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DISPUTE RESOLUTION **ALERT**

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On 19 February 2019, the Constitutional Court (CC) handed down its judgment in the consolidated matters of Trustees of the Simcha Trust v Da Cruz and Others and City of Cape Town v Da Cruz and Others (Simcha Trust) in which it had to decide whether there was an obligation on local authorities considering a building application, to apply the legitimate expectations test when considering whether the surrounding area where the building is to be erected would likely be disfigured or whether such a building would be unsightly or objectionable.

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Those who allege may not need to prove: The "appropriate relief" exception

The courts have had to engage with the concept of "appropriate relief", specifically whether such relief constitutes an appropriate remedy in the face of a violation of a constitutional right.

It is a general principle in our law that those who allege before a court that they are entitled to succeed in their claim bear the onus to prove their entitlement. In a recent case, the Supreme Court of Appeal, in awarding the Appellants "appropriate relief", paid short shrift to this general principle, thereby creating a precedent that may have unintended consequences.

Section 38 of the Constitution empowers a court to award *"appropriate relief"* where a right in the Bill of Rights has been violated. Accordingly, the courts have had to engage with the concept of *"appropriate relief"*, specifically whether such relief constitutes an appropriate remedy in the face of a violation of a constitutional right.

In *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* [2019] ZASCA 57 *(Ngomane)*, handed down on 3 April 2019, the Supreme Court of Appeal (SCA) awarded 27 homeless people (the Appellants) damages as *"appropriate relief"* for the violation of *inter alia* their constitutional right to dignity, without requiring the Appellants to prove the elements of a damages claim nor reasoning that the requirements thereof had been met. *Ngomane* is of relevance to organs of state who, by acting unconstitutionally, may potentially expose themselves to damages claims – the award, and quantum, of which may be determined with reference to only a court's sense of justice.

In considering what constitutes *"appropriate relief"*, the Constitutional Court in *Fose v Minister of Safety and Security (Fose)* made it clear that courts are left to determine *"appropriate relief"* in the context of the particular case in question, and that such determination is confined to the facts thereof. The Constitutional Court further explained that *"appropriate relief"* will, in essence, be relief that is required to effectively protect, enforce and vindicate constitutional rights which have been contravened. Such relief has, thus far, been held to include: a declaration of rights, an interdict, a *mandamus* and constitutional damages. In addition, the Constitutional Court has noted that courts are further empowered, if necessary, to *"forge new tools"* and *"shape innovative remedies"* to achieve the goal of protecting, enforcing and vindicating constitutional rights.

In *Ngomane* the Appellants sought the return of their personal belongings and shelter materials, alternatively to be provided with similar shelter material and possessions, confiscated (and subsequently destroyed) by officials of the Johannesburg Metropolitan Police Department (JMPD) – acting under the instructions of the City of Johannesburg Metropolitan Municipality (the City) – from a road traffic island on which the Appellants lived pursuant to *"a clean-up"* operation conducted in terms of the City's Public Health By-Laws.

Those who allege may not need to prove: The "appropriate relief" exception...*continued*

The SCA noted that it was of no consequence that the Appellants sought to vindicate their constitutional rights for the first time.

In the High Court the Appellants contended that: the conduct of the JMPD constituted an eviction from their homes; they were entitled to invoke the *mandament van spolie* to vindicate their lost property; and several of their constitutional rights had been breached. The High Court, however, found against the Appellant's, despite holding that the JMPD's conduct in discarding the Appellants' property *"was a cynical and mean-spirited act deserving of censure."*

On appeal the SCA, through Maya P for a unanimous bench, agreed with the High Court's findings in respect of the order the Appellants had sought before the court *a quo*. However, when considering the conduct of the JMPD the SCA found that it not only constituted a violation of the Appellants' property rights but was also *"disrespectful and demeaning"* to the extent that it *"obviously caused [the Appellants] distress and was [therefore] a breach of their right to have their inherent dignity respected and protected"*. The SCA further found that the City's conduct, through the JMPD, infringed the Appellants' constitutional rights to privacy. Accordingly, the SCA held that the City's conduct must be declared inconsistent with the Constitution and was therefore unlawful. The SCA further reasoned that its finding entitled the Appellants to *"appropriate relief"* for the violation of their rights as envisaged in s38 of the Constitution.

The SCA further noted that it was of no consequence that the Appellants sought to vindicate their constitutional rights for the first time before it as, although the Appellants sought only the return of their property, *"a claimant in respect of a constitutional breach that has been established is not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued"*.

In determining what would constitute *"appropriate relief"* in the circumstances, the SCA - relying loosely on the principles espoused in *Fose* - made it clear that the payment of R1,500 by the City to each Appellant as compensation for the wrong they had suffered, particularly in light of the Appellants' indication of their willingness to accept such payment, in addition to a declaration that the destruction and confiscation of the Appellants' property was unconstitutional and unlawful, constituted *"appropriate relief"* in the circumstances. This position was further supported by the SCA's reasoning that an action for damages was not an appropriate remedy as instituting a damages claim would involve the Appellants in costly and time-consuming civil litigation in respect of property which was of objectively trifling commercial value.

Those who allege may not need to prove: The "appropriate relief" exception...*continued*

Organs of state - pursuant to a contravention of a constitutional right - may be ordered to pay damages where such claim was not pleaded and the elements thereof have not been proved.

In terms of *Fose*, courts have significant latitude and discretion to forge appropriate remedies for breaches of constitutional rights. However, what is notable about the decision in *Ngomane* is that the SCA did not set out any guiding principles which it relied on to arrive at the amount of R1,500, nor did it clearly set out why the Appellants were entitled to the amount, save for the fact that it would not be commercially viable for the Appellants to bring civil damages claims. The determination of the quantum of the *"appropriate relief"* was based purely on the Appellants' assertion that this amount would vindicate their rights, without the Appellants having to justify the quantum thereof.

Whilst, on the facts, the financial obligation imposed on the City was minimal and the compensation to be paid appears to be eminently reasonable for the breaches in question, organs of state should be alert to the potential unintended consequences of this judgment, namely that an award of damages in such a manner may operate more like a penalty wherein the organ of state may be subjected to a significant court-ordered financial obligation without having had an opportunity to contest the appropriateness of the remedy nor the determination of the quantum thereof. This potential punitive effect may further be compounded in situations where there are many more claimants than in *Ngomane*, in which case the quantum of the *"appropriate relief"* could far exceed the cost order an organ of state would ordinarily have been subject to in similar circumstances.

Organs of state must thus be alive to the possibility that, in terms of *Ngomane*, they, pursuant to a contravention of a constitutional right, may be ordered to pay damages in proceedings where a claim for damages was not pleaded and the elements thereof have not been proved.

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Neighbouring building plans ruining your scenery? Constitutional Court rules that legitimate expectations of property owners should be considered

Section 7 (1)(b)(ii)(aa) of the National Building Regulations and Building Standards Act sets out certain disqualifying factors whereby local authorities must refuse a building application.

On 19 February 2019, the Constitutional Court (CC) handed down its judgment in the consolidated matters of *Trustees of the Simcha Trust v Da Cruz and Others and City of Cape Town v Da Cruz and Others* (Simcha Trust) in which it had to decide whether there was an obligation on local authorities considering a building application, to apply the legitimate expectations test when considering whether the surrounding area where the building is to be erected would likely be disfigured or whether such a building would be unsightly or objectionable.

Section 7 (1)(b)(ii)(aa) of the National Building Regulations and Building Standards Act (Act) sets out certain disqualifying factors whereby local authorities must refuse a building application, namely where the proposed building would:

(aaa) disfigure the area in which it will be erected;

(bbb) be unsightly or objectionable; or

(ccc) derogate from the value of the adjoining or neighbouring properties.

In 2010, the CC in *Camps Bay Ratepayers and Residents Association v Harrison* described the legitimate expectations test as a positive obligation on a local authority to satisfy itself that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed application would be denied because it was so unattractive or intrusive.

In that case, the legitimate expectations test was only considered in relation to whether the building application would derogate from the value of neighbouring properties as envisaged in section 7(1)(b)(ii)(aa)(ccc) above and did not consider whether the legitimate expectations test would be applicable when evaluating the other disqualifying factors such as whether the proposed building would disfigure an area or where it would be unsightly or objectionable.

The CC in Simcha Trust considered this question in light of a building application that had been approved by the City of Cape Town (Municipality) which allowed for the construction of four additional stories on a building owned by Simcha Trust, the effect of which would be that the newly erected stories would be built so as to touch the balconies on three stories of a neighbouring property.

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Neighbouring building plans ruining your scenery? Constitutional Court rules that legitimate expectations of property owners should be considered...*continued*

The legitimate expectations test would accordingly require the decision maker to consider the impact of the proposed development on neighbouring properties from the perspective of a hypothetical neighbour.

Following litigation, the Simcha Trust had re-submitted the new plans to the Municipality which invited comment from interested parties. The Municipality received a number of submissions from neighbouring property owners opposing the application and thereafter granted the application. Litigation again ensued resulting in the High Court setting aside the development approval and which ultimately led to the CC being asked on appeal to consider a narrow point of law, namely the proper interpretation of s7 (1)(b)(ii)(aa) of the Act and whether the legitimate expectations test applies to all of the disqualifying factors in the section and not just the derogation of the value of adjoining or neighbouring properties in s7(1)(b)(ii)(aa)(ccc).

The CC held that the legitimate expectations test is an objective test, based on the relevant facts available to the local authority and when applied to each of the disqualifying factors in s7(1)(b)(ii)(aa) is an accurate translation of the duties of local authorities under the Act and the Constitution of the Republic of South Africa, 1996. The legitimate expectations test would accordingly require the decision maker to consider the impact of the proposed development on neighbouring properties from the perspective of a hypothetical neighbour.

In addition to this, the CC reaffirmed that the local authority when considering a building application, must be positively satisfied that there are no disqualifying factors present, and that such factors should be considered separately from the compliance with the other requirements of the Act.

The CC also emphasised that the application of the legitimate expectations test to all of the disqualifying factors does not place any additional obligations on local authorities to consult with the public above and beyond the existing requirements of law and stated that the decision maker should consider whether the proposed building will probably, or in fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property.

This judgment is significant in that local authorities are now to apply the legitimate expectations test to all the disqualifying factors in order to make decisions which are geared towards preserving the value of surrounding properties and the appearance of the area as a whole, ultimately ensuring that the interests of property owners in the surrounding area are adequately protected.

Joe Whittle, Reece May and Arlina Ramothar

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