IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: 688/2017

In the matter between:

MALUTI-A-PHOFUNG MUNICIPALITY	PLAINTIFF
and	
BIBI CASH & CARRY SUPERMARKET (PTY) LTD	1ST DEFENDANT
FREE STATE DEVELOPMENT CORPORATION	2ND DEFENDANT
THE REGISTRAR OF DEEDS	3RD DEFENDANT
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	4TH DEFENDANT
THE SURVEYOR GENERAL, FREE STATE PROVINCE	5TH DEFENDANT
THE MINISTER FOR AGRICULTURE AND LAND REFORM	6TH DEFENDANT
MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNMENT	7TH DEFENDANT

AND TRADITIONAL AFFAIRS, FREE
STATE PROVINCE

HEARD ON: 14 MARCH 2019

DELIVERED ON: 6 JUNE 2019

RAMPAI ADJP

[1] These were interlocutory proceedings. They were initiated at the special instance of 4 of the 7 defendants. The remaining 3 defendants were dormant, not only in these proceedings but even in the main action proceedings as well. The primary relief sought is an absolution from the instance. The plaintiff opposed the absolution application.

[2] The hearing of the main action started on Tuesday, 12 February 2019. On Friday, 15 February 2019, the plaintiff's case was closed. Thereupon the 4 defendants, at the halfway station, signalled their common intention to apply for an absolution from the instance. I then directed all the parties to file written heads of argument, determined formal deadlines for the filing thereof and postponed the matter to Thursday, 14 March 2019 for the necessary oral argument.

[3] Come 14 March 2019, I could not entertain the proposed oral argument as was previously envisaged. There were two reasons for that unfortunate turn of events. The first was that I had to preside in the motion court where the customary inauguration ceremony of Judge CJ Musi as the judge president was held. These ceremonial proceedings endured for almost an hour.

The second reason was that I was obliged to resume the hearing in a criminal trial – S v Mabaso & Others at 11:30 that very same morning. As a matter of fact, the entire week had been allocated to that criminal case as far back as 30 October 2018. Three of the five counsels involved in that case came from outside the province. So were four of the accused persons as well as the key prosecution witness, Ms Zandile Ngcobo.

[4] At 10:30 the hearing of the absolution application could not immediately commence. By 11:00 it became quite apparent that argument by four counsels would not be presented and completed before 11:30. In view of all those practical hassles the parties unanimously agreed to dispense with the envisaged oral argument and to let me decide the application on the strength of

the written heads of argument. I am indebted to the four counsels for their understanding of my predicament.

[5] Now let me turn to the task at hand. I think a brief description of the five parties participating in the action will not be a bad idea.

5.1. The plaintiff is Maluti-a-Phofung Municipality, a local municipality with legal personality duly established as a local government in terms of the statutes of the Republic of South Africa

5.2. The first defendant is Bibi Cash and Carry Supermarket (Pty) Ltd, a private corporate entity with legal personality and capacity to sue and to be sued duly established in terms of the Companies Act , No 61 of 1973.

5.3. The second defendant is the Free State Development Corporation, a public business enterprise with legal personality and capacity to sue and to be sued duly constituted in terms of the Free State Development Corporation Act, No 6 of 1995.

5.4. The fourth defendant is the Minister of Rural Development and Land Reform.

5.5. The fifth defendant is the Surveyor General: Free State Province.

[6] The following three parties, though cited as the defendants, did not defend the action:

6.1. The third defendant, namely the Registrar of Deeds, Free State Province;

6.2. The sixth defendant, namely the Minister for Agriculture and Land Affairs;

6.3. The seventh defendant, the Member of the Executive Council for Co-operative Government and Traditional Affairs, Free State Province.

[7] The historical background of events which precipitated the current dispute is essential.

The township of Phuthaditjhaba, which includes erf 9091, was initially situated in the self-governing territory of the Qwa-Qwa Homeland Government (QHG) as contemplated and declared under section 26 of the Self-Governing Territories Constitution

Act, No 21 of 1971, read with Proclamation R293 of 1962 ("Proclamation R293")

At all relevant times prior to 7 July 1988, the ownership of erf 9091 vested in the QHG in terms of the provisions of section 36(1) of the Self-Governing Territories Constitution Act, No 21 of 1971.

[8] On 15 June 1988 erf 9091 was sold by the QHG to QwaQwa Development Corporation (QDC). The transaction was facilitated by the Department of Development Aid.

On 16 June 1988, the office of the QHG Service approved the transfer of the property to QDC.

[9] Pursuant to the above transaction, a deed of grant 333/88/259 QQ was issued to QDC on 17 July 1988.

The registration of erf 9091 and the subsequent transfer to QDC have been recorded in the land register as provided for in Proclamation R293.

[10] On 24 January 1990, the Director General: Department of Development Aid approved the subdivision of erf 9091 into three portions, being portion 1, portion 2, and portion 3.

[11] On or about 14 September 2001, Maluti-A-Phofung Local Municipality (MAP) and the Free State Government (FSG) concluded a written deed of donation in terms of which part of the Farm Witsieshoek North 1922, situated in the district of Harrismith, in the province of the Free State, was donated to the plaintiff (MAP). Certain pieces of farmland, as fully specified and listed on pages 1-10 of the annexure to the deed of donation, were excluded from the donation.

[11] On 16 October 2002, the Registrar of Deeds transferred various immovable properties from the FSG to the plaintiff pursuant to the above deed of donation.

[12] On 22 February 2006, the Surveyor General: FSP approved subdivision of erf 9091 into portions 5,6 and 7 in accordance with diagrams LG No. 100/2006, LG No. 103/2006 and LG No. 104/2006.

[13] On 13 March 2013 the Registrar of Deeds: FSP registered an endorsement against the title deed regarding the Township of Phuthaditjhaba-A. Through the endorsement, it was recorded that the township has been established in terms of section 9(2) of Act 112 of 1991. The endorsement was embodied in a separate document labelled “introductory folio.”

On 9 December 2014, the Registrar of Deeds made an endorsement to the 1988 deed of grant, reflecting the change of the name of the transferee from Qwa-Qwa Development Corporation to Free State Development Corporation.

[14] On 9 December 2014 the third defendant, the Registrar of Deeds, issued a Certificate of Registered Title in favour of the second defendant, FDC in respect of Portion 5 of erf 9091. The deed in question was evidenced by Certificate No.T4075/2014. The certificate was issued in terms of section 43 of the Deeds Registries Act 47 of 1937. That first transaction represented the first partial alienation of erf 9091.

Still on 9 December 2014 the third defendant issued a further Certificate of Registered Title in favour of the second defendant in respect of portion 6 of erf 9091. The deed in question was evidenced by Certificate No.T14076/2014. The certificate was also issued in terms of section 43 Act No. 47 of 1937. That particular transaction represented the second partial alienation of erf 9091.

[15] On 24 February 2016, the second defendant, FDC concluded a written deed of sale with the first defendant, Bibi Cash and Carry Supermarket (BCS) in terms of which the second defendant sold portions 5 and 6 of erf 9091 to the first defendant.

[16] On 3 March 2016, the first defendant applied to this court for an interdict against, inter alia, the plaintiff. The purpose of the interdictory relief sought was to prohibit and to restrain the plaintiff from proceeding with certain construction works on portions 5 and 6 of erf 9091.

[17] On 23 June 2016, the Registrar of Deeds transferred portion 6 of erf 9091 from the second defendant, FDC, to the first defendant, BCS, in terms of deed of transfer T7699/2016.

On 24 June 2016, the Registrar of Deeds transferred portion 5 of erf 9091 from the second defendant, FDC, to the first defendant, BCS in terms of deed of transfer T7859/2016.

[18] On 8 December 2016, by agreement between the plaintiff and the first defendant, the court issued an order directing the plaintiff to institute action against all concerned on or before 10 February 2017. The whole idea underlying the mutual agreement was to have registration of the properties in dispute cancelled in order to have ownership thereof determined. At the heart of the dispute was the ownership of portions 5 and 6 of erf 9091.

[19] The plaintiff issued summons in this matter out of this court against the defendants on 10 February 2017, pursuant to the above order of the court.

[20] The relief sought by the plaintiff in the main action proceedings is, in essence, the nullification of the purported transfer of parts of erf 9091 by QHGQ to QDC. The relief is sought on the ground that the 1988 deed of grant, which underlined such transfer by QHG and its ultimate registration by the third defendant, the Registrar of Deeds, in favour of the second defendant, QDC was null and void *ab initio.* The erstwhile QDC is the forerunner of the current FDC.

[21] The essence of the defence raised by the defendants in the main action proceedings is that the purported transfer of erf 9091 by the FSG to MAP Municipality, the plaintiff, and its ultimate registration by the third defendant, the Registrar of Deeds, was legally an exercise in futility. The foundation of their defence is that the FSG had no right in law to transfer ownership of erf 9091 to MAP Municipality; that such real right of ownership still vested in the FDC at the time of the purported transfer, being 16 October 2002 and that MAP Municipality, therefore, never became the lawfully registered owner of erf 9091 in terms of the deed of transfer T25155/2002 dated 16 of October 2002.

[22] The cardinal question in the main case is in whom did ownership of the piece of land, technically known as erf 9091 Witsieshoek North Farm, vest as at 16 October 2002 when the plaintiff, MAP Municipality was issued with the title deed by virtue of the deed of transfer.

[23] At this juncture the question in these interlocutory proceedings is different. When a plaintiff's case is closed at a halfway station but the defendant's case is not, the cardinal question is whether the plaintiff has, by way of evidence adduced, crossed the low threshold of proof that the law sets at this midstream point of the proceedings.

[24] A cursory exposition of some principles of law applicable to applications for absolution from the instance appears necessary. In **Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A)** at 409 G-H Miller AJA laid down the tests to be applied to an application for absolution. He said:

> *"When absolution from the instance is sought at the close of the plaintiff's case,* ***the test to be applied is*** *not whether the evidence led by the plaintiff establishes what would finally be required to be*

established, ***but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might*** *but (not should or ought to)* ***find for the plaintiff****."*

(my emphasis)

[25] In **Gordon Lloyd Page and Associates v Rivera and another 2001 (1) SA 88 (SCA)** para [2] the court, per Harms JA, approved the principle as laid down in **Claude Neon**, *supra*. The court added that the absolution principle implies that a plaintiff is to make out a *prima facie* case against the defendant; that such a *prima facie* case entails that there be evidence adduced relating to all the basic elements of the claim in order to survive the absolution attack; that without such *prima facie* evidence no court could correctly find for the plaintiff - **Marine Trade Insurance Co Ltd v Van der Schyff** 1972 **(1) SA 26 (A) at 37G-38H**

Still in Gordon, *supra*, Harms JA went further to say:

"Having said this, absolution at the end of the plaintiff's case, ***in the ordinary course of events****,* ***will nevertheless be granted sparingly*** *but when the occasion arises, a court should order it in the interest of justice."*

(my emphasis)

[26] In **De Klerk v ABSA Bank Limited and Others 2003 (4) SA 315 (SCA) para [10]** the court, per Schutz JA said:

> *"**Counsel** who applies for absolution from the instance at the end of the plaintiff's case **takes a risk,** even though the plaintiff's case may be **weak**…. The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets the plaintiff's case is closed but the defendants is not."*
>
> (my emphasis)

[27] In **McCarthy v Absa Bank Limited 2010 (2) SA 321 (SCA) para [21]** the court, per Nugent JA reaffirmed the principle that when absolution from the instance is sort in terms of rule 39(6) at the close of the plaintiff's case, the test to be applied is not whether the evidence presented by the plaintiff established what would finally be required to be established by the plaintiff, but whether there is evidence upon which a court, reasonably applying its mind to such evidence, could or might find for the plaintiff. See also **Hanger Regal and Another 2015 (3) SA 115 (FB) para [7-9]** per Murray, AJ.

[28] In deciding whether to grant or refuse absolution at the close of the plaintiff's case, it must be ordinarily assumed that the evidence adduced by or on behalf of the plaintiff is true unless very special considerations dictate otherwise. Consequently, questions of credibility are not ordinarily supposed to be raised by the defendant and, if they are raised, are not ordinarily supposed to be entertained by the trial court at this midstream stage of the proceedings, unless it is undoubtedly clear that the evidence adduced by the plaintiff or witness for the plaintiff is untrue. See **South Coast Furnishers CC v Secprop Investments (Pty) Ltd 2012 (3) Sa 431 (KZP) par [15]. See also Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 (E)** at **527C-D**.

[29] The high watermark of the argument raised by the defendants is premised on the contentions that the FSG was not the lawful owner of erf 9091; that the FSG could not, therefore, transfer ownership of that piece of land to the plaintiff, MAP Municipality; that the plaintiff as the transferee could not, therefore, have lawfully acquired the real right of ownership from the FSG as the transferor; that in view of all these legal hassles, the purported registration of the relevant erven in the name of the plaintiff was a

serious mistake and that the plaintiff never juridically became a lawfully registered owner of the immovable property in question.

[30] The evidence, concerning the relevant facts and circumstances relative to the registration of the erven in question namely 10029, 10030 and 10031 in the name of the plaintiff, was given by Mr M.S Nyembe. His current designation is: Director: Human Settlement, Spatial Development, Capital planning and Traditional Affairs under the auspices of MAP.

[30] He gave *viva voce* evidence which, among others, traversed historic correspondence of the current subject matter. The relevant correspondence was written by the attorney on behalf of the 4th and 5th defendants. The same attorney was the conveyancer who actually passed the transfer of the erven in question from the FSG to MAP.

[31] Moreover, the witness also testified about the relevant historic correspondence written by a certain BJ Steenkamp on behalf of the Surveyor General: FSG, the 5th defendant. Such historic correspondence was disclosed, not only by the plaintiff, but also by the first defendant. Probably the first defendant, BCS, obtained

such correspondence from the second defendant, FDC. How can the unchallenged evidence adduced on behalf of the plaintiff shows that the 4th and 5th defendants were instrumental to the transfer of the properties to the plaintiff, way back in 2002.

[32] The following facts are either common cause or facts which though denied, could not be seriously disputed.

- The first defendant relies on a deed of grant number TG 333/1988 QQ registered on 7 July 1988, on the strength of which erf 9091, Phuthaditjhaba-A was transferred to the QDC by the QHG.
- Such type of ownership was referred to in **Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2001 (1) SA 500 (CC)** by Goldstone J, O'Reagan J and Sachs J as an insecure form of ownership as opposed to a secure form of outright ownership.

[33] Later on erf 9091 was surveyed, measured and subdivided into three portions. The subdivisions were described as portions 1/9091, 2/9091 and 3/9091.

See p14-19 first defendant's trial bundle

Those three portions formed part and parcel of Farm Witsieshoek North 1922 District Harrismith measuring in extent 432,2625ha. Before the subdivision, the particular piece of the farm was described as portion 21. It was only that particular portion of the farm which was subdivided into three portions.

[34] On 11 February 1999 the entire Farm Witsieshoek North 1922 was registered as an unalienated property of the State. The Certificate of Registered State Title was then issued under Title Deed 2523/1999. That particular deed of transfer still stands to this day.

See p55 – 58 first defendant's trial bundle

[35] On 20 September 200, just over seven months later, Portion 21 of Farm Witsieshoek North 1922 District Harrismith in extent 432,2625ha was surveyed, measured and laid out in General Plan LG889/2000. The plan had been previously approved by both the Surveyor General as well as the Director General: FSP to establish Phuthaditjhaba-A Township. The approval of the plan by such senior public functionaries in a way provided some kind of quality assurance. All this was done in accordance with the

provisions of the Upgrading of Land Tenure Rights Act 112 of 1991.

The endorsement whereby the township was established, is appended to the deed of transfer, labelled as an introductory folio, signed by the Registrar of Deeds and dated 13 March 2003.

[36] On 16 October 2002 certain fixed properties owned by the State were alienated. Now Portion 21 of Farm Witsieshoek North 1922 District Harrismith was among the properties which were held under Title Deed 2532/ 1999 all of which were transferred and registered in the name of the plaintiff.

The Deed of Title, T025155/2002, was discovered by the first defendant as well as the plaintiff.

See p66 - 82 first defendant's trial bundle.

See p8 - 14 plaintiff's trial bundle.

That transfer too has never been cancelled.

[37] Among others, the approved General Plan 889/2000 included three erven. Those three properties were described as erven 10029, 10030 and 10031. Before the year 2000 the same

properties were described as portions 1/9091, 2/9091 and 3/9091of the erstwhile undivided portion 21 of Farm Witsieshoek North 1922 District Harrismith in extent measuring 432,2625ha.

[38] At this juncture, I have to pause. It is imperative that l express one significant point of view. Given the above undisputed historical backdrop coupled with the relevant statutory provisions, it would appear that the plaintiff was the registered owner of the properties and that it has always been at all times material to the current dispute. It further appears that this will probably remain the state of affairs until the properties are either sold or until they are donated, transferred and their ownership passed to a third, in other words, to another person or entity. Whether sold or donated, the plaintiff will have to be instrumental to the transaction to alienate the properties. This is the one side of the coin.

In the event of the plaintiff exercising none of the two options, the court may be approached to have the earlier transfers of the properties to the plaintiff and their registrations in its name nullified and set aside. This then is the other side of the coin. Unless and until any of those two possible events occurs, the plaintiff will remain the lawfully registered owner of the properties.

[39] The views that I have expressed in the preceding paragraph, have their legal foundation in sec 6(1) of the Deeds Registries Act 47 of 1937. The heading of the section captures the gist of the matter quite well. It reads: “Registered deeds not to be cancelled except upon an order of court.” It is prohibitive.

[40] The subsection provides as follows:

(1) Save as is provided in this Act or any other law no registered deed of grant, deed of transfer, certificate of title, or other deed conferring or conveying title to land or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, **shall be cancelled by a registrar except upon an order of court.”**

(my emphasis)

[41] It is undisputed that the deed of donation, by virtue of which the properties were transferred to MAP and the corresponding registrations effected, still stands. No order of court has been sought and obtained to have it cancelled. The law is clear. No registered deed conferring title to land or any real right in land can be cancelled except upon an order of court. The power to cancel

real rights in land is the exclusive preserve of a competent court. No registrar of deeds can arrogate such power unto himself or herself. To the extent that the actions of the Registrar of Deeds, or the Surveyor General or both, subsequent to the transfers and registrations in favour of MAP were calculated to circumvent the section in order to divest the plaintiff of such real rights in land, they were unlawful and of no force and effect whatsoever.

[42] The provisions of sec 6(2) Deeds Registries Act 47 of 1937 are also significant to the dispute. The subsection reads:

> *"Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed."*

[43] Let me assume firstly, that the properties were erroneously transferred to the plaintiff, as the defendants contend, which contention the plaintiff denies, and that the court subsequently cancelled such deed of title. The section makes it abundantly clear that, even in the event of a mistaken transfer of real rights in

land, the deed by virtue of which the real right was held, immediately prior to the mistaken registration of the deed that has been cancelled by the court, **shall be revived by the cancellation.** In other words, the cancellation will not have the effect of conferring upon the second defendant (FDC) the real rights taken away from the plaintiff (MAP) and thus validate their transfer to the first defendant (BCS).

[44] As I have earlier alluded, the transfer of the properties to the plaintiff was registered. It is our law and it has always been our law that deeds attested or executed by a registrar of deeds are deemed to be registered upon the actual affixing of the registrar's signature thereon. Deeds and supporting documents lodged with the registrar for registration are deemed to be registered when the deeds registry endorsement in respect of the registration thereof is signed - Section 13 of the Deeds Registry Act 47 of 1937.

The plaintiff took transfer of the properties years ago. Notwithstanding threats by the second defendant to challenge the validity of such transfers and the related registrations, nothing came out of those threats. They remained empty threats. As of now, no counterclaim by any of the defendants pends for the cancellation of the alleged erroneous transfers. It will also be

readily appreciated that, apart from the glaring absence of a counterclaim, no declaratory order of any sort is sought by any of the defendants.

[45] It is an undisputed fact that, at some stage during the year 2004, the second defendant became aware of the registration of the properties in the name of the plaintiff. Such constructive knowledge notwithstanding, the second defendant sat back, relaxed and did nothing about it until now. An inordinately long period of almost 12 years has gone by since then.

[46] The second defendant reckons that it, the FDC, is the outright successor in title of the dissolved QDC by virtue of the provisions of the Free State Development Corporation Act 6 of 1995.

We need to take a closer look at Sec 23 Free State Development Corporation Act 6 of 1995. It reads as follows;

> *"**23 Repeal of laws and saving***
>
> *(1) Subject to the provisions of subsections (2) and (3), the laws referred to in the Schedule are hereby repealed.*
>
> *(2) At the commencement of this Act -*

> *(a) all assets, liabilities, rights and obligations of a dissolved agency shall vest in the Corporation: Provided that the responsible Member may by notice in the Provincial Gazette further regulate matters relating to the assets, liabilities, rights and obligations of the Corporation, including the transfer thereof to any entity, person or body: Provided further that such administrative records and other documents of a dissolved agency as may be determined by the responsible Member shall be transferred to the Corporation, or such entity, person or body;"*

[47] Obviously the second defendant's succession claim hinges on the main clause of ss 2(a). The main clause states that at the commencement of this particular legislation, all assets, liabilities, obligations and rights of the dissolved QDC shall vest in the FDC. However, it does not all end there. The section goes further than that. It contains two important provisos.

[48] The first proviso is that the responsible Member of the Executive Council: FSG may regulate matters relative to the assets, liabilities, obligations and rights of the FDC and that the regulation of these matters includes the transfer thereof from the FDC to any other entity, person or body. Put differently, the MEC and not the FDC itself has the final say as regards the transfer of assets, liabilities, obligations and rights of the FDC.

[49] The second proviso states that such administrative records and other documents of the dissolved QDC, as may be determined by the responsible MEC, shall be transferred from QDC to any other entity, person or body including but certainly not limited to FDC. It is significant to point out that the second defendant has not discovered such administrative records and other official documents on which it relies in support of its succession claim.

[50] I have to mention that the first defendant's trial bundle contains no such records or documents that ***prima facie*** underscore its alleged succession claim. He who alleges has to prove. That is the basic principle of the law of evidence. The failure of the first defendant to discover such records and documents for the purpose of cross-examination drastically watered down its succession claim. Moreover, the decision of the responsible MEC to transfer the properties to MAP Local Municipality by itself strongly militates against the first defendant's claim. Even if it is accepted that the four crucial matters, being the assets, liabilities, obligations of the dissolved QDC, had automatically vested in the FDC in 1995 by operation of law, the subsequent conduct of the responsible MEC strongly suggests that in 1999 the responsible

MEC probably transferred those four crucial matters from FDC to MAP.

[51] All along the second defendant was discontent about the 2002 transfer of the properties to the plaintiff and the registration of the real rights in those pieces of land in the name of the plaintiff. Aggrieved by those legal transactions, FDC caused a letter to be addressed to the fifth defendant. It sought to have the Deed of Transfer 25155/2002 immediately cancelled. Through its attorneys it threatened to seek a ***mandamus*** against the Surveyor General unless the Surveyor General: FSP instructed the State Attorney: FSP without delay to cancel the deed of transfer whereby the properties were transferred to the plaintiff, MAP. It is significant to bear in mind that the letter in question was dated 9 September 2004, some 11.5 years back before the first defendant, with the ostensible backing of the second defendant, applied to this court in an attempt to interdict the plaintiff from developing the properties.

[52] From the above, it follows that the second defendant appreciated and anticipated, quite correctly so, that in order to have the alleged mistaken transfer of the properties to the plaintiff

cancelled, set aside or rectified an application to court necessarily had to be made. The power of the high court to dispense with such remedies is envisaged in Sec 6, *supra.*

[53] In response to the above letter of the second defendant, the State Attorney assured a certain Mr Steenkamp, the second defendant's attorney, that should the second defendant apply to court, as intimated in its letter, to have the deed of transfer rectified, the State Attorney would advise the Survey General and the Registrar of Deeds to abide by the court order. Again it is significant to note that the State Attorney replied on the same day, 9 September 2004. Yet the second defendant took its time to approach this court.

Certain incorrect assumptions concerning the history of the properties were made by the State Attorney. However, those did not really affect the substantive merits of the dispute. Therefore, I deem it unnecessary to dwell on them here.

[54] The plaintiff, as earlier indicated, acquired the properties by virtue of a deed of donation. The deed was fully described as the Deed of Donation *Inter Vivos*. The immovable property, Farm Witsieshoek North 1922, District Harrismith was partially donated

to the plaintiff excluding properties listed on pages 1-10 of the annexures attached to the deed of transfer.

[55] The Surveyor General was of the opinion that the deed of donation did not indicate who owned erf 9091. So did the State Attorney. However, the annexure to the above deed of donation proved that their opinions were incorrect.

Firstly, erf 9091 no longer existed in 2004. By then it had already been subdivided and renumbered. By then its subdivisions were known as erven 10029, 10030 and 10031 on Mr Steenkamp's own version as evidenced by the undisputed correspondence already alluded to.

Secondly, page 5 of the annexure to the deed of donation deals with FDC Properties. The properties so explicitly identified and scheduled were specifically excluded from the donation in accordance with Schedule 6 of the 1996 RSA Constitution. Among those constitutional exclusions was **erf 10029.**

[56] It logically follows that of the three erven mentioned above, only one was transferred to FDC. The remaining two, erven 10030 and 10031 were not. Therefore, they, unlike erf 10029, remained as unalienated properties of the State. As such they were not

excluded from the donation. Consequently they were legitimately transferred to MAP. This puts to rest the submission of the defendants that owing to some kind of an error, it was not known that erf 10029 belonged to FDC. It did and it was so recorded. Because it belonged to FDC, it was not donated to MAP.

[57] The aforesaid excluded property, in other words erf 10029, was also transferred to the plaintiff by virtue of a negotiated agreement between the plaintiff, MAP, and the second defendant, FDC. I have to stress that neither erf 10030 nor erf 10031 were excluded from the donation. Since they were not identified and mentioned in Schedule 6 to the 1996 RSA Constitution as erf 10029 was, they were not listed as the properties of the FDC. Had these two properties also been regarded as property belonging to FDC at the time the deed of donation was executed, they too would have been pertinently listed along with their twin property, namely: erf 10029.

[58] The second defendant will have to explain why only erf 10029 was listed as the property of FDC but the other two not so listed if all three of them belonged to FDC. The second defendant has not discovered any administrative records or documents to beef up its

contention that all three belong to FDC. In view of the omission, oral evidence as to how FDC acquired full ownership of erven 10030 and 10031 would be of vital importance in the proper adjudication of the main dispute. It would appear that during the upgrading of the land tenure rights FDC did not acquire the alleged real rights in respect of the two properties.

[59] I deem it expedient to recap the position thus far. It is common cause now that the three properties were transferred to the plaintiff; that the transfer and the registration are currently extant; that such transfer and registration can be cancelled by the registrar of deeds only on the strength of a court order and that no court order was sought and obtained to have the transfer and registration cancelled.

Consequently, it has to be accepted that in the absence of a court order the real rights in the immovable properties remain vested in the plaintiff. Therefore, unless a competent court cancels, rectifies or declares the second defendant to be the lawful owner of the properties the *status quo* deserves to be respected and protected by law. Lest we forget, the properties concerned are erven 10029, 10030 and 10031.

[60] The defendants reckoned that the solution to the present impasse entailed bypassing the cancelling of the deed of transfer registered in favour of the plaintiff as Sec 6(1) requires; amending the General Plan by abolishing or discarding the numerical identities of the properties, to wit erven 10029, 10030 and 10031; by consolidating the three properties into a single undivided property; by renumbering it once again as erf 9091as was previously the case and the upgrading of the second defendant's deed of grant to deed of title. The latter is a secure form of ownership. The former is an insecure form of ownership.

[61] The above proposal as a possible resolution of the problem can be gleaned from two historical sources.

The first source is a letter from the State Attorney to the Surveyor General dated 7 September 2005.

See p90 first defendant's trial bundle.

The second source is a letter from the State Attorney to the second defendant's attorneys, namely: Messrs Mthembu & Van Vuuren dated 19 June 2006.

See p92 first defendant's trial bundle.

I deem it unnecessary to extract passages from the above two letters. Both letters by one Ms CE Cawood contained lamentable misgivings as regards the correct legal position.

[62] The proposed action plan was ill-conceived because it would not bring about the necessary cancellation in terms of Sec 6(1) or revocation of the real rights of ownership the plaintiff had acquired. The registration of the properties in the name of the plaintiff occurred in terms of an approved Diagram and General Plan.

The Surveyor General may only cancel or amend a General Plans in accordance with the law. That law - the principle of legality - includes the provisions of Sec 6 Deeds Registries Act 47 of 1937.

[63] The provisions of Sec 22 of the Land Survey Act 8 of 1997 though applicable, did not authorise actions taken by the Survey General. Those actions could not divest the plaintiff of its rights of ownership. Those rights were and are still protected by law. The Surveyor General, the fifth defendant, did not follow the

requirements of the section on which the defendants apparently rely. The section concerns land represented by an incorrect diagram. In the present matter, there is no insinuation, let alone an averment, that the land or property in dispute is incorrectly represented in the official diagram. Accordingly the section relied upon by the defendants does not apply.

[64] The properties were registered in the name of the plaintiff. The State Attorney knew it. Mr Steenkamp of the office of the Surveyor General also knew it. Their knowledge notwithstanding, no notice was given to the plaintiff about the invasive actions the Surveyor General intended taking. Without the knowledge of the plaintiff, the land was renumbered, new diagrams were framed and the land was upgraded and the land in question, erf 909, was subdivided. It eventually became erven 10029, 10030 and 10031. The plaintiff was unaware of the unfolding drama concerning its property. During the course of his oral evidence, Mr Nyembe repeatedly said the plaintiff was ambushed. I think the fifth defendant has some explaining to do.

[65] As regards the second defendant, the only issue is that it has been divested of its ownership. The divestment occurred when

the land was transferred to and registered in the name of the plaintiff. Its remedy was to approach the court in terms of Sec 6, as it initially threatened to do.

[66] The plaintiff commenced with the improvement of its property. The improvement entailed the development of a taxi rank thereon. It will be recalled that the property was registered in its name way back in 2002. It would appear that the plaintiff's taxi rank project precipitated the purported withdrawal of the General Plan 889/2002 as well as the purported framing of the General Plan LG 100/2006 to 104/2006. Subsequent to those changes, Mr Steenkamp embarked upon several invalid processes. The original deed of grant was varied in certain respects.

Firstly the name of the transferee was changed from Qwa-Qwa Development Corporation (QDC) to Free State development Corporation (FDC). The change was then endorsed on the original deed of grant on 9 December 2014.

Secondly, an endorsement was effected showing that the property had been divided into portions 4 - 7. The deed of grant was so endorsed on 9 December 2014

Thirdly, Certificates of Registered Title were then issued to the second defendant in respect of two portions 4 - 7 of the newly

framed erf 9091.The certificates were also issued on 9 December 2014. It is not clear why the certificates were issued. Whatever the underlying reason could have been the issue, could not cancel the plaintiff's real rights of ownership.

[67] On the strength of the above new subdivision and renumbering of the property, the second defendant purported to sell the property to the first defendant. FDC did that with the full knowledge that the property was registered in the name of MAP. Similarly, BCS took the purported transfer of the property from FDC with the full knowledge that there was a pending dispute in connection with the ownership of the property. The expectations were that the dispute between FDC and MAP would be ventilated in this court under application number 1040/2016. The application of FDC was contested by MAP. The relief sought by the latter by way of a counter-application was twofold. MAP successfully applied that the main application be stayed *sine die* pending the outcome of a declaratory process to determine the question of ownership of the property in dispute. The current action proceedings stemmed from that order.

[68] Once again I deem expedient to stress a vital point in order to clear up possible misunderstanding. By virtue of upgrading, the property was transferred to the State. None of the defendants before me has put up a defence in their pleadings or in any documentary evidence in their trial bundles to show or to even suggest that the transfer of the property to the State was invalid or irregular. The property formed part of the Farm Witsieshoek North 1922. Ownership of that particular farm vested in the State. It is important to understand this. The State then donated the property to the plaintiff, MAP, subject to the terms and conditions as stated in the deed of donation *inter vivos*. Neither the second defendant nor its predecessor ever became the holder of outright ownership rights in respect of the property. Each of them became nothing more than the holder of limited ownership rights. The foundation of their rights was not a deed of title but rather a deed of grant. There is a huge difference. Those limited ownership rights were never subsequently upgraded to comprehensive ownership rights.

[69] It must be readily appreciated that all the re-layouts done by Mr Steenkamp during 2002, 2004 and 2006 were done subsequent

to the transfer of the property to and its registration in the name of the plaintiff. In the circumstances, the second defendant could not pass transfer of the property to the first defendant as it purported to do since the property was not registered in its name. The salient principle of the law of property is that one cannot transfer greater rights than he has. That principle applies to the facts of the instant matter.

[70] In view of the above the purported transfer from FDC to BCS stands to be nullified. The court has inherent power, implicit in Sec 6 of the Deeds Registries Act 47 of 1937, to order cancellation of real rights registered in violation of the principle of legality.

See: **Ex Parte: Raulstone NO 1959 (4) SA 606 (N)**

See also **Indurjith v Naidoo 1973 (1) SA 104 (D)**

[71] The contravention of Sec 6 Act No 47 of 1937 epitomised the violation of the principle of legality. However, it did not all end there. The actions of the Surveyor General were also seriously tarnished in another manner. His re-layouts and subdivisions were also done in contravention of the empowering or authorising legislation. He gave no notice to the plaintiff of his intention do re-

layouts and subdivision of the property. He was legally obliged to do so either in terms of the Land Survey Act 8 of 1997 or the Bloemfontein Township Ordinance. The ordinance applies throughout the Free State Province. Worst still, the prescribed public notices were not even published as the law requires. At this midway juncture of the hearing, no contrary evidence pends before me.

Moreover, it does not appear that the necessary consent, as required by Sec 37(2) and (3) Land Survey Act, No 8 of 1997, for the subdivision was done by Mr Steenkamp.

[72] The registration of a new General Plan by Mr Steenkamp, in and by itself, could not and did not bring about a change in the ownership of the property. Only a court order could do so.

See: **EM & EM Enginering (Pty) Ltd v Kwa-Dukuza Municipality and 2 Others (2015) ZAKD ZHC 55**

The Certificate of Registered Title could not cancel the plaintiff's ownership.

[73] The primary defence of the defendants appears to be wanting. They primarily dispute the authority of the FSG to transfer the property. The argument does not really assist them. It does not constitute a substantive defence to the relief sought by the plaintiff. The plaintiff's case is that the property was transferred and registered in its name; that such registration has never been cancelled by a court and that no counter-claim for such relief is currently pending. All this is common cause.

It appears to me that the FSG, as the responsible organ of the State, had the requisite intention to transfer its real rights of ownership in the properties; that MAP had the corresponding intention to acquire such real rights of ownership in the properties and that the FSG ultimately delivered the properties to MAP through registration in the provincial deeds registry.

[74] I deem it necessary to deal with the second defendant's predecessor, QHG. The transfer from QHG to QDC is legally irrelevant in the light of what I have said earlier on. In passing, I point out that no certificate issued by a competent authority as envisaged in Sec 28 of Schedule 6 to the RSA Constitution was produced. At any rate, such a certificate would not have resolved

the problem of the defendants in any event. The fact of the matter is that the property was lawfully transferred to and registered in the name of the plaintiff, *cadit quaestio.*

[75] It has to be borne in mind also that the QHG unlike the TBVC states, was never an autonomous state. At the time of the purported transfer of the properties to QDC, it was still in its embryonic stage of political development. Whereas Transkei, Bophuthatswana, Venda and Ciskei were independent states in their own right, QHG was merely a self-governing territory, along with Gazankulu, Kangwane, Kwandebele, Lebowa and Kwazulu. All those territories were still dependent on the RSA. They were still subject to its effective control in many ways.

See: **2015 (78) THRHR**

[76] QHG administered the land or territory placed at its disposal on behalf of the landowner, the then RSA State. It did not own the land concerned. Therefore the property it purported to transfer to QDC was an integral part and parcel of an unalienated land owned by the State, the RSA.

[77] But even if I am wrong, my mistake would not alter the fact that QHG as the holder did not have completely full real rights of ownership. It never acquired full-house ownership of the properties. It merely acquired limited real rights of ownership. At best for the defendants, QHG was a holder of some tenuous rights which would necessarily need to be upgraded at some point before QHG could become a complete holder of unlimited real rights in the properties in question. However, its limited real rights of ownership were never upgraded, on the defendants' own case. On the contrary, the properties were transferred and registered in the plaintiff's name. The transferor was the FSG, the holder of unlimited real rights of ownership in the properties.

[78] At some stage prior to 1988, there were 10 self-governing territories in this country. Of those, four opted for independence from the RSA State. The four were Transkei, Bophuthatswana, Venda and Ciskei. When they opted to become independent, both the land and the minerals in their respective territories were transferred to their respective governments. Four legislations and four territorial constitutions were enacted to underpin their independence.

[79] After the independence of the four, six self-governing territories remained, namely:

Gazankulu, Kangwane, Kwandebele, Kwazulu Lebowa and QwaQwa. In their case, land rights and the mineral rights remained in the hands of the RSA State. In principle such rights would have remained so held for as long those self-governing territories remained dependent on the RSA State.

[80] The argument of the defendants is that the properties belonged to the QHG and that QHG lawfully transferred it to QDC, the predecessor to FDC, the second defendants during 1988. The properties formed part of the land formerly administered by the South African Development Trust, (SADT). The SADT was created under the provisions of the Development Trust and Land Act, 18 of 1936. On 30 June 1991 legislation with the title Abolition of Racially Based Land Measures Act, 108 of 1991, was enacted. In terms of Sec 11(1) (a) thereof the Development Trust and Land Act, 18 of 1936 was repealed. Consequently the SADT were thereby dismantled.

[81] On 31 March 1992 all unalienated land owned by the State within the self-governing territories was transferred to those remaining

self-governing territories by the RSA Government. Before that particular date, QHG merely administered the territory for and on behalf of the RSA State. From this it follows that between 1988 and 1992 QHG could not have transferred to QDC full real rights of ownership because QHG itself was not the holder of such rights.

See: **Proclamation No. R28 of 1992 published in the Regulation Gazette No. 4852, Government Gazette No. 13906.**

See: **Khoete v Dimbaza (A448/07) ZAFSHC 129 (12 November 2009) FB per Van Zyl J *et* Mocumi J**

[82] From the above the evidence of the plaintiff that the assets and liabilities of the QHG vest in the FSG through the RSA Government would appear to be correct. In any event, at this midstream point of the action proceedings, the defendants have produced no evidence to the contrary, as yet.

[83] If I am wrong in the way I have reasoned the matter, it is quite evident that the second defendant would nonetheless still be obliged to institute action proceedings in the future to have the transfers set aside. There is simply no other alternative avenue

open. As matters stand, the second defendant's cause of action or possible claim of ownership in respect of the properties appears to have prescribed way back in 2007.

See: **Desai N.O *v* Desai Others 1996 (1) SA 141 (A)**

[84] Given all the considerations traversed above, at this juncture of the action proceedings, I am persuaded that the plaintiff has crossed the threshold of the required evidence – **De Klerk, supra**; that notwithstanding the attack launched by the defendants, the plaintiff's witness stood firm; that the attack on his credibility was not permissible at this stage; that absolution from the instance is a remedy sparingly granted – **Gordon Lloyds, supra**; that at this halfway station, the plaintiff is not required to present such evidence as would be required at the final station after all the evidence would have been heard and all the burning issues ventilated – **McCarthy, supra** and **Hanger, supra;** that any court reasonably applying its mind to the evidence, so far adduced and tested but unbroken, would not be inclined to absolve the defendants from the instance - **Claude Neon, supra** and **Hanger, supra**; that, in view of the peculiar circumstances of this case, ***a prima facie case*** has been made out which calls for an answer – **Marine Trade, supra** and finally that, I have to

sound a fair warning to all the defendants of the possible risk ahead, should they elect to give no oral evidence - **De Klerk, supra.** It follows, therefore, that the plaintiff passes the test.

[85] I accordingly I make the following order:

85.1 The application for absolution from the instance is dismissed with costs;

85.2 The first, second, fourth and fifth defendants pay the costs jointly and severally, the one paying the others to be absolved.

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MH RAMPAI ADJP

Obo the plaintiff	Adv N Snellenburg SC
Instructed by:	Ponoane Attorneys
	Bloemfontein
Obo the 1st defendant	Adv CD Pienaar
Instructed by:	Cloete & Nevelling
	Harrismith

Obo second defendant	Adv MA Mavodze
Instructed by:	Rampai Attorneys
	Bloemfontein
Obo the 4th and 5th defendant:	Adv LT Sibeko SC
Instructed by:	State Attorney
	Bloemfontein