



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

Case No: 389/2021P

In the matter between:

**HENDRIKA PETRONELLA FOURIE
KARLIEN KRUGER**

**FIRST APPLICANT
SECOND APPLICANT**

and

**TROPICAL WINTER TRADING (PTY) LTD
REGISTRAR OF DEEDS: PIETERMARITZBURG**

**FIRST RESPONDENT
SECOND RESPONDENT**

ORDER

The following order shall issue:

1. The applicants be joined in the ex parte application of Tropical Winter Trading (Pty) Ltd (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J, on 26 February 2020, in the ex parte application of Tropical Winter Trading (Pty) Ltd (Case Number. 3635/19P), is rescinded and set aside.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: T 23804/2020, in extent 191, 6466 (one hundred and ninety – one comma six four six six) 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. 3339, Registration Division HS, Province of KwaZulu – Natal, held under title deed number: T23804/2020, in extent 192, 6811 (one hundred and ninety – two comma six eight one 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 and 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 1 (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 authorised 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 five (5) days of demand; and
- 5.3 that the Sheriff be authorised to take all steps contemplated in prayer 5.2, in and on the first respondent's stead and behalf, should the first respondent fail 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 32 Mouton 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.
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JUDGMENT

ZP Nkosi J

Introduction

[1] The applicants apply to be joined, in terms of Uniform rule 12, as respondents in the ex parte application brought by the first respondent in this court, under case number 3635/19P; and consequent upon that, for a rescission of the order granted by this court (per Seegobin J) on 26 February 2020, as well as relief aimed at giving effect to the rescission of that order. Upon rescission of the aforementioned order, the applicants seek an order that the registration and transfer of three farms, namely, the Remainder of the Farm Glen Ashton; Portion 6 (of 3) of the Farm Twyfelhoek; and the Farm Moeders Rus to the first respondent be set aside. And further that the first respondent be ordered to take all steps necessary to effect transfer of the farms to the erstwhile owners, or their successors in title, with alternative relief should the first respondent fail to do so.

[2] The relief sought is assailed by the first respondent on various grounds to be traversed in the judgment. In particular, the first respondent states that the rescission relief is brought on the incorrect rule and that there is no case made out as per the rule or as per the common law requirements. The second respondent has not filed papers to oppose the application.

Case history

[3] On 29 May 2019 the first respondent, a private registered company, brought an ex parte application in this court, under case number: 3635/19P, seeking the following relief:¹

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 8589 HS, P.O (Pietermaritzburg), KwaZulu-Natal held under Title Deed 1752/1962 measuring 191.447 HA** for the purposes of creating and maintaining firebreaks 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 one (1) 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 necessary information regarding the ownership of the Property and attempts to trace the owners and their successors in title and shall enrol 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 of the interim order anticipate the return date by giving due notice to the Applicant;

¹ Annexure "SA03" to the founding affidavit.

1.7 The costs for this application be paid by the Applicant.

1.8 Further and/or alternative relief.’

[4] The relief sought was granted by this court (per Jikela AJ) in the terms set out in the notice of application save that the time period to file a supplementary affidavit was reduced from 12 months to six months.² Thereafter, the first respondent allegedly complied with the terms of the order by preparing firebreaks on the farm, and by advertising the order in the manner prescribed.

[5] On 29 October 2019 the first respondent delivered, as directed in the order, a supplementary affidavit in which it reported back to the court on the manner it complied with the order. Without effecting an amendment to the notice of application, the first respondent, in the supplementary affidavit, requested the court to authorise the transfer of the property into the name of the first respondent, based on a valuation obtained by a sworn valuator, and against a purchase consideration to be paid into the Guardian’s Fund, as administered by the Master of the High Court.³

[6] On 4 December 2019, and on the basis of the supplementary affidavit, this court (per Bezuidenhout AJ) granted an order in the following terms:⁴

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 2 weeks prior to the date of hearing in 26 February 2020.
4. The costs of the *ex parte* application be paid by the Applicant.’

² Annexure “SA05”.

³ Annexure “SA06”.

⁴ Annexure “SA07”.

[7] On 11 February 2020 the first respondent, as mandated by the order of 4 December 2019, delivered a further supplementary affidavit in which it reported back to the court on the way it complied with the order.⁵ The report was to the following effect:

- (a) the court order of 4 December 2019 was advertised in the manner prescribed;
- (b) a sworn valuator did a valuation of the farm and that the value of the farm was R 1 254 687.03 (one million two hundred and fifty-four thousand, six hundred and eighty-seven rand and three cents); and
- (c) no one contacted the first respondent pursuant to the advertisement having placed in the manner prescribed in the order.

[8] On 26 February 2020, and pursuant to the delivery of the second supplementary affidavit, this court (per Seegobin J) granted an order in the following terms:⁶

- 1. The Applicant shall make payment in the amount of R1 254 687.03 into the Guardian's Fund within a reasonable time.
- 2. The funds deposited by as per paragraph 1 hereto into the Guardian's Fund will be for the benefit of all interested parties yet unknown in relation with 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 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 hereby 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.'

Factual background

⁵ Annexure "SA08".

⁶ Annexure "SA09".

[9] The first applicant's father, Hendrik Petrus Geldenhuys ("Geldenhuys") was the owner of the following farms:

- (a) the Remainder of the Farm Glen Ashton, No. 8589, Registration Division HS, Province of KwaZulu-Natal, held under title deed number: T23804/2020, in extent 191, 6466 hectares, first registered by Crown Grant Number G8589/1914 and previously held by Deed of Transfer Number: T1752/1962;
- (b) Portion 6 (of 3) of the Farm Twyfelhoek No. 3339, Registration Division HS, Province of KwaZulu-Natal, held under title deed number: T23804/2020, in extent 192, 6811 hectares, first transferred by Deed of Partition Transfer Number: T2420/1927, and previously held by Deed of Transfer Number: T1752/1962; and
- (c) the Farm Moeders Rus No. 11657, Registration Division HS, Province of KwaZulu-Natal, held under title deed number: T23804/2020, in extent 487,7306 hectares, first registered by Crown Grant Number G11657/1930 and previously held by Deed of Transfer Number: T1752/62 (referred to as "the farms").

[10] Geldenhuys was first married to Getruida Jacoba Geldenhuys (neè De Wet), and after she passed away, to Catharina Wilhelmina Geldenhuys (neè Beukes). All in all, twelve children were born of Geldenhuys' two marriages.

[11] Geldenhuys passed away on 31 December 1960. Catharina Wilhelmina Geldenhuys ("Catharina") was appointed executrix of his deceased estate in terms of Letters of Administration No. 137/61 issued in her favour by the Master of the High Court of South Africa (Orange Free State Provincial Division, as it then was), on 6 February 1961.

[12] In his last will and testament, dated 14 November 1954, Geldenhuys bequeathed the farms to his six sons, and the spouses of his six daughters, by substitution. The heirs were the following:

- (a) Frans Johannes Geldenhuys, born on 3 July 1905;
- (b) Willem Daniel Van Niekerk, born on 2 November 1897;
- (c) Nicolaas Gerhardus Johannes Oosthuizen, born on 9 November 1899;

- (d) Jacobus Ignatius Geldenhuys, born on 21 October 1910;
- (e) Michiel Josias Beukes, born on 2 February 1917;
- (f) Johannes Stephanus Viljoen, born on 23 September 1906;
- (g) Hendrik Petrus Geldenhuys, born on 7 September 1927;
- (h) Gert Stephanus Kok, born on 24 October 1914;
- (i) Pieter George Slabber van Zyl, born on 14 July 1911;
- (j) Hermanus Christiaan Michiel Geldenhuys (the second applicant's father) born on 8 August 1931;
- (k) Catharina Wilhelmina Maria Geldenhuys, born on 14 November 1934; and
- (l) Hendrika Petronella Geldenhuys (the first applicant) born on 4 June 1941.

[13] On 16 March 1962 the farms were transferred to the heirs, in undivided shares, by the Registrar of Deeds for the Natal Province (as it was then) under Deed of Transfer Number: T1752/1962.⁷ After the farms were registered in their names, the heirs, as co-owners, leased the farms to one Danie du Toit. The rental was used for the upkeep and maintenance of the farms, as well as municipal rates and taxes.

[14] From 1991, and after his retirement, the second applicant's father (and first applicant's brother) -Hermanus Christiaan Michiel Geldenhuys was given permission by the co-owners to utilise the farms to graze livestock, free of rent, on condition that he would be responsible for the upkeep and maintenance of the farms, as well as municipal rates and taxes. He utilised the farms until his death in December 2012. His undivided share in the farms was bequeathed to his daughters, the second applicant and her sister, Lizelle Geldenhuys.

[15] The second applicant was appointed as the executrix of her father's estate.⁸ It appears that a final liquidation and distribution account was prepared in respect of his estate but the estate has not yet been finally distributed.⁹

⁷ Attached to annexure "SA04" as "FA8".

⁸ Annexure "SA10".

⁹ Annexure "SA11".

[16] After the demise of the first applicant's brother, two of the first applicant's great-nephews, Herman Geldenhuys and Paul Geldenhuys and her son, Phillipus Jurie Wynand Fourie (Flippie), asked permission from the first applicant to utilise the farms to graze cattle. At the time, the first applicant was the only surviving co-owner. The first applicant gave them permission to utilise the farms on condition that they would be responsible for its upkeep and maintenance, as well as municipal rates and taxes.

[17] From 2012 they have grazed cattle on the farms, using part of the farms for summer grazing, and the other parts for winter grazing. It appears that they do not reside on the farms but they have farm labourers who do, who also keep livestock on the farms.

[18] On 11 March 2020, a certain Zelda Strauss ("Strauss") from a company called Mulilo Renewable Project Developments ("Mulilo") made enquiries from Paul Neethling, an attorney in Memel, if he knew who the owners of the farm Moeders Rus were, because the company was interested in erecting wind turbines on the farm to generate and sell electricity. Strauss was then referred to a company in Newcastle called Ni-Da Transport ("Ni-Da").

[19] It appears the proprietor of Ni-Da was well acquainted with the residents of Newcastle and it was believed that he might know who the owners were. Indeed, Strauss was then referred to one of the first applicant's nieces, Gerda Greyvenstein ("Greyvenstein"), who is the daughter of Gert Stephanus Kok, and who lives in Newcastle.

[20] It appears that Strauss then explained to Greyvenstein that she was looking for the owners of the farm Moeders Rus and that Mulilo was interested in erecting wind turbines on the farm. It seems Greyvenstein referred Strauss to the first applicant's nephew, who in turn referred Strauss to Flippie.

[21] On 13 March 2020 Strauss contacted Flippie and explained to him about Mulilo's interest to secure an option to erect 30 wind turbines on the farm for which they will pay R10 000 per month, per turbine, for a period of 25 years, should the option be exercised. Flippie referred Strauss to the second applicant.

[22] On 17 October 2020, Strauss formalised Mulilo's proposal, via an email sent to the second applicant.¹⁰ Attached to the e-mail was an option and notarial lease agreement.¹¹

[23] The second applicant obtained a mandate from the first applicant, and the progeny of the deceased co-owners, to negotiate the terms of the option with Mulilo. On 22 October 2020, while the second applicant was still negotiating the terms of the lease agreement, Strauss informed her that when she performed a deed search in respect of the Moeders Rus property, she noted that the property was registered in the name of an entity called Tropical Winter Trading (Pty) Ltd ("the first respondent").

[24] On 4 November 2020 Strauss sent an email to the second applicant and Flippie to which was attached a copy of the most recent deed of transfer of the farms.¹² The deed of transfer not only confirmed that the farm Moeders Rus was registered in the name of the first respondent, but also the other two farms.¹³

[25] On 9 November 2020 the second applicant contacted the progeny of the deceased co-owners to inform them of the developments regarding the transfer of the farms. On 24 November 2020, the second applicant contacted the rest of the family who had an interest in the farms to obtain a mandate to apply for the judgment and order granted in the ex parte application to be rescinded and set aside; and for the transfer of the properties to the first respondent to be reversed.

The applicants' case

¹⁰ Annexure "SA12".

¹¹ Annexure "SA13".

¹² Annexure "SA14".

¹³ Annexure "SA15".

[26] The applicants aver, firstly, that the application upon which the final order was premised did not disclose a cause of action and it was legally incompetent for the court to have made such order. They contend that the court lacked jurisdiction to authorise the transfer of the farms to the first respondent.

[27] The applicants further submit that there is no provision in any law empowering a court (or indeed, any other administrative body), to authorise a transfer of immovable property through a private individual, which has the effect of detracting from a person or entity's real right to that property. They aver that if the first respondent's argument is that the land in question (the farms) was *res derelicta*, and as a result *res nullius*, to which they argue it was not, the land which is abandoned by its owners would revert to the State and does not become *res nullius*.

[28] Therefore, the applicants submit that what the court order amounted to is expropriation of land without compensation and without any statutory authority empowering it to do so. Furthermore, since expropriation without compensation, even by an authority statutorily empowered to do so, is expressly prohibited by s 25 of the Constitution, the court is therefore in direct violation of the rights of the owners and descendants of the farms.

[29] If it is accepted, they argue, that the court had statutory authority to authorise the transfer of the property and that payment into the Guardian's Fund constituted compensation, the procedures set out in the Expropriation Act 63 of 1975 should have been followed. That is, compensation had to be calculated in a manner consistent with s 25(3) of the Constitution, with a solatium of ten percent which is normally paid in addition to the actual loss incurred to the owner by expropriation.

[30] Secondly, the applicants aver that the order should be rescinded and set aside as a result of material non-disclosure and the deliberate misleading of the court by the first respondent and its attorneys of record. The facts not disclosed were the following:

- (a) In the notice of motion reference is only made to the following property: The Remainder of the Farm Glen Ashton, No 8589, Registration Division HS, Province of KwaZulu-Natal, held under title deed number: T23804/2020, in extent 191, 6466 (one hundred and ninety-one comma six four six six) hectares, first registered by Crown Grant Number G8589/1914 and previously held by Deed of Transfer Number: T1752/1962. All averments in the founding affidavit related to this property and the relief sought in the notice of motion only related to this property. Nowhere, in the founding affidavit, is reference made to the other two farms, Twyfelhoek and Moeders Rus and none of the relief sought in the notice of motion related to them. This, notwithstanding the fact that the first respondent already knew Glen Ashton formed part of the three farms held under the same title deed number.¹⁴
- (b) The relief sought in the notice of motion only related to creating and maintaining firebreaks on the farm Glen Ashton in terms of the National Veld and Forest Act. The founding affidavit covered the same subject matter, and no mention is made of the first respondent's intention to acquire this property or any other property for that matter. Consequently, the court order granted on 6 June 2019, only related to the farm Glen Ashton to create and maintain firebreaks thereon. The supplementary affidavit¹⁵ similarly only mentions the farm Glen Ashton, and no mention is made of the farms Twyfelhoek and Moeders Rus. The advertisements placed in the newspapers relating to the aforementioned order also only made mention of the farm Glen Ashton. Yet, without any amendment to the notice of motion, the first respondent applied for relief aimed at the acquisition of the farm Glen Ashton and, peculiarly, the order¹⁶ granted only made mention of "the Property". In this regard, it is the applicants' submission that the court is not alerted to the fact that the original notice of motion and affidavits filed on record only dealt with Glen Ashton and not the other two farms. The court is also not alerted to the fact that in none of the notices published were the other two farms mentioned. Consequently, the court order granted on 26 February 2020¹⁷ does

¹⁴ Annexure "FA8".

¹⁵ Annexure "SA06".

¹⁶ Annexure "SA07".

¹⁷ Annexure "SA09".

not refer to the farm Glen Ashton but only to the title deed number, which includes all three farms. From the foregoing, the applicants contend that from the outset the issue of creating and maintaining firebreaks was merely a ruse, and the real intention of the first respondent and its attorneys were to acquire the farms in a dishonest manner by deliberately misleading the court.

- (c) The final order was obtained by fraud, which includes perjury in that the first respondent, or the deponent to the founding and supplementary affidavits, gave incorrect evidence, which evidence was given fraudulently and with intent to mislead the court. Firstly, the deponent lied in the founding affidavit that there are no structures on the farm and that there are no persons exercising occupation or control over the farms, which is patently false. The deponent made allegations, which are so palpably implausible and patently false that the first respondent could not trace the owners of the farm. With farm labourers living on the farm, a very simple enquiry with them would have led the first respondent to the persons running the farms and the surviving co-owners thereof. In this regard, the applicants found it astounding that Strauss, who is not from the area, had no difficulty in tracing the surviving owners of the farms. Yet the first respondent, who is from the area, and whose properties are adjacent to the farms found it impossible to do so. With the deponent attaching the final liquidation and distribution account¹⁸ to the founding affidavit, a simple enquiry with the Master of the High Court would have provided the first respondent with the details of the executrix of the estate, and the details of the heirs.
- (d) The deponent to the affidavits filed on record by the first respondent makes no mention of the fact that there are cattle grazing on the farms, which would have been a clear indication that the farms are being utilised. Most telling, is the fact that although the farms are landlocked, Paul Geldenhuys could access them through an access pass,¹⁹ issued by Vulintaba County Estate (an entity of the first respondent). It is noted that the pass was issued, in June 2019, a month after the ex parte application was launched, and eight months before the first respondent obtain the final order. So, it is argued, at the time when the final order

¹⁸ Annexure "FA9".

¹⁹ Annexure "SA16".

was obtained, the first respondent knew that the facts upon which the relief sought was premised were not true.

[31] The applicants aver that neither of them had knowledge of the ex parte application and the subsequent orders granted. And, neither of them was given proper notice of the proceedings. The advertisements in the newspapers did not come to their attention and they only became aware of the fact that an order was granted in the manner described herein earlier.

[32] Therefore, they aver, this application is brought in terms of Uniform rule 42(1), alternatively under common law, alternatively based on a breach of a fundamental right, either through the development of the common law, or through an appropriate constitutional remedy. The applicants submit that they clearly have a direct and substantial interest in the order granted, and as such should be joined to the ex parte application.

[33] The applicants submit that based on the allegations set out in the founding affidavit; the evidentiary material attached as proof of these allegations; the confirmatory affidavits of Flippie and the second respondent; and inferences that may properly be drawn from a conspectus of the evidence, the costs of the application are to be paid by the first respondent, jointly and severally with its attorneys, Messrs Kruger Attorneys and Conveyancers, on the scale as between attorney and client. The applicants further submit that the conduct of the first respondent's attorneys be referred to the Legal Practice Council for investigation, while that of the first respondent, its directors and its legal advisor, to the Special Investigative Unit ("SIU") for investigation.

The first respondent's case

[34] As a starting point, the first respondent avers (in limine) that the first applicant does not have the necessary locus standi to bring the application and no case for it has been made in her founding affidavit. A claim that an oral mandate was obtained from the "rest of the family" who have not been identified and whose interest has not been

divulged, does not suffice to prove that the applicants have a genuine mandate to bring these proceedings.

[35] Furthermore, since it is common cause that 11 of the original co-owners became deceased, the first respondent contends that the co-owner's beneficiaries or the executors of their estates should have been joined to the proceedings. As things stand, it is argued, the court has no insight into the affairs of the deceased co-owner's estates and whether or not same have been wound up, in accordance with the laws regarding deceased estates.

[36] The first respondent submits that since payment has been made to the Guardian's Fund, as administered by the Master of the High Court, in the amount of R1,2 million, all parties connected to the erstwhile co-owners of the farms may have interest in the amount, in that they may have a claim to such fund. The first respondent thus contends that the non-joinder of interested parties is prejudicial.

[37] It is further submitted that the second applicant, while appointed executrix of the estate of HCM Geldenhuys, and the estate not finally distributed, and no transfer of the undivided share of the farms having yet taken place, she has no real right to the farms. And thus, has no locus standi to bring these proceeding against the first respondent.

[38] The first respondent further avers that the applicants accused it and its legal practitioner of fraudulent and sinister conduct which is not supported by the facts of the matter in any anyway whatsoever. The purpose of the application brought under case number 3635/2019 P was to address the serious concerns regarding veld fires that are a common place in the region in which the first respondent owns properties.

[39] It is averred by the first respondent that the entire area where the properties of the first respondent is situated is an extreme veld fire risk area. So, the order granted on 6 June 2019 was specifically for access to the farm Glen Ashton for the purposes of creating the required firebreaks.

[40] The matter was brought ex parte since the first respondent could not trace any of the owners as per the Deed of Transfer 1752/1962. The status of the first applicant was unknown to the first respondent as only the date of birth was disclosed in the Deed of Transfer.

[41] While the first respondent managed to obtain the liquidation and distribution accounts, it was not possible to ascertain the contact details of the beneficiaries. In the meanwhile, the first respondent has always had to pay for firebreaks and take on the responsibility of absent farm owners.

[42] Due to the lack of response from any person (to the notices and advertisements placed in the local and national newspapers), the first respondent proceeded to seek the assistance of the court in order to take transfer of the farms for the reasons set out in the various affidavits, as attached to the founding affidavit. In this regard, the first respondent complied with the various orders of the court and made payment for compensation to any interested party with the Guardian's Fund to ensure that there is no prejudice to any potential interested party, which funds are secure for a period of no less than 30 years from date it was deposited with the Master.

[43] It is averred that the first applicant, along with any other person who may have an interest in the farms through succession, have never bothered to adhere to their statutory obligations in terms of the farms, and simply left it to the first respondent to foot the bill for all the expenses in maintaining the firebreaks. The only reason, it is stated, the first applicant now appears on the scene is the prospect of a potential lucrative commercial opportunity regarding Moeders Rus. Otherwise, for a period of 50 years, the farms have long been forgotten and neglected.

[44] The first respondent further avers that Vulintaba Country Estate ("Vulintaba"), while owned by the first respondent, is managed by a separate juristic person, being the Home Owner's Association. Access to Vulintaba is therefore not regulated by the first

respondent but by the Association; and the access pass issued to Paul Geldenhuys was done without its knowledge as the Association administered its own affairs.

[45] The first respondent submits that the first applicant has failed to state why the rescission application is made in terms of rule 42(1); and why it was erroneously granted. It reiterates that the applicants have not made out a case per the rule nor the common law.

Issues

[46] The first main issue to be determined is whether or not the applicants made out a case to be joined in the *ex parte* application as respondents. If so and secondly, whether the judgment granted in that application should be rescinded in terms of rule 42(1), alternatively the common law.

[47] Before those issues may be traversed, the first respondent has raised three points/ issues in limine to be decided. The first one relates to the locus standi challenge against the first applicant. The second regards the non-joinder of other persons related to the applicants who may have an interest in the application. The third concerns the locus standi challenge against the second applicant. I propose to deal with all three challenges together as they are factually closely related to one another.

Locus standi and non-joinder

[48] As a starting point, a person who has a right to sue or be sued in a particular matter is said to possess locus standi in iudicio in that matter. The general rule of our law rests an onus upon the party instituting proceedings to allege and prove that such party has locus standi to do so.²⁰

[49] There are two tests to determine the locus standi of a party. First, whether or not the party concerned has a direct and substantial interest in the matter and, second, whether or not that party has legal capacity to litigate in the matter. For purposes of this

²⁰ *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575.

matter, the second test does not come into play as both applicants are obviously endowed with such legal capacity and it is a non-issue.

[50] The common law position is that a person wishing to institute or defend legal proceedings must have a direct and substantial interest in the right, which is the subject matter of litigation, and in the outcome of the litigation.²¹ In other words, you cannot take over someone else's legal battle, simply because you wish to litigate for the fun of it or for some other reason. An indirect financial interest is not sufficient.

[51] The requirements for a direct and substantial interest are summed up as follows:²²

- '(a) the plaintiff/applicant for relief must have an adequate interest in the subject matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;
- (b) the interest must not be too far removed;
- (c) the interest must be actual, not abstract or academic;
- (d) the interest must be a current interest and not a hypothetical one.' (Footnote omitted.)

[52] While the above is the general rule, it is important to bear in mind that in respect of actions based on the Bill of Rights, the provisions of the Constitution have extended locus standi to persons and groups who, in the past, would not have been considered to have a "direct and substantial interest" in a matter.²³ In terms of s 38 of the Constitution, relief may be sought by:

- '(a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.'

²¹ *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534.

²² DE Van Loggerenberg & E Bertelsmann *Erasmus Superior Court Practice* (RS20, 2022) at D1-187.

²³ *Coetzee v Comitiss and Others* 2001 (1) SA 1254 (C); and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1082.

[53] Uniform rule 12 provides for a person entitled to join as a plaintiff (applicant) or liable to be joined as a defendant (respondent) in any action (application) to, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as plaintiff (applicant) or defendant (respondent). In *Tlouamma and Others v Speaker of the National Assembly and Others*,²⁴ it was held that the test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation, *which may be prejudicially affected by the judgment or order*.²⁵

[54] The first applicant as co-owner in undivided shares of the farms, and the second applicant as executor of the deceased estate of the co-owner in undivided shares of the farms have locus standi to be joined and apply to have a judgment and order granted ex parte and by default rescinded and set aside, which judgment and order authorised the transfer of the farms to the first respondent. Their substantial and direct interest is beyond reproach. It does not matter that the “rest of the family” who had an interest in the properties have not been joined.

[55] The application is aimed at the preservation or return of the common properties. The first applicant does not require the co-operation of any fellow co-owners to institute and prosecute the claim. She can, without the co-operation, consent, or mandate of her fellow co-owner or co-owners, institute a claim (rei vindicatio or possessory remedy) for the recovery of the common properties.²⁶

[56] The second applicant is the executor of a deceased co-owner’s estate. She stepped into the shoes of the deceased co-owner and can represent his estate.²⁷

²⁴ *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) para 159.

²⁵ See also *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) paras 64-66; and *Shapiro v South African Recording Rights Association Ltd (Galela Intervening)* 2008 (4) SA 145 (W).

²⁶ Van der Keesel DG *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* (translated by Van Warmelo et al) Balkema 1961-1967 at D43 27 5.

²⁷ See *Ohlsson’s Cape Breweries v Hamburg* 1908 TS 134; *Gartrell v Southern Life Association* 1909 TH 57; *Estate Hughes v Fouche* 1930 TPP 41; and *Horwood v Horwood* 1936 (1) PH F74.

[57] In regard to the second applicant's status in this application, the following principle is apposite:²⁸

'[10] ...In *Wille's Principles of South African Law* 9 ed, at 673, under the heading 'Title of Beneficiaries', the following is said:

"However, in the light of the modern system of administration of estates that replaced the common law system of universal succession, the right of beneficiaries to inherit is no longer absolute nor an assured one: if the deceased estate, after confirmation of the liquidation and distribution account, is found to be insolvent, none of the beneficiaries will obtain any property or assets at all...In any event, an heir cannot vindicate from a third person property which the heir alleges forms part of the deceased estate; *only the executor has that power...* The modern position is therefore that a beneficiary has merely a personal right, *jus in personam ad rem acquirendam*, against the executor and does not acquire ownership by virtue of a will..." (My emphasis.)

[58] Like with the position of the first applicant, the second applicant does not require the co-operation of any fellow co-owners to institute and prosecute this claim. She can, without the co-operation or consent, or mandate of the fellow co-owner(s), institute a claim (*rei vindicatio* or a possessory remedy) for the recovery of the common properties. I believe, that the "rest of the family" 's interest in the subject matter will not be prejudicially affected by the judgment or order ultimately issued.

[59] From the foregoing, none of the points raised in limine have merit. They are, accordingly, dismissed.

Rescission

[60] The rescission application, in this case, has been brought under a new and different case number because the second respondent, the Registrar of Deeds, is also joined and the substantive relief *ad factum praestandum* is sought against his Office. However, the main proceedings being impugned forms part of the pertinent evidentiary material to be considered.

²⁸ *Booyesen and Others v Booyesen and Others* 2012 (2) SA 38 (GSJ).

[61] The applicants bring the application in terms of rule 42(1), alternatively under common law based on the following discernible grounds:

- (a) material non-disclosure and misrepresentation of facts; and
- (b) no cause of action; and legal incompetence of a court to make such an order.

I defer to deal with the grounds later in the judgment.

[62] A court does not have inherent power to set aside its judgments. However, a judgment by default can be set aside under rule 42(1) or under the common law.²⁹ Rule 42(1) empowers the court, mero motu, or upon the application of any party affected, to vary an order or judgment erroneously sought or erroneously granted, in the absence of any party affected thereby.

[63] The fact that the application for rescission is brought under a specific rule does not mean that it cannot be entertained under a different rule or common law, provided the requirements thereof are met.³⁰ The facts and circumstances raised in the affidavits, sustain relief on any of the grounds for rescission, even if not expressly raised.³¹

Rule 42(1)(a)

[64] As alluded to above, this rule provides for the rescission of an order or judgment “erroneously sought or erroneously granted in the absence of any party affected thereby”. Most often than not, that relates to a judgment granted by default.³²

[65] The following principles govern rescission under this rule:³³

‘[11.1] the rule must be understood against its common-law background;

²⁹ *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 (T) at 780.

³⁰ *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (TkH) para 12; and *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C).

³¹ *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509D-510D; *Cole v Government of the Union of South Africa* 1910 AD 263 at 272-273; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-24G; and *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 43.

³² See *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F; and *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 417B.

³³ *Kgomo and Another v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP).

- [11.2] the basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which rule 42(1)(a) is one;
- [11.3] the rule caters for a mistake in the proceedings;
- [11.4] the mistake may either be one which appears on the record of proceedings *or one which subsequently becomes apparent from the information made available in an application for rescission of judgment*;
- [11.5] a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;
- [11.6] *the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court*; and
- [11.7] the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).’ (My emphasis.) (Footnotes omitted.)

[66] Unfortunately, it is not possible in the High Court to have a judgment set aside merely because both parties consent to it.³⁴

[67] Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the sub-rule to apply.³⁵ In general terms, a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.³⁶

[68] An order or judgment is also erroneously granted if:

³⁴ See *Ex Parte Naude* 1964 (1) SA 763 (D) at 764.

³⁵ *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) at 30D; *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471G; *Naidoo v Somai and Others* 2011 (1) SA 219 (KZD) at 220F-G; and *Rossitter and Others v Nedbank Ltd* (96/2014) [2015] ZASCA 196 (1 December 2015) para 16.

³⁶ *Nyingwa v Moolman NO* 1993 (2) SA 508 (TK) at 510 D-G; *Naidoo and Another v Matlala NO and Others* 2012 (4) SA 143 (GNP) at 153C; and *Thomani and Another v Seboka NO and Others* 2017 (1) SA 51 (GP) at 58C-E.

- (a) there was an irregularity in the proceedings;³⁷ and
- (b) if it was not legally competent for the court to have made such an order.³⁸

Though, in most cases the error concerned would be apparent from the record of the proceedings, it has been held that in deciding whether a judgment was erroneously granted a court is not confined to the record of the proceedings.³⁹

Common law

[69] Judgments may also be set aside at common law in the following circumstances:⁴⁰

- (a) *fraud*;
- (b) *justus error* (on rare occasions);
- (c) in certain exceptional circumstances when new documents have been discovered;
- (d) *where judgment has been granted by default*; and.
- (e) in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*.' (My emphasis.) (Footnotes omitted.)

[70] In relation to fraud, to have a judgment set aside a party must prove that:

- (a) the successful party (or someone to his/her knowledge), gave incorrect evidence;
- (b) that the evidence was given fraudulently and with intent to mislead the court; and
- (c) that the false evidence was the cause of the unfavourable judgment.⁴¹

[71] A court has power to rescind a judgment obtained on default of appearance, provided that sufficient cause for rescission has been shown. This means the following requirements must be met:

- (a) that the party seeking relief must present a reasonable and acceptable explanation for his/her failure to appear (good cause); and
- (b) that he/she has a bona fide defence which, prima facie, carries some prospect of success.⁴²

³⁷ *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038D-E.

³⁸ *Athmaram v Singh* 1989 (3) SA 953 (D) at 956D and 956I.

³⁹ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 93C-H; and *President of the Republic of South Africa v Eisenberg and Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C) at 264D-H.

⁴⁰ *Erasmus Superior Court Practice* (RS20, 2022) at D1-562D.

⁴¹ *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O); and *Smit v Van Tonder* 1957 (1) SA 421 (T).

⁴² *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042.

[72] In addition, it has been held that the High Court also has an inherent jurisdiction to rescind default judgments.⁴³

[73] I turn to deal with the grounds for rescission. However, before I do so in earnest, may I state upfront that it is my considered view that there are no material factual disputes and/or no genuine ones emerged from the papers.

(a) *Material non-disclosure and misrepresentation of facts*

[74] It is trite in *ex parte* applications that all material facts must be disclosed which might influence a court in coming to a decision.⁴⁴ The legal principle is that the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission and the court, apprised of the true facts, has the discretion to set aside the order obtained on material facts not disclosed or to preserve it. Unless 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. A litigant who approaches a court *ex parte* is not entitled to omit any reference to a fact or attitude of his opponent which is relevant to the point in issue merely because he is not prepared to accept the correctness thereof.

[75] The above-mentioned principle was aptly stated in *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs* as follows:⁴⁵

[45] ...In *NDPP vs Basson* this court said:

“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* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B).”

⁴³ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 761H-J.

⁴⁴ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).

⁴⁵ *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA).

[46] The duty of the utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, *audi alteram partem*. The law sometimes allows a departure from this principle in the interests of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

[47] 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.

[48] As Waller J said in *Arab Business Consortium*, points in favour of the absent party should not only be drawn to the judge's attention, but must be done clearly: "There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough."

[49] *The ex parte litigant should not be guided by any notion of doing the bare minimum*. She should not make disclosure in a way calculated to deflect the judge's attention from the force and substance of the absent respondent's known or likely stance on the matters at issue. Generally, this will require disclosure in the body of the affidavit. The judge who hears an ex parte application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.

[50] In regard to the court's discretion as to whether to set aside an ex parte order because of non-disclosure, Le Roux J said in *Schlesinger v Schlesinger*:

"(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."

[51] This is consistent with the approach in English law, that if material non-disclosure is established a 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”.

[52] As to the factors that are relevant in the court’s exercise of its discretion whether or not to set aside an ex parte order on grounds of non-disclosure, in *NDPP v Phillips* this court said that regard must be had to the extent of the non-disclosure, the question whether the judge hearing the ex parte application might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the provisional order aside.’ (My emphasis.) (Footnotes omitted.)

[76] From the new facts which have since emerged in this application, it appears to me that the first respondent and/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”.

[77] What demonstrates that fact is the ease with which Strauss was able to trace the owners of the farms apparently doing her own investigations without a tracing urgent. The affidavits used to obtain the interim and final relief do not spell out to what great extent the first respondent together with its directors and or legal advisers went to in order to trace the owners of the farms beyond merely assuming, from the title deed, that they are unlikely to be still alive, before seeking relief from the court.

[78] Furthermore, the first respondent or its deponent attached the final liquidation and distribution account of the deceased HCM Geldenhuys to its founding affidavit in the ex parte application. In this document it is clearly indicated that the heirs to Geldenhuys’s undivided share in the farms are the second applicant and her sister, Lizelle Geldenhuys. A simple enquiry with the Master of the High Court would, I believe, have provided the first respondent with the details of the executrix of the estate, and the details of the heirs. From the fact that the first respondent attached the liquidation and

distribution account of Geldenhuys leads one to the inescapable conclusion that the first respondent and its attorneys had access to the information held by the Master, which included details of the second applicant.

[79] The statement by the deponent that “there is no way of tracing any of the owners as per the title deed, nor is there any way of establishing whether or not there are any next of kin” is misleading and untrue. This statement coming from the first respondent, who is from the area, and whose properties are adjacent to the farms. The extent of the first respondent’s investigations woefully fell short of what was expected to be reasonable in the circumstances and an inference is inescapable that this was done deliberately with intent to propose and achieve transfer of ownership of the farms to itself.

[80] Even when the first respondent approached court, it appears that evidence which was either half-truth or false was adduced. The following facts give credence to that conclusion:

- (a) In the notice of motion reference is only made to the farm Gen Ashton. All averments in the founding affidavit related to this property and relief sought in the notice of motion only related to this property. There was no reference made to Twyfelhoek or Moeders Rus farms anywhere. None of the averments found in the founding affidavit related to these other two properties; and none of the relief sought related to these properties. This was done notwithstanding the fact that, at the time of deposing to the founding affidavit, the first respondent already knew (from the copy of the deed of transfer attached) that the farm which formed the subject matter of the relief sought in the notice of motion, was part of three farms held under the same title deed number, namely Glen Ashton, Twyfelhoek and Moeders Rus. Even when transfer of the property to the first respondent was proposed in the supplementary affidavits, no mention is made of the other two farms.
- (b) The relief sought in the notice of motion only related to creating and maintaining firebreaks in terms of the National Veld and Forest Act on the farm Glen Ashton.

No mention was made, in the founding affidavit, of the first respondent's intention to acquire this property, let alone the other two farms for that matter. As a result, on 6 June 2019, the court order only related to Glen Ashton, authorising access to this farm in order to create and or maintain firebreaks thereon. Even the advertisements, placed by the first respondent in the newspapers relating to that order, only made mention of Glen Ashton. However, without an amendment to the notice of motion to establish a cause of action or any legal foundation, the first respondent, on a sudden turn of events, simply claims for relief aimed at the acquisition of Glen Ashton farm.

- (c) When seeking that order, on 4 December 2019, the first respondent, well aware of the fact that there were three farms with same title deed number, and that the advertisement in the local newspaper only made reference to the farm Glen Ashton fails to alert the court to the fact that the original notice of motion and affidavits filed of record only dealt with Glen Ashton farm and not the other two farms. And so do the notices published in terms of the interim orders. When the final order of 26 February 2020 is issued, suddenly no reference is made to the farm Glen Ashton but only to the title deed number, which included all three farms. Was this subtle change intended to hoodwink and bamboozle the court to grant this extraordinary relief? It seems so, if one considers further pertinent facts below.
- (d) Of the three farms, only one, namely Glen Ashton, shares a common border with the first respondent's property. That fact was not disclosed in any of the affidavits filed on record. All that was disclosed, was the fact that the subject-matter, namely Glen Ashton was completely landlocked, which is true, and therefore has no commercial value, housing or industrial value, which is false as some value was obtained by the sworn valuator for some purchase consideration.⁴⁶ I return to the value aspect later on. The correct position seems to be the following:
- (i) As alluded to above, only Glen Ashton shares a common border with the first respondent's property. It is completely landlocked and is surrounded by farms belonging to the first respondent.⁴⁷

⁴⁶ Annexure "TFK1".

⁴⁷ Annexures "FA6" and "SA16".

- (ii) Effective firebreaks and back burns around the perimeter of the first respondent's farms completely insulates Glen Ashton from external fire threats. Similarly, effective firebreaks and back burns around the perimeter of the first respondent's farms neutralises any threat of a fire emanating from Glen Ashton, from spreading to any of the first respondent's farms.
- (iii) The first applicant's son belongs to the local Fire Protection Association in Newcastle, and he, together with her two nephews, made firebreaks and back burns on all three farms since 2012. Before that, her late brother did the same. It is only since 2020 when the first respondent allegedly prevented the first applicant's son and nephews from accessing Glen Ashton via Vulintaba that they did not make firebreaks and back burns on that farm, but not even this, it would appear, ever caused any realistic threat to the first respondent's properties.
- (iv) It is denied, as false, that there are no structures on the farms and that there are no persons exercising any occupation or control over the farms. The first applicant avers to the fact that her son and great-nephews were utilising the farms for grazing purposes, and that there were several farm labourers who lived on the farm, although her son and great-nephews did not live on it.
- (v) Twyfelhoek is completely landlocked and is surrounded by the Remainder of the Farm Twyfelhoek 3339; the Farm Toegeken 9739; and the Farm the Drop 4603.⁴⁸ All these farms are said to belong to the company Oubas Bosbou Landgoed (Pty) Ltd which is neither owned nor associated with the first respondent. Twyfelhoek does not share a common border with the first respondent's property and in so far as the farm might have posed any fire risk, the risk would not have been to the property of the first respondent, but the properties of Oubas Bosbou Landgoed.
- (vi) Moeders Rus is also completely landlocked and is surrounded by Portions 2,3 and 4 of the Farm Vergelegen A9770 (owned by a certain Mr CJ

⁴⁸ Annexure "FA6".

Botha, Mr Giep Van Heerden and Mr Dries Boshoff respectively or companies associated or controlled by them), the Farm Toegeken 9739 and The Drop 4603 (owned by Oubas Bosbou Landgoed); and the Farm Geduld 255 (owned by the MJ Glutz Trust). Moeders Rus does not share a common border with the first respondent's property; and in as far as the farm might have posed any fire risk, the risk would not have been to the property of the first respondent but the aforementioned owners. It is averred that the old farmhouse in which the first applicant grew up is still on Moeders Rus and until recently, she states, her son and nephews would occupy the house when they visited the farm to tend to their livestock. It appears that after this application was launched, the first respondent's employees broke down the door to the house and forced the first applicant's son to remove all his belongings.

- (vii) It is alleged that, to this day, Twyfelhoek has infrastructure which includes a shed, rondavels, and an ablution facility. The applicants' family could congregate there at least once a year for a family reunion and the rondavels and ablution facilities were used by the family during these congregations. The last time the family congregated there was in 2019 before the onset of the Covid 19 pandemic.
- (e) There were cattle grazing on the farms which would have been a clear indication that the farms were being utilised. The first respondent or its deponent to the affidavits filed on record omitted to mention this fact in its evidence, instead opted to claim that there was no life (of people and animals) on the farms. I find it strange that since these proceedings have been launched there seems to be life again on the farms.⁴⁹
- (f) Moeders Rus and Twyfelhoek both have access to provincial or municipal roads via servitudes which tends to show that the first respondent was not telling the whole truth in its affidavits, when it stated that the farm (which to its knowledge were actually three farms) had no road access. Although it is true Glen Ashton needed to be accessed via Vulintaba, Twyfelhoek is accessed via a servitude

⁴⁹ Annexures "AA6" and "AA7" to the answering affidavit.

that runs over the Farm Toegeken 9739; while Moeders Rus is accessed via a servitude that runs over Farm Geduld 255. It is to be noted that Vulintaba, of which the deponent to the affidavits is one of the directors, issued an access pass to Paul Geldenhuys to traverse the Estate in order to access the farm (ostensibly Glen Ashton) in June 2019, a month after the ex parte application was launched and eight months before the first respondent obtained the final order. The first respondent owned Vulintaba. I find it strange that despite this fact of a neglectful neighbour who has suddenly showed up, which I believe should have been within the common knowledge of its employees, the first respondent still went ahead and sought final relief to take ownership of the farms. It appears to me that, at the time the final order was granted, the first respondent knew or should have known that the facts upon which the relief sought was premised were not true.

- (g) The first respondent held out to the court that the farm (which to its knowledge were actually three farms) was of little or no commercial value. The valuation certificate attached to its supplementary affidavit in the ex parte application indicated the combined value of the three farms is R1 254 687.03. Having regard to the massive discrepancy between the true value of the farms and the value expressed in the valuation certificate, the first respondent's valuation is grossly inaccurate, and the information contained therein was either manipulated or deliberately misstated.
- (h) The Newcastle Municipality undertook a General Valuation Roll (GV 2019) which was implemented with effect from 1 July 2019. The GV 2019 Roll property values remain valid for the period 1 July 2019 to June 2024. According to the Valuation Roll the municipal values of three farms are as follows: -
- (i) Glen Ashton – R1 340 000;
 - (ii) Moeders Rus – R4 478 000; and
 - (iii) Twyfelhoef – R 1 272 000

Therefore, the combined municipal valuation of the farms is R7 090 000. Clearly, the farms were acquired at a bargain even by the municipal standards.

(i) Because a municipal evaluation is generally lower than the actual commercial value of a property, the first applicant caused a commercial valuation of the farms to be done using a web-based application called 'Lightstone' which, it is argued provides credible and accurate information, valuations and market intelligence on properties in South Africa. The platform is said to be completely impartial and unbiased. According to Lightstone, the comparable average sales prices of the farms are as follows:

- (i) Glen Ashton – R6 785 999.95;
- (ii) Twyfelhoek – R6 360 893.10; and
- (iii) Moeders Rus – R6 875 249.95

So, the realistic commercial value of the farms is therefore R20 022 143. Therefore, the first respondent acquired the farms for R18 767 456 below its commercial value. By any standard, this occasioned a big loss to the true owners and/or beneficiaries.

(b) No cause of action and legal incompetence of a court

[81] The applicants submit that the application upon which the final order was premised, did not disclose a cause of action and that it was legally incompetent for a court to have made such order. It is argued, that the court lacked jurisdiction to authorise the transfer of the farms to the first respondent as there is no provision in any law empowering a court to do so without express statutory provision.⁵⁰

[82] It would seem as if it was the first respondent's case, in the ex parte application, that the farms in question were abandoned (*res derelicta*), and as a result became *res nullius*. However, our courts have taken a strict approach in determining whether valuable property has been abandoned. Apathy on the part of the owner of valuable property is thus insufficient to establish an intention to abandon. Given the value attached to immovable property, a court will not find that abandonment has occurred absent an express intention to do so on the part of the owner.⁵¹

⁵⁰ *SP & C Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews and Others* 2010 (4) SA 104 (SCA) paras 4 and 5.

⁵¹ See *Minister Van Landbou v Sonnendecker* 1979 (2) SA 944 (A) at 946A-947B; *Meintjes NO v Coetzer and Others* 2010 (5) SA 186 (SCA); and *Papas NO v Motsere Trading CC and Others* (46011/2012)

[83] Available evidence tells us now that the farms were not *res derelicta*. But even if it was, land which is abandoned by its owner would revert to the State and does not become *res nullius*.⁵²

[84] The position regarding unclaimed inheritances is also that such property is rendered *bona vacantia*, although this position is now regulated by legislation.⁵³

[85] The court order was akin to expropriation of land without compensation and without any statutory authority empowering the court to do so. Such expropriation, even by an authority statutorily empowered to do so, is expressly prohibited by s 25 of the Constitution. The court order is therefore in direct violation of the rights of the owners of the farms and their descendants.

[86] Even if it is accepted (from some source I could not establish) that the court had statutory authority to authorise the transfer of the property against the payment into the Guardian's Fund, as some compensation, the procedures set out in the Expropriation Act should have been followed as a guideline. Compensation had to be calculated in a manner consistent with s 25(3) of the Constitution.⁵⁴

[87] The following procedures are prescribed for expropriation:

- (a) the decision to expropriate is administrative and the rules and principles prescribed for the taking of administrative decisions should be adhered to;
- (b) notice of expropriation must be served on the owner;
- (c) procedure for claiming, negotiating etc. of payment of compensation is set out in ss 7(2)(c) and (d); and 9-12 of the Expropriation Act; and

[2014] ZAGPJHC 144 (6 June 2014).

⁵² *Wille's Principles of South African Law* 9 ed (2007) at 492; DL Carey Miller *The Acquisition and Protection of Ownership* (1986) at 8-9.

⁵³ See *Estate Baker and Others v Estate Baker and Others* (1908) 25 SC 234; *Bielovich and Others v The Master and Another* 1992 (4) SA 736 (N); and ss 35(13); 43(6); and s 92 of the Administration of Estates Act 66 of 1965.

⁵⁴ See Harms *Amler's Precedents of Pleadings*, 9 ed (2018) at 197-200.

- (d) if there is no agreement on compensation, it has to be decided by the Compensation Court, Land Claims Court or High Court.

Clearly, none of these procedures were followed before the court granted an order authorising the transfer of the properties to the first respondent.

[88] If there is no agreement, a court must determine what is just and equitable, taking into account public interest and those affected. The following factors must be taken into account;

- (a) current property use;
- (b) history of acquisition and use of property;
- (c) market value of the property; and
- (d) extent of State direct investment and subsidy in acquiring the property.

Clearly, none of these factors were considered when the court determined the amount of compensation to be paid for the properties. In addition, a solatium of ten percent is normally paid in addition to the actual loss incurred to the owner by the expropriation.

(c) *Rescission at common law (ex abundanti cautela)*

[89] As alluded to earlier, at common law the court is entitled to rescind a judgment obtain in default of appearance provided sufficient cause is shown. This includes a reasonable and acceptable explanation for the default and that on the merits the party has a bona defence.⁵⁵

[90] Taken from the history of the matter, the applicants have a reasonable explanation for the default. As found earlier, the first respondent merely conducted a minimal and cosmetic investigation to trace the owners of the farms and the advertisement notices were insufficient and probably never reached the applicants, as they claimed. Their default was not wilful.

[91] I am persuaded (by the new facts, which have emerged since the order), that the application is made bona fide and that the applicants have a genuine defence or claim

⁵⁵ *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042; and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764.

which prima facie carries some prospect of success. The defence(s) raised by the first respondent to the applicants claim of ownership of the farms have no merit and no basis in law. Theirs (applicants) is a good claim.⁵⁶

Conclusion

[92] From the foregoing, I am satisfied that the first respondent duly assisted by its attorneys committed a comedy of errors in seeking the default judgment. Most errors, if not all, 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 aim. Otherwise, nothing else explains the hostile processes or procedures adopted to seek the final order of transfer beyond the interim relief granted.

[93] The order was erroneously sought or erroneously granted in the absence of the applicants who are affected by it. That is so for all the reasons enumerated earlier, including that it was not legally competent for the court to have made such an order and in the manner that it was done. I am satisfied that the final order granted cannot be sustained and should be rescinded, with the status quo ante revived.

Costs

[94] The applicants seek for a cost order de bonis propriis against the displeasing conduct of the first respondents' attorneys in pursuance of the course which led to the final and transfer order of the farms to the first respondent. It is my view that there is a legitimate case to be made out for such costs since attorneys should not be allowed to sneak applications through by deliberately failing to make a full and frank disclosure of all relevant facts.

[95] In *Khan v Mzovuyo Investments (Pty) Ltd*⁵⁷ an order to pay wasted costs de bonis propriis against the plaintiff's attorney was granted where his conduct was unreasonable and negligent, and his handling of the case was slack and apparently characterised by a lack of concern.⁵⁸

⁵⁶ *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C).

⁵⁷ *Khan v Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47 (TK) at 48G-I.

⁵⁸ See *Darries v Sheriff, Magistrate's Court Wynberg, and Another* 1998 (3) SA 34 (SCA).

[96] In *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others*⁵⁹ the Constitutional Court stated as follows:

'[54] An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs *de bonis propriis* on the scale as between attorney and client...' (Footnote omitted.)

[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 have had no real prospect of success. This alone is a sufficient ground for an award of costs *de bonis propriis*.

[99] 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.

Order

⁵⁹ *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC).

[100] Consequently, the following order shall issue:

1. The applicants be joined in the ex parte application of Tropical Winter Trading (Pty) Ltd (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) Ltd (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: T 23804/2020, in extent 191, 6466 (one hundred and ninety – one comma six four six six) 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. 3339, Registration Division HS, Province of KwaZulu – Natal, held under title deed number: T23804/2020, in extent 192, 6811 (one hundred and ninety – two comma six eight one 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 and 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 1 (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 authorised 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 five (5) days of demand; and
 - 5.3 that the Sheriff be authorised to take all steps contemplated in prayer 5.2, in and on the first respondent's stead and behalf, should the first respondent fail 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 32 Mouton 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.

ZP Nkosi J

DATE OF HEARING : 28 OCTOBER 2022

DATE JUDGMENT HANDED DOWN : 22 MAY 2023

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