THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

No precedential value

Case No: 515/2009

In the matter between:

ROSEMARY M MATHAVHA NO
Appellant

and

ZIBA SIBEKO
Respondent

Neutral citation: *Mathavha v Sibeko* (515/09) [2010] ZASCA 100 (7 September 2010)

Coram: Conradie, Maya, Shongwe, Tshiqi JJA and K Pillay AJA

Heard: 24 August 2010

Delivered: 07 September 2010

Summary: Sale of land – first sale found to be valid – second purchaser bought and took transfer of property with knowledge of first sale -- ordered to transfer property to estate of first purchaser.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Preller J sitting as court of first instance):

The appeal succeeds with costs. The order of the court *a quo* is set aside and replaced by an order reading as follows:

‘1. The sale agreement between the Municipality and the deceased dated 18 November 2000 and annexed to the particulars of claim is declared to be valid;

2. The respondent is directed to take all necessary steps to transfer erf 1577, Extension 9, Lebohang, Leandra to the estate late M M Ramarope.

3. In the event that the respondent fails to take such steps, the deputy sheriff is authorised to sign all necessary documents and take all other necessary steps to ensure the transfer of erf 1577 Lebohang to the estate late M M Ramarope.

4. The respondent is to pay the costs of the application.’

JUDGMENT

CONRADIE JA (MAYA, SHONGWE, TSHIQI JJA and K PILLAY AJA concurring)

[1] The appellant is the executor of the estate late M M Ramarope (the deceased) who on 18 November 2000 concluded with the predecessor of the Govan Mbeki Local Municipality a written contract in terms of which he bought from the Municipality a property described as Erf 1577, Extension 9, Lebohang, Township, Leandra for R135 000. The Municipality, cited as the second defendant, has abided the judgment of the court.

[2] Six years later on 20 November 2006, the respondent, for R171 114, acquired

from the Municipality the same property (which had, through no fault of the deceased, not yet been transferred to him) in terms of a written contract dated 20 November 2006 and took transfer of the property on 16 May 2007.

[3] The trial was heard as a stated case by the North Gauteng High Court which granted leave to appeal against its judgment dismissing the appellant's claim for transfer of the property from the respondent.

[4] The stated case records the consensus of the parties on the following:

> 'At all material times and in particular when the First Defendant purchased the property the First Defendant knew that a valid and binding sale agreement existed between the Plaintiff and the Second Defendant . . .'.

[5] This agreement really disposes of the matter. Mr Muller for the respondent did not argue that once the respondent knew of the earlier (valid) sale, he would not be obliged to transfer the property to the appellant. The decision not to defend the conclusion of the court *a quo* that the respondent had been shown to be 'dishonest (if not fraudulent)' was a wise one. *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere*,[1] 'saw the demise', as Prof Gerhard Lubbe puts it,[2] 'of the fraud construction'.

[6] The stated case does the respondent no injustice. In 1988 the Municipality put the property out to tender. It would seem that the respondent tendered for the property in competition with the deceased.

[7] According to the stated case the Municipality in 1998 'resolved to recommend' that the property be awarded to the respondent. Of course, a resolution by a local authority to enter into a contract is no more than an instruction to its officials to act in

1 1982 (3) SA 893 (A) at 910A–911B.

2 A doctrine in search of a theory: reflections on the so-called doctrine of notice in South African law, 1997 *Acta Juridica* 246.

the manner authorised by the resolution. Before the official has concluded the authorised contract, the local authority acquires no rights and incurs no obligations. In particular, the resolution could not (as was at one time thought) have created an option contract between the Municipality and the respondent. Quite apart from that, the offer comprising such an 'option', to be valid, would have had to be in writing so that a written contract might be constituted by acceptance of the offer.

[8] After the Municipality had resolved to enter into a sale agreement with the respondent, but before it had entered into any legal relationship with him, it would appear that it, the respondent and the deceased arranged for the deceased to buy the property.

[9] The respondent maintains that he then orally ceded his right to purchase the property to the deceased but, as I said above, he had not acquired any right that might be capable of cession and, anyway, interest in land can only be ceded if the cession is evidenced in writing. When the deceased bought the property he could not have done so as the cessionary of any right acquired from the respondent.

[10] The written cession concluded between the deceased and the respondent on 27 November 2000 is a sadly defective agreement. In the first place, it was concluded on a date after the sale between the Municipality and the deceased when, assuming that any right capable of cession had been created, there was none left to cede; in the second place, the consent of the municipality (which had not been obtained) was required for the validity of the cession.

[11] Clause 10 of the cession contains a curious provision:

> 'In the event of the cessionary passing away before transfer of the property in the name of the cessionary this agreement will lapse and any amount paid by the cessionary in terms hereof will be refunded to the executor of his estate.'

[12] Leaving aside the consideration that it is futile to attempt to extract a sensible meaning from the clause, it falls to the ground with the remainder of the cession. One would have thought that the appellant would under these circumstances on the basis of unjustified enrichment, have been entitled to repayment of the R30 000 paid in terms of the cession. However, there is no claim for this amount in the summons and Mr Smit for the appellant did not press it.

[13] The stated case contains a tender to pay to the respondent the purchase price that he had paid to the Municipality and the costs of transferring the property to the plaintiff. We are obviously bound by the tender which seems to be a sensible solution to the dilemma in which the parties find themselves.

[14] Since the municipality is not a party to the stated case acknowledging the validity of the agreement between it and the deceased, it would be best to declare that agreement to be valid.

[15] The Registrar of Deeds Pretoria was cited as a party but the notice of appeal does not mention him as a party so that it is not clear whether he has had notice of these proceedings or not. In the circumstances the order cancelling the registration of transfer of erf 1577 cannot be granted but such an order would in any event be superfluous.

[16] The appeal succeeds with costs. The order of the court *a quo* is set aside and replaced by an order reading as follows:

‘1. The sale agreement between the Municipality and the deceased dated 18 November 2000 and annexed to the particulars of claim is declared to be valid;

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4. The respondent is to pay the costs of the application.'

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J CONRADIE

JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	M Smit Instructed by Stabin Gross & Shull, Johannesburg Claude Reid Inc, Bloemfontein
RESPONDENTS:	G C Muller SC (with him N A R Ngoepe) Instructed by TMN Kgomo & Associates, Pretoria Symington & De Kok, Bloemfontein