FLYNOTES: FRAUDULENT CLEARANCE CERTIFICATE

Property – Municipal account – Agreement for sale of immovable – Fraudulent clearance certificate – Amounts still owing to municipality – Dispute between seller and municipality – Purchaser the innocent party – Municipality ordered to open account for purchaser.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 8334/2021
REPORTABLE:
OF INTEREST TO OTHER JUDGES:
REVISED.
4 July 2022

In the matter between:

DEMETRIOS BALADAKIS N.O.	First Applicant
THERESA BALADAKIS N.O.	Second Applicant
ANDREW NICHOLAS LAMBRIANOS N.O.	Third Applicant
JOHN-DEMETRIOS BALADAKIS N.O.	Fourth Applicant

And

KEVYN GLYNN JENZEN First Respondent

EKURHULENI METROPOLITAN MUNICIPALITY Second Respondent

JUDGMENT

MAKUME, J:

[1] The four Applicants are the duly authorised Trustees of trust the IVB Trust No IT002236/2019(G) (The Trust).

[2] During or about the year 2019 the Trust concluded in a Deed of Sale with the first Respondent in terms of which the Trust acquired certain immovable property situated at [....] C [....] S [....] 1 S [....] 2 described as the remaining extent of Erf [....] Township, St Andrews (the Property) for an amount of R3.6milion (the Purchase price).

[3] The property was acquired voetstoots which required the Applicants to spend considerable amounts of money to make it habitable. The property is situated within the Local Municipality of Ekurhuleni.

[4] It was a term of the Agreement of Sale that the first Respondent would make payment of additional costs being bond cancellation fees, clearance certificate and outstanding rates and taxes as well as water and electricity due to the Local Authority.

[5] It was a further term of the agreement that on taking occupation of the property the first Respondent would see to it that the Applicant is provided with a valid electrical certificate of compliance.

[6] On the 7th December 2019 the Applicants paid the full purchase price of R3 650 000.00 for the property. Shortly thereafter Applicant took occupation and

commenced with extensive repairs to the property. Applicants also engaged a security firm to watch over the property and prevent it from being vandalised.

[7] During or about January 2020 the Applicant received notices of electricity disconnection issued by the second Respondent in respect of the property t unless payment is made to it in the sum of R52 889.85. Applicant duly informed the Estate Agent one Melanie Davids who informed the Applicant that the first Respondent was aware of the arrears but was disputing same

[8] On the 12th March 2020 the Applicant paid to Ms Davids the Agent/Conveyancer transfer costs and transfer duties in the amount of R234 859.50.

[9] A new set of Attorneys namely DJ Nkosi Attorneys of Kempton Park came into the picture and on the 29th July 2020 the property was transferred into the name of the Trust as the purchaser. Shortly thereafter the first Applicant who at all times represented the Trust attended at the offices of the second Respondent with the intention to change the services account being for rates, taxes, levies as well as electricity from that of the Seller to the Trust. The request was refused. First Applicant was informed that there was still an amount owing to Ekurhuleni Municipality.

[10] When first Applicant produced the clearance certificate that was presented by DJ Nkosi Attorneys for purposes of transfer he was told that the clearance certificate was a fraud and not valid.

[11] On the 8th October 2020 Applicant's attorneys addressed a letter to DJ Nkosi Attorneys, Melanie David Inc. in which they informed them that Mr Jenzen the seller had breached the Agreement of sale in that he did not pay the amount of R678 992.00 owing to the Municipality. They informed them further that the City of Ekurhuleni informed them that the clearance certificate was fraudulently obtained.

[12] DJ Nkosi attorneys responded and distanced themselves from the acquisition of the fraudulent clearance certificate. They maintained that all documents were delivered to them by the first Respondent and all that they did was to act as

middlemen. On the 9th October 2020 a day after the previous letter DJ Nkosi addressed another letter to Applicant attorneys and this time they said that they received a call on the 4th June 2020 from Mashoeshoe Attorneys of Kempton Park who referred the first Respondent to them

[13] On the 13th October 2020 Melanie Davids respondent to the fraud allegations denying any involvement. The second Respondent filed an Opposing Affidavit in which they allege that since the clearance certificate was fraudulently obtained transfer of the property is a nullity. As a result, the second Respondent cannot be forced to open a new account in the name of the Applicant until the amount of R1million outstanding is paid.

[14] Mr Davey Frank the deponent to the second Respondent's Opposing Affidavit informed the Court that the lady by the name of Fully Tsebe whose name appears on the clearance certificate had left the employment of the City Council 2 years prior to the date of the issuing of the clearance certificate.

[15] The first Respondent filed his Answering Affidavit and laid out his basis of opposition as follows:

i) That he disputes that he owes any arrears on the property to enable the second Respondent to issue a clearance certificate.

ii) He raised the issue of incorrect billing by the Municipality in respect of the property.

iii) He disputes that the clearance certificate was fraudulently issued. He continued to pile an attack on the statements of account issued and says that the billing was incorrect. He says that the bill from the year 2019 is an absolute confusion.

[16] In his Opposing Affidavit Mr Davey Frank for the second Respondent says that the only interest that the second Respondent has in this matter is to see to it that the first Respondent settles arrears in respect of the property and that once that shall

have been done a valid rate clearance certificate shall be issued and a service account in the name of the purchaser viz the Applicant Trust shall be opened.

[17] The first Respondent says that he did not commit any fraud in respect of the property. The second Respondent has filed a counter claim in which it seeks an order nullifying and setting aside clearance certificate number 86814

POINT IN LIMINE AGAINST THE FIRST RESPONDENT

[18] The Applicant has raised two points in *limine* against the first Respondent the first being that the first Respondent's Answering Affidavit was filed six days out of time without any application for condonation. Applicant requests this Court not to exercise its discretion to condone non-compliance.

[19] It is trite law that it is the trial Court which has a discretion whether to admit a late affidavit or not, and in exercising that discretion the overriding factor that ought to be considered is the question of prejudice.

[20] In this matter the first Respondent's Affidavit was filed six days later to which the Applicant fully replied. The Applicant has not shown why they would be prejudiced if the matter is heard with me taking the first Respondent's Answering Affidavit into consideration. All the papers were placed before me and the matter was ready to be heard. As Wepener J said in **Pangbourne Properties v Pulse Moving 2013 (3) SA 140 page 148F**

> "To uphold the argument that the Replying Affidavit and consequently the answering affidavit fall to be disregarded because they were filed out of time will be too formalistic and an exercise in futility and will leave the parties to commence the same proceedings on the same facts *de novo*."

[21] In the result the late filing of the first Respondent's Answering Affidavit is hereby condoned and the point in *limine* is dismissed.

SECOND POINT IN LIMINE

[22] The second point in *limine* attacks the validity of the affidavit dealt with above on the basis that it was not properly oathed before a commissioner of oaths in accordance with the Justice of Peace and Commissioner of Oath Act 16 of 1963 read with the regulations.

[23] I have already admitted this affidavit when I dealt with issues of condonation above. It will serve no purpose for this Court to now find that there is no affidavit.

[24] Erasmus in Superior Court Practice second edition at page D1 – 53 quoting from the decision of **Goodwoood Municipality v Rabie 1954 (2) SA 404 (C)** and says the following:

> "An affidavit is a statement in writing sworn to before someone who has authority to administer the oath, it is a solemn assurance of facts known to the person who states it and sworn to as his statement before someone in authority such a Magistrate, Justice of the peace, Commission of the Court or Commission of Oath."

[25] It would appear that the aspect that the Applicant takes an issue with is the fact that the person who administered the oath did not print his full name business and address as is required by Regulation 4(2).

[26] I do not see how that defect can result in the statement made by the first Respondent to be invalid. After all there are people who testify verbally in Court and decline to take an oath because of their religious beliefs that does not water down their evidence.

[27] The Court in Goodwood Municipality expressed itself in the following words at page 406 – G:

> "Die is die vereistes van die wet wat nagekom moet word. As ons nadaardie dokument kyk, dan is daar 'n dokument; dit lui "beedigde

> verklaring”dit is ‘n verklaring; dit is onderteken deur die twee verklaarders en hulle word beskrywe as die deponente, dit is mense volgens ons praktyk wat skriftelik getuinis gee. So word hulle ook beskrywe deur die kommisaris van Ede. Die deponente verklaar dat hulle die inhoud van hierdie verklaring ten volle begryp en verstaan Dus aan die vereistes van die seksie wat ek nou gelees het stiptelik voldoen. Dan eindig dit, wat betref die “manner of attestation” Beedig voor my op die 10e dag van November 1953” Myns insiens is dit heeltemaal duidelik dat daar geen beswaar geneem kan word teen di aansoek op grond, dat dit nie vergesel is deur ‘n behoolike beedigde verklaring.”

[28] In the result the objection to the first Respondent’s affidavit is also dismissed.

POINTS IN LIMINE IN RESPECT OF THE SECOND RESPONDENT

[29] The first such issue of objection is similar to the one dealt with above about the administration of the oath not being in compliance with the Act and the regulations. My conclusion is similar to the reasons advanced above and I dismiss the objection.

[30] This is similarly followed by an objection to the fact that Mr Davey Frank in the affidavit has not indicated how he knows of the facts he is deposing to. It is argued by the Applicant that Mr Davey Frank deposed to hearsay evidence. This objection is technical and not worth dealing with. The affidavit is before me.

[31] In the counter application to the main application Mr Davey Frank says the following at paragraph 1

> “I am an adult male employed by the Applicant as a Division Head: Specialised Legal Drafting and SCM Support. I am duly authorised to depose to this affidavit on behalf of the Applicant and also as a deponent to the main application on behalf of the Applicant who is the second Respondent herein. Attached as proof thereof is a resolution marked “CA1”.”

[32] I am satisfied that the second objection is also without merit and it is accordingly dismissed.

THE APPLICATIONS BEFORE THIS COURT

[33] The first application before this court is the main application in which the Applicant seeks certain relief against the Municipality to enable them to have full use and access to the property they purchased from the first Respondent.

[34] The Applicant maintains that they have complied fully with the terms of the agreement of sale between them and the first Respondent and that the transfer of the property to them has taken place legally. Applicants assert that they played no part in the acquisition of any fraudulent document for purposes of transfer.

[35] The second Application is the counterclaim by the Municipality the second Respondent who seek an order setting aside clearance certificate number 86814 obtained by the Seller Mr Jenzen (first Respondent) in the main application) which clearance certificate Jenzen handed to his transferring attorneys DJ Nkosi for purposes of transferring the property from Jenzen to the Applicant. In addition, the Municipality seeks an order to the effect that the first Respondent owes it money in respect of the property.

THE CLEARANCE CERTIFICATE 86814

[36] The central issue in this matter is not so much the sale agreement it is the clearance certificate purportedly issued by the second Respondent and used by the conveyancer DJ Nkosi to transfer the property. This is a certificate issued in terms of Section 118 of the Local Government Municipal System Act 32 of 2020.

[37] That clearance certificate which is dated 15 June 2020 records as follows:

> "This is to certify that all the amounts due in terms of Section 118 (1) of the Local Government Municipal System Act 32 of 2000 payable to

Ekurhuleni Metropolitan Municipality in respect of the land or the right in land described hereunder have been paid in full."

[38] The second Respondent maintains that the clearance certificate is not authentic and was issued fraudulently firstly because it purports to have been signed by an employee who had long left the employment of the City prior to the date of issue of the certificate. Secondly it is also said that the first Respondent did not pay the amount due to enable the City to issue a clearance certificate.

[39] It is common cause that the seller namely the first Respondent does not dispute that he did not pay the amount of money that the second Respondent says it is owing to it. The first Respondent says that he played no part in the issuing of the certificate. In paragraph 20 of his Answering Affidavit Mr Jenzen the first Respondent says the following:

"I have never personally attended at the second Respondent's offices in my life but I did however make calls to various people at the Municipality trying to explain that there were huge credits due on the account and they should please attend to the adjustments, and stemming from that alone the certificate was issued."

[40] That statement in my view is loaded and its reliability will have to be tested in another Court. This Court is not in a position to declare that the clearance certificate was in fact fraudulent for reasons that will appear hereunder. Neither is this Court saying that the certificate was valid.

[41] The attorneys both Melanie Davids and DJ Nkosi will have to be called to explain what part they played in the acquisition of that clearance certificate. It is to be noted regrettably that both now blame each other. This dispute amongst the two sets of attorneys and their client the seller should and can never be used as a valid reason to question the transfer of the property.

[42] The Deed Registry Act 47 of 1937 assigns onerous responsibilities to conveyancers. It is imperative that conveyancers are meticulous and methodical in

the collecting and studying of information and supporting documentation. The duty to obtain accurate facts and to process correctly a conveyancing transaction is assigned to the conveyancer by the Deeds Registry Act and Regulations especially Section 15, 15A and Regulation 43, 44 and 44A.

[43] The fraudulent act was discovered by the second Respondent's officials early in the year 2020 when the first Applicant approached it to process its rates and taxes service certificate and yet up to now the second Respondent has done nothing to investigate that fraud and to appraise this Court of its findings.

[44] The clearance certificate is issued on the letter head of the Municipality Ekurhuleni and also stamped. This has not been disputed. The signature is that of a person who according to them is no longer in their employment and yet no criminal charges of fraud have been laid against that person to enable the police to investigate.

[45] Lastly the Municipality has not taken any legal action in terms of their credit regulation to recover the money that it says the seller Mr Jenzen owes to it. In trying to mitigate their failure to act the second Respondent has seen it fit to hold the Applicant to ransom. It must be recalled that Mr Frank in the Answering Affidavit on behalf of the second Respondent says the following at paragraph 2:

> "Let me point out from the outset that the second Respondent has no interest whatsoever in the dispute between the Applicant and the first Respondent. The only interest that the second Respondent has in this matter is that the first Respondent fully settle its arrears. Once the arrears are fully settled, the second Respondent will follow the legal procedure for issuing an account for the property in the name of the Applicants."

[46] Firstly the second Respondent is incorrect in saying that there is a dispute between Applicant and first Respondent. There is no such dispute. The only dispute that is there is between the first and second Respondents and it concerns payment of arrears rates and taxes.

[47] Secondly the property has been transferred to the Applicant. The second Respondent has not cited the Deeds Registry office in its counter application directing them to cancel the title deed. The validity of the transfer cannot at this stage be placed at the door of the Applicants who did everything in their power to comply with the deed of sale.

[48] When the first Respondent obtained the clearance certificate from the second Respondent he warranted to the Applicant in terms of clause 5.2 of the Sale Agreement that he had effected payment of the full debt due by him to the second Respondent. The first Respondent by obtaining the clearance certificate and then producing it to the conveyancer represented that all the amounts due to the second Respondent had been paid in full.

[49] What the second Respondent wants to achieve in the counter claim is contrary to the decision laid down by the Constitutional Court in the matter of **Jordaan and Others v Tshwane Metropolitan Municipality and Others 2017 (6) SA 287 CC**. The second Respondent is trying to recover a historical debt due and owing to it by the seller in a rather dubious manner by denying the Applicant who is the purchaser and a new owner its right to enjoy the benefit of its property.

[50] The Central issue in Jordaan (supra) was whether Section 118 (3) permits a Municipality to reclaim from a new owner of property debts a predecessor in title incurred. The second Respondent was a party in that matter. In that matter the Applicants had recently taken transfer of properties within the jurisdiction of the Municipalities involved. The Applicants complained that the Municipalities which included Ekurhuleni had suspended Municipal service or refused to conclude consumer services agreement for Municipal services until the historical debts relating to the property had been cleared.

[51] The Constitutional Court concluded that this was akin to deprivation of property as entrenched in Section 25 of the Constitution of South Africa at paragraph 58 of that Judgment the following was said:

> "[58] Apart from the consideration the municipalities advanced as favouring survival of the change, we also weigh these severe consequences of imposing historical debts on a new owner. The Bill of Rights prohibits arbitrary deprivation of property. It was rightly not disputed that the new owner has a property interest that would be affected, if the charge were transmissible. Equally the interest of bond holders who advanced loans to transferees would be affected if the debts accumulated during the previous owners title were to operate as a charge against the new owner."

[52] The second Respondent failed to take any steps to deal with the alleged fraud neither did it take steps to recover the money from the first Respondent. There is in my view no justification for the second Respondent to refuse to open a municipal service account in the name of the Trust. Reliance on the impugned clearance certificate by the second Respondent to justify the failure to open the account is misplaced and an after-thought.

[53] The Applicants are the innocent party in this matter. It is the first and second Respondents who must resolve their dispute and not drag the Applicants into that mess. The Applicant and the first Respondent had an intention to transfer which was achieved.

[54] In the matter of **Du Plessis v Prophitius and Another 2010 (1) SA 49 SCA** it was held that ownership, the real right can nonetheless pass even in instances of fraud and the property cannot be vindicated in the hands of an innocent third party. The Trust is being prejudiced by the conduct of the first and second Respondents.

[55] The first Respondent in particular has breached clause 5.2 of the Sale Agreement and the Trust has a right to claim specific performance by calling on the first Respondent to settle its dispute with the second Respondent.

[56] Having regard to what has been stated above regarding the clearance certificate especially taking into consideration the Constitutional Court decision in Jordaan the Applicants cannot be held liable for debts of the first Respondent. It

accordingly means that no basis remains to refuse to open a Municipal service account in the name of the Trust.

[57] In the result I have come to the conclusion that the main application by the Applicant be granted as per the orders hereunder and that the second Respondent's counter application be dismissed.

COSTS

[58] What now remain is to determine the application for a punitive costs order against the first Respondent's previous attorneys.

[59] It is common cause that this application was wrongly set down for hearing at the Pretoria High Court by the first Respondent's Attorneys for sometime in February 2022. It was removed and the costs were reserved. Then on the 6th May 2022 at the commencement of the hearing Advocate Alli interjected proceedings whilst counsel for the Applicant was making his introductory submissions and told the Court that his brief had been recalled and asked to be excused.

[60] As a result of that happening I stood the matter down to the 12th May 2022 to enable Mr Jenzen the first Applicant to resolve issues about representation. Saleem Ebrahim Attorneys filed a notice of withdrawal as his attorneys of record only on the 9th May 2022.

[61] The Applicant now ask that this Court should order attorneys to pay wasted costs of the two postponements *de bonis propris.* The attorneys are opposing that application and have filed an affidavit.

[62] Having read the affidavit by Attorney Nomonde Msimanga I am satisfied that the enrolment of this matter at the Pretoria High Court was a bona fide error and cannot be attributed to any form of negligence on the part of the attorney. The costs of that day will follow the result on a party and party scale.

[63] It is the wasted costs of the 6th May 2022 which are of great concern. Miss Msimanga says she informed first Respondent by email on 13th April 2022 to make payment of fees. The email read as follows:

> "Dear Kevin,
>
> Kindly find the attached letter from the opposing attorneys. Please take note that in order for us to brief Counsel to appear for the pre-trial as well as the hearing on 2 May 2022 we will need you to settle the outstanding invoice as sent to you and further pay a deposit"

[64] There is no indication what their client said or how he responded to the email. All seemed in order until the 6th May 2022 when suddenly Counsel withdrew. It took the first Respondent by surprise also.

[65] In my view the attorney did not give their client a date by when to pay the outstanding fees neither did they tell him that failure to make payment they will withdraw. They did the opposite and proceeded to brief Counsel who appeared on the 6th May 2022 only to withdraw a few minute after commencement. I find that unacceptable as it not only disrupted the Court roll but caused Applicants costs. In my view the attorneys should bear the wasted costs occasioned by the postponement of the 6th May 2022 *de bonis propris*.

[66] In the result I make the following order:

<u>MAIN APPLICATION</u>

1. The application is granted on the following terms:

> a) The second Respondent is ordered to amend its records to reflect the Trust as the owner of the property situated at [....] C [....] S [....] 1, S [....] 2 described as the remaining extent of Erf [....] Township, St Andrews.

b) The second Respondent is ordered to open a Municipal Account in the name of the Trust on receipt of this order.

c) The second Respondent shall provide and supply the property with electricity within 3 days after payment of amount due in respect of the property for the period 30th July 2020 to date of this order which amounts shall be paid by the Applicants.

d) The first and second Respondents are ordered to pay the costs of this application jointly and severally on a party and party scale including the costs of Counsel.

e) The Attorney's firm Saleem Ebrahim are ordered to pay the wasted costs occasioned by the postponement of the matter on the 6th May 2022 *de bonis propris*.

SECOND RESPONDENTS COUNTER APPLICATION

2. This application is dismissed with cost which shall include costs of Counsel.

Dated at Johannesburg on this 4th day of July 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	06th and 12th MAY 2022
DATE OF JUDGMENT	:	JULY 2022
FOR APPLICANTS	:	ADV
INSTRUCTED BY	:	Messrs Leoni Attorneys

FOR RESPONDENTS	:	ADV
INSTRUCTED BY	:	Messrs Mabuza Attorneys