Case number: A542/12

Date: 19 March 2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

19/03/2014 .....

DATE SIGNATURE

In the matter between:

ANVER LESLIE ABDULL	**FIRST APPELLANT**
KATY SUSAN ABDULL	**SECOND APPELLANT**
and	
DEON SHERLIN JACOBS	**FIRST RESPONDENT**
CHARMAINE FLORENCE JACOBS	**SECOND RESPONDENT**
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOUSING, GAUTENG PROVINCE	**THIRD RESPONDENT**
THE MEC FOR THE DEPARTMENT OF HOUSING, GAUTENG PROVINCE	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS (PRETORIA)	**FIFTH RESPONDENT**

JUDGMENT

MOSEAMO AJ

[1] This is an appeal against the decision of this court delivered by Justice Fine dismissing appellants' application with costs including reserved costs.

[2] Appellants applied for an order (a) cancelling Title Deed no. T 049127/2006 which deed holds property known as Erf 486 Geluksdal Township (the property) in the names of the first and second respondents. (b) Declaring that the Director General of the Department of Housing, Gauteng Province, hold a hearing for purposes of determining who the rightful claimant in respect of the property is.

[3] Appellants joined the Director General and MEC for the Department of Housing as third and fourth respondents respectively. Registrar of deeds was also joined as the fifth respondent. The third, fourth and fifth respondents did not participate in these proceedings and therefore any reference to the respondents refers to first and second respondents.

[4] The claim arose from transfer of property by the Ekurhuleni Municipality (the municipality) to the first and second respondents.

[5] The version of the appellants is that the second appellant's mother was the lessee of Erf 486 Geluksdal Township (the property). She passed the lease to the first and second appellants in 1990 when she could not afford to pay rental. Appellants took over the lease. Appellants moved out of the property in 1995 and bought their own property but later returned to the property when they could not keep up with the loan repayments. They later entered into a sale agreement with the Brakpan Town Council as the seller of the property

and the appellants as purchasers. According to appellants the property was supposed to have been transferred to them.

[6] The version of the respondents is that they lodged a claim with the municipality to be awarded ownership of the property and the municipality awarded the property to them.

[7] Appellants contend in their heads of argument that the municipality erroneously registered the property in the names of first and second respondents. The basis of this contention is that appellants were the lessees of the property and they subsequently concluded a sale agreement with the municipality. Their argument is that the property ought to have been transferred to them as a result of the concluded sale agreement.

[8] Appellants submit that it is likely that the process that was undertaken by the appellants to have property transferred to them was in fact used to effect transfer to the respondents.

[9] It appears that a central question in this matter is the validity or otherwise of the transfer of ownership by the municipality.

[10] It is trite that the supporting affidavit must set out the cause of action and failure to do will entitle the respondents to ask the court to dismiss the application on the ground that it discloses no basis on which the relief can be granted.

[11] In **BAYAT AND OTHERS V HANSA AND ANOTHER 1955 (3) SA 547 (N)** it was held that an applicant for relief must make his case and produce all evidence he desires to use in support of it in his affidavits filed with the Notice of Motion.

[12] In his founding affidavit the first appellant states that: he became aware that the property had been transferred to the names of the first and second respondents' names. He does not know how the property was registered in

the names of the first and second respondents when he had signed a lease agreement and subsequently signed a sale agreement with the same council. In 2007 he became aware that the first respondent had lodged a claim with the municipality to be awarded ownership of the property. He had also lodged a claim with the municipality. Upon enquiry from the municipality he was advised that he would be called to a hearing.

[13] In **LEGATOR MECKENNA V SHEA 2010 (1) SA 35 at 44 H-I** the court stated that:

"in accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in case of immovable property is effected by registration of transfer in the deeds office coupled with the so called real agreement..."

It was further stated that the essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. The abstract theory does not require a valid underlying contract, for example sale.

[14] In the present case the registration of the property in to the names of the respondents has taken place; the second enquiry in terms of the McKenna case is whether there was an intention on the part of the transferor to transfer ownership and the intention on the part of the transferees to become the owners of the property.

[15] There is nothing in the founding affidavit to suggest that the municipality did not have the intention to transfer the property, in fact the first appellant in his founding affidavit states that he does not know how the property was registered in the names of the Respondent when they had signed an agreement with the council.

[16] In my view ownership has passed to the respondents. The appellants have not shown any mistake or lack of intention on the side of the municipality to transfer ownership that can vitiate the transfer.

[17] Appellants contend that failure by the respondents to provide information regarding the type of documents submitted by them to the municipality confirms their submission that the municipality committed a clerical error. In this regard appellant referred the court to the case of KHUZWAYO V EXECUTOR, ESTATE OF THE LATE MASILELA 2011 (2) ALL SA 599 (SCA)

[18] It is trite that the applicant must make out a prima facie case in his founding affidavit. In my view the appellants have failed to make out a case for the respondent to answer.

[19] The case of khuzwayo referred to by the appellants is different from the present case in that:
Khuzwayo, the appellant in that case, had applied for a site and later handed back the site after failing to pay the money required by the municipality. Masilela was then handed the site and he paid the required sums and built a house on the site. His family had been staying on the property for 18 years before it was transferred to Khuzwayo. Khuzwayo had no claim to the site as she was not a permit holder or an occupier. The court held that the transfer was a clerical error, and made an order for the cancellation of the deed of transfer.

[20] In the present case the respondents and the appellants lodged a claim for ownership of the property. The municipality had two competing claims that they had to decide on.

[21] According to appellants' heads of argument, appellants lodged their claim for ownership during 2005 and their subsidy was approved on 27 September 2005. According to the Deed of Transfer the agreement to transfer ownership of the property to respondents was concluded on the 9th September 2005, which was prior to the approval of the appellants' subsidy scheme. Therefore the submission that the transfer was as a result of a clerical error stands to be rejected.

[23] In my view the court a quo correctly found that there has been a proper transfer of ownership in that the appellants, in their papers have not shown that the necessary intention on the part of the municipality or the respondents was lacking.

[24] Appellants submit that respondents a quo had not raised issue of non joinder as part of their opposition to their application.

[25] In **NGCWASE AND OTHERS V TERBLANCHE NO. AND OTHERS 1977 (3) SA 796 AD** it was held that the court can mero metu raise an issue of non-joinder to safeguard the interest of third parties.

[26] I agree with the appellant that the court has often adjourned proceedings for a party with substantial interest in the matter to be joined. I also agree that in the case of Khuzwayo mentioned above the court ordered cancellation of the registration of ownership without requiring the municipality to be joined.

[27] In my view failure to join an interested party is not always fatal, it will depend on the circumstances of each case. In the present case the municipality has a direct and substantial interest in the possible order cancelling the transfer. However considering the fact that the appellants' founding affidavit does not disclose a cause of action, joining the municipality would not have cured the defect.

[28] Appellants submit in their heads of argument that the dispute between first and second respondents and the appellants should be dealt with in terms of Section 24B of Conversion of Certain Rights into Leasehold and Ownership Act 81 0f 1998 (the Act).

[29] Section 24B of the Act provides for the establishment of an adjudication panel and an appeal panel. It also provides for the appointment of adjudicators to adjudicate on disputed cases in order to determine the lawful beneficiary to whom residence or property must be transferred.

[30] Section 24B of the Act does not provide a basis on which the court can cancel transfer of ownership of a property, rather it provides for a process that must take place before the transfer takes place. In the absence of the grounds for cancellation of the transfer of ownership then Section 24B of the Act does not assist the appellants in their case.

[33] Appellant submits that municipality did not consider all the factors in transferring the property to the respondents. Appellants put forth the following question: "what were the facts considered to rank the respondents above other claimants like the appellants."

[34] The only way the court could determine whether the municipality has taken all factors in to consideration is if the municipality was joined as a party to the proceedings alternatively if the appellants were in possession of the reasons from the municipality for their decision to transfer.

[35] In my view, looking at all the facts, especially the fact that there were two competing claims; it appears that the approval of appellants' subsidy came after the municipality approved the respondents' claim; municipality decided to transfer ownership to the respondents.

[36] In so far as the appellants are challenging the procedure followed to arrive at the decision or the reasonableness of the decision to transfer ownership to the respondents, then PAJA is applicable and therefore the application should have been in terms of PAJA.

[37] It follows that, in my view, the court a quo correctly found that no case was made out for the relief sought. Consequently the appeal must fail.

The following order is made:

The appeal is dismissed with costs.

P D MOSEAMO
ACTING JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED

H J FABRICIUS
JUDGE OF THE HIGH COURT

I AGREE,

M F KGANYAGO
ACTING JUDGE OF THE HIGH COURT