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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 2108/2017

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED: YES

08/03/2021

In the matter between:

PETER NEVES

Applicant

and

ELIZABETH IRENE NEVES N.O.

First Respondent

PRICILLA FRANCINA RAMSBOTTOM N.O.

Second Respondent

CHRISTOPHER GILBERT NEVES N.O.

Third Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] The Applicant seeks relief in the following terms:

1.1 Declaring the registration of transfer of ownership of **Erf [....], [....] and [....] Kamhluswa- A Extension 1 Township** (“the properties”) into the name of the Peter Neves Will Trust (“the Trust”) and the causa that underpins the transaction concluded on 21 August 2001 between the Applicant and the Respondents in their representative capacities as trustees of the Trust invalid and unenforceable; and

1.2 Directing the Respondents jointly and severally to register transfer of ownership of the properties back into the name of the Applicant, alternatively directing the Sheriff of this Court to sign all documents necessary to give effect to the transfer of the property from the Trust to the Applicant.

[2] The application is opposed by the Respondents. Firstly, the Respondents have listed a number of points *in limine* some of which, if proved well-grounded, may in fact be dispositive of the matter. The Respondents’ main defence is that the transaction is valid and as such the transfer into the name of the Trust is sound and justified. Of the six points *in limine* raised by the Respondents three are material non-joinder. On 27 May 2019, this Court, per Matshitse AJ, granted the Applicant an order to join the Third Respondent, the joinder disposes of the first two points *in limine* and leaves the remaining four for determination. These points are:

2.1 Non-joinder of the Registrar of Deeds;

2.2 Existence of material disputes of fact;

2.3 The papers of the Applicant do not disclose a cause of action against the Second Respondent;

2.4 Prescription.

[3] Apart from the above, the Respondents have also raised important procedural non-compliance with both the Uniform Rules and Practice Manual by the Applicant. Prior to the allocation of the date of hearing, the parties had, through Form B, committed themselves to certain dates on which they had undertaken to discharge their respective duties. It is common cause that the Applicant has failed to observe the management directive order that was granted in that regard in consequence of which the Respondents delivered a Notice in terms of Rule 30A(1) read with Rule 37A.

[4] As an acknowledgment of the non-observance of the management directive order, The Applicant launched a Condonation Application in terms of Rule 27 to address the complaints. By the time this matter served before this Court, there was no answering affidavit on file opposing the condonation application. To save time and purely to make certain that this matter does not return to this Court in one form or another, I have chosen to grant the condonation application so that the court can address the issues raised in the main application once and for all.

FACTUAL MATRIX

[5] Before considering the points *in limine*, it will be useful to first describe the factual background against which the claim is founded on the one hand, and defence and/or points *in limine* are raised on the other. On 21 September 2001, the Applicant and the Respondents as trustees of the Trust with Registration Number **IT 13266/1996** concluded an oral agreement in terms of which:

5.1 The Applicant would sell the following three immovable properties described as hereinunder:

5.1.1 **Erf [....] Kamhlushwa** –A Township, Registration division J.U Province of Mpumalanga in extent of 1988 (**One Thousand Nine Hundred and Eighty-Eight**) Square Meters);

5.1.2 **Erf [....] Kamhlushwa** –A Township, Registration division J.U Province of Mpumalanga in extent of 2000 (**Two Thousand**) Square Meters); and

5.1.3 **Erf [....] Kamhlushwa** –A Township, Registration division J.U Province of Mpumalanga in extent of 5910 (**Five Thousand Nine Hundred and Ten**) Square Meters).

5.2 For purposes of compliance with The provisions of the Alienation of Land Act 68 of 1981, as amended, the parties would subsequently conclude a written sale agreement;

5.3 No money would exchange hands between the Trust and the Applicant for the sale and transfer of the properties but Their acquisition by the trust would serve as a direct investment of the Applicant into the business of the Trust.

[6] According to the Applicant, following the conclusion of the oral agreement, the Trust took registration of transfer of the properties into its name based on transferring documents annexed to his founding affidavit as **PN1** to **PN18**. Without diminishing the significance of the other annexures, I will be making reference to, and laying more emphasis on **PN2, PN3, PN7, PN11, and PN15** later in this judgment. As is evident from the provisions of the three title deeds attached to the founding affidavit of the Applicant as **PN19** to **PN21**, the properties were registered into the name of the Trust by the deeds office

FIRST POINT *IN LIMINE* - NON-JOINDER OF THE REGISTRAR OF DEEDS

[7] The argument by the Respondents here is that to the extent that the Applicant seeks the declaration of invalidity of the registration of transfer of the properties into the name of the Trust by the Registrar of Deeds (“the Registrar”) effected in 2001 and that he now wants the reversal of the act through the same medium, it should not take a lot to appreciate that the Registrar has a direct and substantial interest in the matter. For

this reason, contend the Respondents, it is unquestionable that the Registrar ought to have been joined to these proceedings.

[8] In the case of **Bowring NO v Vrededorp Properties CC and Another** the court stated the following about the enquiry that must be undertaken when deciding on whether a party ought to be joined or not:

“... the enquiry relating to non-joinder remains one of substance rather than the form of the claim. (See eg Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657.) The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder, has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Aquatur (Pty) Ltd v Sacks 1989 (1) SA 56 (A) at 62A-F; Transvaal Agricultural Union v Minister of Agriculture and Land Affairs 2005 (4) SA 212 (SCA) paras 64 66).”

[9] In Erasmus: Superior Court Practice, Vol 2 at D1-125 the following is stated:

“The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the Court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the Court is satisfied that he has waived his right to be joined.”

[10] Other than the authorities mentioned above, it is significant that the joinder of the Registrar in these kind of transactions is regulated by statute. In this regard, it is instructive to refer to Section 97 of the Deeds Registries Act headed: **Notice to registrar of application to court**. The Section provides as follows:

“(1) Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days' notice before the hearing of such

application and such registrar may submit to the court such report thereon as he may deem desirable to make.

(2) Subject to notice in terms of subsection (1) being given to the registrar concerned, any order made by a court having jurisdiction over a person in respect of that person's property or rights to property situate in another province shall be given effect to by the registrar of such other province without the necessity of having such order confirmed by the court of the province in which the property is situate."

[11] In view of the legal guideline provided by these authorities, the Registrar's direct and substantial interest in the matter is indubitable and cannot be reduced to oblivion as the Applicant would have this Court believe. The response of the Applicant to the non-joinder of the Registrar is, to say the least, shocking. The Applicant contends that the role of the Registrar in these types of transactions is minimal in that it consists in execution and storage of documents. The roles mentioned by the Applicant are certainly correct but how can they be peripheral when registration of transfer of the properties into the name of the Trust was effected through an act of execution?

[12] The Applicant seems to be ignorant of the fact that for the transfer to be reversed, the papers will be required to be executed by the very Registrar whose role he regards as easily dispensable. Any court order directing that the registration of transfer is to be reversed will necessarily affect or involve the Registrar. As such, the Deeds Office should be part of these proceedings. The Applicant's omission to join the Registrar to these proceedings is staggering especially after he was alerted to the significance of the role that the Registrar is expected to play in the registration of transfer of ownership back into the name of the Applicant. The non-joinder of the Registrar is therefore fatal to this application and the point *in limine* is upheld.

SECOND POINT IN LIMINE - PRESCRIPTION

[13] The Respondents' contention on prescription is that if it is common cause, as it seems, that the Trust took transfer of ownership of the properties during late 2001 and that no cash exchanged hands between the parties as consideration, the claim as outlined by the Applicant in particular, of declaring the transaction that happened in late 2001 has prescribed. The Applicant's response to this is unbelievably that prescription is based on the existence of a debt being owed by one party to another. Since no such debt is owed by the Applicant to the Trust, continues the argument, prescription does not find application.

[14] Section 10 of the Prescription Act, 68 of 1969 is headed: **Extinction of debts by prescription**, and it stipulates that 'subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. Section 11 of the same Act is headed: **Periods of prescription of debts**. Section 11(d) is the most relevant to this and it provides that 'save where an Act of Parliament provides otherwise, three years in respect of any other debt. 'The debt concerned here is governed by Section 11(d) of the Prescription Act. The word, debt, is not defined in the Prescription Act, which means that one must look elsewhere for guidance.

[15] That important direction was given by the Constitutional Court in **Ethekwini Municipality v Mount Haven (Pty) Ltd 2019 (4) SA 394 (CC)** when it held that a claim to transfer immovable property is essentially a claim to deliver goods and in turn, any claim to this effect would therefore also prescribe within three years. The following passage uplifted from the case is significant insofar as it clarifies what would constitute a debt:

"In terms of the dictionary meaning of 'debt' accepted in Makate, an obligation to pay money, deliver goods, or render services is included under the definition and would prescribe within three years under the Prescription Act. Material or corporeal goods consist of property, movable or immovable. Ownership of movable corporeal property is transferred to another by delivery, actual or deemed, of the goods. That is practically impossible in the case of immovable

property like land. Hence it is an accepted principle of venerable ancestry in our law that the equivalent of delivery of movables is, in the case of immovable property, registration of transfer in the deeds office. A claim to transfer immovable property in the name of another is thus a claim to perform an obligation to deliver goods in the form of immovable property. It is a 'debt' in the dictionary sense accepted in Makate. It really is as simple and straightforward as that."

[16] Once the definition of a debt covers the registration of transfer of ownership of an immovable property, it becomes manifest that the claim by the Applicant is affected and that it ought to surrender to the meaning ascribed thereto. It is a matter of record that the registration of transfer of the properties in this matter occurred in late 2001. Thus, if the period of prescription is three years as per Section 11(d) of the Prescription Act, the claim prescribed as early as late 2004. It being indisputable that the Applicant only launched this application in 2017, the claim has long prescribed as maintained by the Respondents. The Applicant's approach on what the meaning of debt is in terms of the Prescription Act is totally misguided and it is rejected. This point *in limine* is as such, upheld.\

THIRD POINT IN LIMINE – FOUNDING PAPERS DO NOT DISCLOSE A CAUSE OF ACTION

[17] The Respondents allege that a perusal of the Applicant's founding papers presents incontestable inconsistencies between the relief sought and the allegations of fact. That this is, so is apparent from the following allegations uplifted directly from his founding affidavit:

17.1 The Applicant, as the owner of the subject properties, and the Respondents, as representatives of the Trust, entered into an ostensible oral agreement in terms whereof the subject properties will be transferred into the name the Trust;

17.2 The transfer of the subject properties in the name of the Trust would serve as a direct investment of the Applicant into the business of the Trust;

17.3 The acquisition of the properties by the Trust would attract no mutual duty to pay the Applicant upon registration of ownership of transfer;

17.4 Following the above, the Trust took transfer of the properties during October 2001.

[18] Among the transferring documents attached by the Applicants in support of his claim are Annexures **PN3**, **PN 11** and **PN15** by which the Applicant Transfers **Erf [....]**, **[....]** and **[....]** to the Trust respectively. The wording of these annexures is the same except that each refers to a different erf and the relevant parts read:

*"I, **PETER NEVES***

***Identity No: [....]** unmarried*

Hereby transfer to the Trustees from time to time of Peter Neves Will Trust – IT13266/1996 hereby represented by Elizabeth Irene Neves in her capacity as Trustee, duly appointed hereto by Letters of Authority issued by the Master of the Supreme Court Pretoria on 7 October 1996, all my rights, title and interest in and to the land held by me ...".

[19] The claim of the Applicant is to nullify the transaction concluded in 2001 on the ground that there was no *causa* as the parties had failed to conclude a written agreement in line with the provisions of the Deeds Registries Act. Simultaneously and once he has achieved the aforesaid invalidation, he seeks relief that the transaction be reversed so that registration of transfer of ownership is registered into his name. That said, it is notable that the founding papers together with the annexures contain unequivocal intention to register transfer of ownership in favour of the Trust and in fact

that is precisely what ensued. The conflict between the relief sought and the allegations of fact set out in the founding papers cannot be more palpable.

[20] The manner in which the Applicant responds to this point *in limine* suggests that he does not appreciate the contradiction between the relief that he seeks and the allegations of fact contained in his founding papers. The annexures and Annexure **PN2** exhibit clear intention to pass transfer to the Trust yet this claim is directed at undermining that plain intention to pass transfer. The point *in limine* must for those reasons be upheld.

CONCLUSION

[21] Any of the three points *in limine* constitutes satisfactory reason to dismiss the Applicant's claim. In the circumstances, it will serve no purpose to consider a further preliminary point concerning whether or not there exist material disputes of fact. Equally, traversing the merits when any of the points *in limine* is dispositive of the whole matter is academic and futile.

ORDER

[22] Against that background, I make the following order:

1. The application is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 08 April 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:

Mr M Singwane

Instructed by:

Singwanw & Partners Attorneys

Counsel for the Respondents:

Adv J De Beer

Instructed by:

Wikus Du Toit Attorneys

Date of Hearing:

27 October 2020

Date of Judgment:

08 April 2021