IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
_____	_____
DATE	SIGNATURE

CASE NO: 15119/21

DATE: 31 October 2022

In the matter between:-

GEORGE M MASOANGANYE	Applicant
V	
VUYANI ABEL MAHLAOELE N.O.	First Respondent
ELIZABETH MAMOSEOLE MAHLAOELE	Second Respondent
REGISTRAR OF DEEDS	Third Respondent

JUDGMENT

KOOVERJIE J

[1] In this application, the applicant seeks. *inter alia*, that the registration of property, Erf Nr. 17435, Mamelodi Township, held under title deed number T74381/99, be declared unlawful and invalid

[2] The applicant further seeks an order that the Registrar of Deeds (the third respondent) be ordered to cancel and transfer of the property and register the property in the name of the original owner. At the outset it needs to be mentioned that the Registrar of Deeds, as a cited party, filed a report, *inter alia*, advising that it cannot on its own accord cancel the title deed which is in the respondents' name as the registration was effected lawfully and in accordance with the legislative provisions set in the Deeds Registry Act, 41 of 1937, specifically sections 3, 15 and 45 thereof.[1] It may only do so by virtue of a court order.

BACKGROUND

[3] In his founding affidavit the applicant submitted that ownership in the property was always vested in the names of Piet Mahlaoele and Phepho Mahlaoele (the parents). Phepho passed on on 31 July 2007 and Piet on 12 May 2019. They had three children being the applicant's late wife, Elizabeth Masoanganye ("Elizabeth"), Johanna Mahlaoele ("Johanna") and the first respondent, Vuyani Abel Mahlaoele ("Vuyani").

[1] P009-2

[4] The respondent argued that the parents were merely granted a residential permit by the City Council of Pretoria on 1 November 1966.

[5] The respondents explained that a family meeting was held in 1986 where Piet Mahlaoele, the father of the aforesaid children, explained to his two children, Vuyani and Elizabeth that Vuyani would purchase the property from the City Council of Pretoria when he was eligible to do so.[2]

[6] On 31 May 1999 Vuyani and his spouse (the respondents) took ownership of the property and duly registered it in their names on 28 June 1999. The respondents also alleged that they had been residing on the property for 53 years, where they renovated and maintained the house. This fact has not been disputed.

[7] It is common cause that the transfer and registration of the property was effected in 1999 whilst the parents were still living. The applicant argued that the parents (who were in fact owners of the property at the time) were not aware of the change of ownership of the property. It was alleged that the respondents failed to inform the parents as well as other members of the family. Simply put, the respondents unlawfully acquired ownership of the property.

[8] The applicant holds the view that the parents died intestate and the property formed part of the deceased estate in terms of the Reform of Customary Law of Succession. This entails that each of the siblings would be entitled to an equal share in the property.

[2] P005-6 - 005-7 par 8.4

[9] The respondents further pointed out that their late sister, Elizabeth, the applicant's wife, had knowledge that the respondents were the lawful owners of the property. This caused her to apologize for the misunderstanding. This fact was alleged in the papers. However, the correspondence confirming this fact was not attached to the papers. The applicant further denied that such concession was made by his late wife.

[10] It is necessary to point out that at the time of this hearing, the parents, Elizabeth and Vuyani (two of the siblings), passed on. However, Vuyani had deposed to the answering affidavit.

[11] In my view, having regard to Annexure 'A3', it cannot be disputed that Piet Mahlaoele was merely granted a residential permit by the City Council of Pretoria allowing him to occupy the municipal dwelling and the premises with effect from 1 November 1966. At the time they were not granted ownership of the property and neither was ownership transferred to the parents.[3]

POINTS *IN LIMINE*

[12] It is, however, necessary to firstly deal with the points *in limine* raised by the applicant. The respondents have raised various points *in limine*, firstly the point on prescription. It was submitted that the cause of action has prescribed; secondly the applicant's replying affidavit was not filed timeously and further no condonation was sought; thirdly there is a *bona fide* factual dispute which cannot be resolved on the papers.

[3] P005-5 par. 6.4 and 6.5

Prescription

[13] The respondents submitted that the applicant's claim to any right in the property prescribed. Such claim constitutes a debt as envisaged in the Prescription Act. Their argument was premised on the fact that the applicant had already been aware that ownership was effected in 1999. Moreso as the applicant's wife, Elizabeth, was aware of the respondent's ownership.

[14] On the issue of prescription, the respondent relied on the following legislative provisions, namely:

14.1 Section 10 of the Prescription Act[4] states the following regarding the extinction of debts by prescription:

"(1) 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."

14.2 Section 11 of the Prescription Act states the following regarding the periods of prescription:

"The periods of prescription of debts shall be the following:

a) …

b) …

c) …

d) Save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[4] Prescription Act 68 of 1969

14.3 Section 12 of the Prescription Act states the following regarding when prescription begins to run:

"(1) Subject to the provisions of subsections (2) and (3), prescription shall run as soon as the debt is due."

[15] The applicant, however, contended that he only became aware of the ownership issue when he started making enquiries in 2021. The respondents contended that the applicant was aware of the transfer of ownership since the applicant's wife, Elizabeth, was aware of this fact.

[16] I, however, find no evidence reflecting that the applicant was aware of the respondents' ownership in 1999 when the transfer took place. Although the applicant's wife, Elizabeth, was a party to the meeting in 1986, the applicant was not present. The only explanation proffered, in paragraph 16.3 of the respondent's affidavit, was that the deceased parents and his late sister (Elizabeth) were aware of the transfer of ownership of the property. [5] In my view, the point of prescription cannot succeed.

Condonation

[17] For this application to succeed, the applicant was required to set out jurisdictional factors demonstrating good cause, and in particular provide sufficient explanation for the delay.

[5] P005-11

[18] Although our courts have refrained from formulating exhaustive requirements in defining "good cause", one of the fundamental requirements is that an affidavit explaining the delay must be set out. If there has been a long delay, the party in default is required to satisfy the court that the relief sought should be granted, especially when the applicant is *dominus litis*.[6] In fact, without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial. A party seeking condonation must make out a case entitling the court's indulgence.

[19] Generally a court in exercising its discretion will have regard to all relevant factors. This includes furnishing a satisfactory explanation, the absence of prejudice to the other party, consideration of public interest in finalizing administrative decisions.[7]

[20] Our courts have been firm that where an applicant fails to provide a basis for condoning the unreasonable delay or in the events taking place after such application had been lodged, such applicant loses his right to complain.[8]

[21] The applicant has further not bothered to explain the late filing of his replying affidavit. I have noted same and no explanation has been proffered for the late filing of such affidavit. The consequence then is that this court should not have regard to the replying affidavit when deliberating on this matter.

Dispute of fact

[6] Van Wyk v Unitas Hospital 2008 (2) SA 472 (Van Wyk matter)
See also Silber v Ozen Wholesales (Pty) Ltd 1954 (2) SA 345A
[7] Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13A at 41
[8] Lion Match Co. Ltd v Paper Printing Wood and Allied Workers Union 2001 (4) SA 149 SCA at 158B-E

[22] The third point is premised on the fact that there is a dispute on the papers which cannot be resolved on the papers. However, during the hearing, counsel for the respondent conceded that this matter can be resolved on the papers. I am of the view that the matter can be resolved by taking a robust common sense approach.

[23] In the often quoted authority of ***Sofiantini***[9] the court stated:

"A bare denial of the applicants' material averments cannot be regarded as sufficient to defeat the applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by the respondent to enable the court to conduct a preliminary examination … and to ascertain whethr the denials are not intended to delay the hearing."

[24] The court, however, warned that:

"If by mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then the motion proceedings are worthless for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common sense approach to a dispute on motion otherwise the effective functioning of the court can be humiliating and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute of fact."

[25] On the evidence in the papers, I find it in the respondents' favour, particularly in paragraph 8.4 of his opposing affidavit where he alleged the following:

[9] Sofiantini v Mould [1956] 4 All SA 171 E

"In 1986 a family meeting was held at the property in question between my late father (Piet Mahlaoele, me and my late sister Hlekani Elizabeth Masoanganye (born Mahlaoele). In terms of our Shangaan culture, my late mother (Phepho Mahlaoele), my youngest sister (Johanna Mahlaoele) and my wife (the second Respondent) was not allowed to attend the said meeting, but was present at the property in question. During the said meeting my father explained to my late sister and me that I would buy the property in question from the City Council of Pretoria once I was eligible to do same."

[26] The applicant has failed to place a tenable version before this court on the issue that the wishes of the parents were disclosed at such meeting. The applicant's version constitutes a bare denial.

[27] In my view, ownership of the property was legally transferred to the respondents.[10] The respondents have sufficiently proven that it had acquired lawful ownership.

COSTS

[28] The applicants further sought a punitive costs order on the basis that the litigation was unnecessary and misconstrued. However, in exercising my discretion, I am not amenable to grant a punitive order. Such an order is only granted in limited instances, particularly where there is evidence for, *inter alia*, reckless or an intentional disregard of the rules of court.

[10] P005-7 par 8.5, 8.6 and Annexure 'M3' and 'M4'

[29] It has generally been said in several of the cases that the court will issue a cost award on attorney and client scale as a matter of showing its displeasure against a litigants' objectionable conduct. Erasmus Superior Court Practice,[11] explains that the awarding of costs on attorney and client scale is not, as has been suggested by the authorities, limited to the concept of the court showing its disapproval of the conduct of the offending party. In other words, the ground for awarding these costs is not limited to punishing the offending party but includes ensuring that the successful party will not be out of pocket in respect of the expenses caused to him or her by the approach to litigation by the losing party. In this respect, the learned authors had the following to say:

"In some of the cases it has been said that the court makes an order of attorney and client costs in order to mark its disapproval of the conduct of the losing party. This terminology suggest that an award of attorney and client simply as punishment does not, however, supply a complete explanation of the grounds on which the practice rests; something more underlies in that the mere punishment of the losing party. On the other hand, the order cannot be justified merely as a form of compensation for damages suffered. The true explanation of awards of attorney and client costs not expressly authorized by statute is that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considered it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation."

[11] Van Loggerenberg: Erasmus Superior Court Practice Volume 2 (second edition), page G5-21

[30] In ***Ferreira***[12] the court said:

"The Supreme Court has, over the years developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs."

[31] I find that in these circumstances there is no evidence of intentional, outrageous, reckless or conscious disregard of the court processes or its rules. Hence a case for a punitive costs order has not been made.

[32] I make the following order:

This application is dismissed with costs.

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H KOOVERJIE

JUDGE OF THE HIGH COURT

Appearances:

[12] Ferreira v Levin NO and Others 1996 (2) SA 621 (CC) at par 3

Counsel for the applicant:	Adv RV Maodi
Instructed by:	JT Leso Inc
Counsel for the respondent:	Adv GL Kasselman
Instructed by:	JW Wessels & Partners Inc
Date heard:	24 October 2022
Date of Judgment:	31 October 2022