IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

15/01/2016

CASE NUMBER: 19060/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

ELIAS MAHLANGU	APPLICANT
And	
WINSTON MANDLA MAHLANGU	FIRST RESPONDENT
MOJUDA JUDAS MOHLALA	SECOND RESPONDENT
THE REGISTRAR OF DEEDS, NELSPRUIT	THIRD RESPONDENT
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	FOURTH RESPONDENT
NEDBANK	FIFTH RESPONDENT

JUDGMENT

MAVUNDLA J

[1] The applicant approached this Court seeking an order in terms of which it be declared that the applicant is the rightful and sole registered owner of immovable property described as Erf […], Enkangala-B, Mpumalanga, held by Deed of Grant No TG339 / 1995KD, in extent 321 (three two one) square metres ("the property"); cancelation of the registration of the said property in the name of the first and second respondent and directing the fourth respondent to amend its Deed Registry to give effect of the above order and reflect the applicant as the sole registered owner of the property in terms of Deed of Grant No TG339 / 1995KD, with a costs on attorney and client own scale only in the event of opposition.

[2] It is common cause that certain immovable property known as site No 4536 "B" measuring 321 square meters situated at Kwa-Mhlanga in the erstwhile KwaNdebele Government Services was registered in the names of three different people and a title deeds in that regard were duly registered as follow:[1]

2.1. Mahlangu Winston Mandia title deed TG403/1991KD registration date 27/06 /1991 (the first respondent) who did not opposed the application;

2.2. Mohlala Mojuda Juda, Title Deed TG554/1994KD registration date 07/04/1994, (the second respondent who opposed the application;

2.3. Mahlangu Elias Title Deed Office property: Erf Kungwini Title deed TG339/1995KD registration date 25 / 05 / 1995, in the name of Mahlangu Elias, the applicant *in casu.*

[3] According to the applicant, he purchased the aforesaid property for an amount of R1203.00. He subsequently obtained a loan in the amount of R92 000. 00 from the fifth respondent and caused a mortgage bond to be registered for the said amount in favour of the fifth respondent on the 29 June 1995. He built a house on the said property and upon its completion moved therein together with his family at the end of 1995 and still

[1] Annexure "E2" reflects the registration of the relevant title deeds of the relevant persons.

continues to reside therein. He has attached copy of a photograph showing a brick built house with tile roof and a garage attached to the house. He and his family have been residing in this house for over 20 years. He further contended that he is 51 years old and would be severely prejudiced were he and his family to be called to vacate the property because he would have no means to start de nova to build another property at his age.

[4] According to the applicant the second respondent did inform him that he is the owner of the property but suggested that he would sell stand to him on exchange of payment of money. The applicant refused this overture by the second respondent because he had a title deed in respect of the stand and deemed it not necessary to pay for it for the second time.

[5] The second respondent filed his answering affidavit resisting the grant of the orders sought by the applicant. He conceded that he did not take any legal steps to resolve the debacle of the registration of the property in his names and the appellant. He further averred that the KwaNdebele Government had no right to have the property registered in the name of the applicant because it was already registered in his name and he never sold the property to any person after he purchased it. He alleged that the registration of the property in the names of the applicant was done fraudulently. I must hasten to state that there was no foundation laid for this statement. Besides, this Court is not engaged with the underlying cause of the double or triple transfer; *vide Prophitius & Another v Campbell & Others,* 2008 (3) SA 553 D&CLD at 558 paras [35]-[36]. The second respondent conceded that he approached the applicant before the latter completed building the house, but averred that the latter ignored his advice that he was the owner of the property. He further contended that the applicant is the architect of his misfortune because he improved the property against advice that the property was registered in the name of the second respondent. The latter further contended in his papers that applicant has an alternative relief which is to seek from the third respondent to rectify its documents by removing the names of the applicant who can then seek damages. Needless to state that the KwaNdebele Government is no longer in existence and therefore there is no merit in this proposition by the second respondent. The second respondent further contended that the principle of *"quo prior est tempore potior est jure'* must be strictly applied against the applicant.

[6] Counsel for the second respondent in his heads of argument raised as a *point in limine* that there was a dispute of fact which could not be resolved on affidavit and that the application should therefore be dismissed. There is in my view, no real dispute of facts and therefore I need not entertain this issue beyond stating that there is no merit in this contention.

[7] The issue to be decided in this matter is the question of strict application of the maxim *"quo prior est tempore potior est jure"* (the priority rule).

[8] The effect of the maxim *"quo prior est tempore potior est jure"* would be that the first respondent being the person in whose name the relevant property was first registered, the property would then have to go to him, with the second and third respondents falling by the way side. It needs to be borne in mind that the first respondent decided not to lock horns in this matter. It can be safely accepted that he would abide by the Court's decision.

[9] Generally, in a situation of double sale, such as *in casu,* the maxim *"quo prior est tempore potior est jure",* also known as doctrine of notice, prevails. The effect thereof is that the first person in whose name the property was transferred, enjoys stronger rights to claim the property; *vide Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) at 395G-I.* This maxim is premised on logic and equity. *In casu,* the applicant must show special circumstanced which militate against a strict application of the maxim. He must satisfy the Court that there are special circumstances which sway the balance of equity and reasonableness in his favour warranting a departure from a strict application of the maxim, *vide Wahloo Sand v Trustees, Hambly Parker Trust 2002 (2) SA* 776 *(SCA) at 784 F-G.*

[10] *In casu,* the first respondent, in whose name the property was first transferred, chose not to lock horns with the applicant. Both the first and second respondents for the past 20 (twenty) years, chose not to take any steps to assert their respective rights over the property. They both implicitly acquiesced with the *status quo,* namely that the applicant is in occupation of and a title holder of the property.

[11] The improvements effected on the house by the applicant are extensive. The applicant not only occupies the property alone but with his family. The duration of the applicant's occupancy of the property together with his family extends well over a period of twenty years. The applicant's right to housing is constitutionally enshrined.[2]

[12] Within the right to housing, lies *inter alia,* the right to dignity, the right to security, and the attenuation of these rightS[3]. The dictate of justice and equity, which demands the balancing of the competing rights of the applicant and those of the first and second respondents, when one considers the factors mentioned in the preceding paragraph, tilt the scale in favour of the applicant and against the first and second respondents. There would be more suffering and prejudice caused to the applicant was this Court to find, in the circumstances of this case, for a strict application of the maxim *"quo prior est tempore potior est jure".* I also take into account the fact that the first respondent, so too the second respondent, deliberately chose not to enforce their respective claims to the property over a long period.

[13] In the result, I am of the view that the applicant has marshalled enough facts which persuade this Court, in the exercise of its discretion, to order that the relevant property must resort with the a pplicant and that he is entitled to the order sought.

[14] It is trite that costs follow the event. The first respondent did not oppose the application. He is the first person in whose name the property was registered in 27/06 /1991. On the principle of the maxim "quo prior est tempore potior est ju re", he would have been the person to demand that the property should remain registered in his name. He however decided not to oppose the application and therefore there is no need to mulct him with a costs order.

[15] The second respondent was the second person in whose name the property was registered in 07/04/1994, after it had already been registered in the names of the first

---

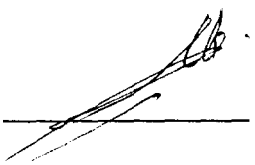
[2] Section 26 of the Constitution of the Republic of South Africa, Act 108 of1996 which provides as follows:
"Housing---(1) Everyone has the right to have access to adequate housing.
(2) The State must take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

[3] Vide Motswagae v Rustenburg Local Municipality 2013 (2) SA 613 (CC) at 617 B-C.

respondent. On the maxim *"quo prior est tempore potior est jure",* the second respondent was not better off than the applicant, in relation to the first respondent who was the first to have the property registered in his name. The second respondent's insistence that the property should remain registered in his name was purely opportunistic and unreasonable. He was forewarned that an attorney and client costs order will be sought against whosoever opposes the application. In my view, it was unreasonable of him to oppose the application. In my view he should therefore be mulcted with costs on attorney and client scale as prayed for by the applicant.

[16] In the result the following order is made:

1. That, it is declared that the applicant is the rightful owner of the immovable property described as Erf […], Enkangala-B, Mpumalanga, held by Deed of Grant No TG339 / 1995KD, in extent 321 (three two one) square metres ("the property");
2. That, the registered ownership of the first and second respondents in relation to the property is hereby cancelled;
3. That, the fourth respondent is directed to amend the records in the Deeds Registry to give effect to the orders in order 1and 2 above, in particular, so that the records reflect that the applicant is the sole registered owner of the property in terms of the Deed of Grant No TG339 / 1995KD, duly registered on 25 May 1995 and expunging from the records of the Deeds Registry any reference to the first and second respondents as the registered owners;
4. That, the second respondent pays the applicant's costs on attorney and client scale.



N:M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING: 04/12 /2015

DATE OF JUDGMENT: 15/01/2016

APPLICANTS' ADV: ADV J. EASTES

INSTRUCTED BY: GEO KILLIAN ATTORNEYS

SECOND RESPONDENTS' ADV: ADV R.G. MASIPA

INSTRUCTED BY: SHAPIRO & LEDWABA INC