the *Phillips* judgment. This judgment correctly confirms that courts assume the existence of a wide discretion to replace injunctive relief (or mandatory interdicts) with compensatory awards; it illustrates how the discretion will be exercised in order to reach a just and equitable outcome and lays open the possible constitutional implications that may be triggered if encroachments are not ordered to be removed.

What is problematic in this case is that the court considered the possibility of ordering transfer of the land to the affected landowner. If a court exercises its discretion in favour of leaving the encroachment in place and additionally orders that the encroached-upon land be transferred to the encroacher, this court order sanctions an involuntary transfer of the affected property. The loss of property or property rights needs to comply with section 25 of the Constitution of the Republic of South Africa, 1996. The crucial concern in this case is whether the common law actually authorises such a court order that results in the deprivation. However, the possible constitutional problem that may have been created by an order for transfer of the affected land was avoided because the court ordered in terms of its discretion that the encroachment be removed. It should be noted, though, that the court's remarks concerning the transfer order were made purely on the basis of the balance of prejudice and not on any constitutional principle. To my mind, the possibility of constitutional infringement may very well have arisen if the balance of prejudice favoured the encroacher and therefore the issue needs to be considered.