



**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: 25460/22**

In the matter between:

**TMNS ENTERPRISE (PTY) LTD**

Applicant

and

**THE DEEDS OFFICE OF PRETORIA**

First Respondent

**SUN INTERNATIONAL SOUTH AFRICA LTD**

Second Respondent

**ANNELISE CATHARINA BUCHLING**

Third Respondent

**Delivered:** This judgment was handed down electronically by circulation to the to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 12 June 2023.

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**JUDGMENT**

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**LG KILMARTIN, AJ:**

**INTRODUCTION**

[1] This is an application brought by the Applicant, TMNS Enterprise (Pty) Ltd, in terms of sections 4 and 6 of the Deeds Registry Act, 47 of 1937 (“the Act”), wherein it seeks an order cancelling Title Deed number T156656/2003 (“the 2003 Title Deed”) in respect of portions 6, 7 and 8 of the Farm Boschplaats 91 (“Boschplaats 91”), Registration Division JR, Province of the North West (hereinafter collectively referred to as “the properties”), which are owned and registered in the name of the Second Respondent, Sun International (South Africa) Ltd.

[2] Section 6 of the Act reads as follows:

***“Registered deeds not to be cancelled except upon an order of Court***

*(1) Save as is otherwise provided in this Act or in 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.*

*(2) 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.”*

[3] The Second Respondent took transfer of the properties on 20 November 2003 under the 2003 Title Deed. In a nutshell, the Applicant alleges that the 2003 Title Deed was tainted by fraud and thus the transfer pursuant thereto is null and void *ab initio*.

[4] The Applicant also seeks ancillary relief in the form of an order that it may appoint a conveyancer to lodge the cancellation of the 2003 Title Deed at the Deeds Office of Pretoria, which is cited as the Fourth Respondent.

[5] The Third Respondent cited in these proceedings is Annelise Catharina Buchling, a qualified and registered conveyancer. The Third Respondent's role was limited to acting as the correspondent conveyancer who executed the documents before the First Respondent, in accordance with the mandate and instruction of the seller of the properties, being the National Government of the Republic of South Africa ("the Government of the Republic of South Africa").

[6] The day before the hearing the Applicant uploaded a Rule 35(9) notice, in terms of which the Applicant advised that it intended proving the following documents at the hearing of the matter:

- “1. *Satellite Picture – Portion 4R, Boschplaats, JR 91*
2. *Satellite Picture – Portion 6, Boschplaats, JR 91*
3. *Satellite Picture – Portion 7, Boschplaats, JR 91*
4. *Satellite Picture – Portion 8, Boschplaats, JR 91*

5. *Satellite Picture – Portion 10, Boschplaats, JR 91*
6. *Streetview – Boschplaats, JR 91 – T2781986 Sub-division Thaba Yabatho AH and Remainder of Boschplaats, JR 91*
7. *SG Diagram Boschplaats, JR 91 – Y31/1993, Y63/1993 and Y64/1993”.*

[7] The Second Respondent responded to the Rule 35(9) notice during the afternoon of the day preceding the hearing and advised that it objected to the delivery of the notice on the basis that it was irregular. The Second Respondent further declined to make any admissions in respect of the documents referred to in the Rule 35(9) notice.

[8] The documents mentioned in the Rule 35(9) notice did not form part of the record and, hence, none of the Respondents had an opportunity to deal with them in affidavits. Absent an application in terms of Rule 35(13), the notice in terms of Rule 35(9) was irregular and counsel for the Applicant was advised that such documents could not be referred to at the hearing as the Respondents would be prejudiced thereby. The Applicant's counsel was further advised that should it wish to proceed with a Rule 35(13) application, it could do so but it would need to apply for a postponement of the matter. The Applicant then advised that it wished to proceed.

[9] There were two interlocutory applications before me which were dealt with at the commencement of the hearing, namely:

[9.1] an opposed application for an order condoning the late filing of the Second Respondent's answering affidavit;

[9.2] an unopposed application condoning the late filing of the Third Respondent's answering affidavit.

[10] Having heard counsel and having read the papers filed of record in the interlocutory applications, I was satisfied with the explanation for the late filing of the answering papers in both applications and accordingly condoned the late filing of the Second Respondent's answering affidavit and the Third Respondent's answering affidavit, with no order as to costs.

[11] Various points of *limine* were raised by the Second and Third Respondents which will be dealt with below. Before doing so, I wish to provide a summary of the relevant background facts.

### **RELEVANT BACKGROUND FACTS**

[12] The 2003 Title Deed reflects that the previous owner of the properties was the Government of the Republic of South Africa. Notwithstanding this, in this application the Applicant contends that it was the original owner of the property and seeks transfer of the properties into its name. I interpolate to point out that, the 2003 Title Deed, previous deeds under which the properties were held and records in the Deeds Office do not reflect that the Applicant was ever the owner of the properties.

[13] By way of background:

[13.1] The properties in question once formed part of Boschplaats 91.

[13.2] Boschplaats 91 was approximately 801 hectares in extent and was owned by one Andries Petrus van der Walt who acquired the farm on 15 October 1860. Over the years, the farm was subdivided and sold off to different buyers.

[13.3] During 1993, Boschplaats 91 was subdivided and Portions 4 and 10 were created and were registered in the name of the Applicant on 25 May 1993 and 31 August 1993, respectively.

[13.4] The diagrams of the Surveyor General indicate that the subdivisions which created Portions 6, 7 and 8 (which comprise the properties relevant to this application) were also created during or about 1993. Although the Applicant contended that Portion 8 does not exist or is not recognised in the Surveyor General diagrams, this is not so and I was pointed to the relevant document in the record evidencing that Portion 8 does exist and is recognised.

[13.5] Prior to subdivision, Portions 6, 7 and 8 remained in the name of the Republic of Bophuthatswana with the Second Respondent holding all other rights in and to the property in terms of a 99-year lease.

- [13.6] In terms of section 239(1) of the Interim Constitution, Act 200 of 1993, all property registered in the name of the Republic of Bophuthatswana vested in the Republic of South Africa with effect from 27 April 1994.
- [13.7] On 5 May 2002, the Government of the Republic of South Africa and the Second Respondent concluded a written sale agreement in terms of which the Second Respondent purchased the properties for an amount of R1 400 000.00. Thereafter, the Second Respondent took transfer of the properties and they were registered in the Second Respondent's name on 20 November 2003, as is reflected on the 2003 Transfer Deed.
- [13.8] On 30 October 2020, the Applicant's attorneys, Molati Attorneys, addressed a letter of demand to the Second Respondent and claimed to writing on behalf of "*the community in trust*". In that letter, a meeting was requested with the Second Respondent to discuss the properties which were "*generally known as Carousel Casino*" and the transfer of such properties. Importantly, in paragraph 2 of that letter the following is stated:

*"Ours is to seek your approval for Molati Attorneys Inc. to initiate the process of rectifying the transfer back to the National Government of the Republic of South Africa, which we believe was erroneously transferred to Sun International Hotels Limited on the 20<sup>th</sup> of November 2003. Details leading to the above determination shall be*

*discussed at the proposed meeting where information relating to the property shall be shared.”(sic). (Underlining added).*

[13.9] On 11 November 2020, a further email was sent by the Applicant’s attorneys to the Second Respondent which attached documents to “*enable the rectification transfer*”. It was further stated that:

*“You are hereby placed **in mora** for a period of **14 days** failure to comply with what should be done to protect and promote the laws of the Republic of South Africa, we will institute legal proceedings without further notice.” (sic).*

[14] It is clear from the initial demands that it was accepted by the Applicant that the rightful owner of the properties prior to the Second Respondent was the Government of the Republic of South Africa and not the Applicant. As will be demonstrated below, the Applicant did a *volte face* when it came to its version in this application.

[15] In paragraphs 10 and 11 of the founding affidavit the following was stated:

*“10. The primary basis upon which the cancellation of the title deed is predicated upon is that the deed of transfer is tainted by fraud and thus any transfer consequent there from is null and void ab initio.*



11. *Consequent upon such cancellation the Applicant seeks the property to be transferred **back to its original owner being TMNS Enterprise (Pty) Ltd.*** ” (Emphasis added).

[16] Furthermore, in paragraph 22 of the founding affidavit, the following was stated:

*“22. The Applicant is suited to bring this application by virtue of the fact that he is the Director of T.M.N.S. Enterprise (Pty) Ltd and the lawful owner of Portion 10 (a portion of Portion 4) of the Farm Boschplaats 91, Registration Division J.R held under Certificate of Registered Title No T360/1993. In addition, the filling station situated on the abovementioned land had fuel reserve tanks storage on the portions in dispute.”*

[17] It is unfathomable how the Applicant could suddenly claim to be the owner of the properties despite: (i) initially acknowledging that the Government of the Republic of South Africa was the previous owner; and (ii) none of the documents evidencing this. To exacerbate matters, in the Applicant’s practice note which was filed in terms of paragraph 154 of the Judge President’s Revised Consolidated Directive, 2 of 2020, it was stated in paragraph 4.1, under the heading “*CONTENTIONS BY THE APPLICANT*” that:

*“The **whole Farm 91 Boschplaats No. 91 was owned by the Applicant** under T164/1993 as per annexure ‘RA1’ annexed to the replying affidavit. (016-14 to 016-16).”* (Emphasis added).

[18] A perusal of the document referred to demonstrates that it only relates to the transfer of Portion 4 to the Applicant and does not evidence that the Applicant owned the whole of Boschplaats 91.

[19] On 27 May 2022, after the application had been served, the Registrar of Deeds, Pretoria ("Registrar") filed a report in which it was *inter alia* recorded under paragraph 3.2 thereof that:

*"It is evident from the referred section [section 6(2) of the Act] that the Registrar of Deeds will only cancel the title which is mentioned to the extent of the title in which the property was held immediately prior to the registration of the deed which is cancelled, which will be the TMNS ENTERPRISES (PTY) LTD."*(sic).

[20] In paragraph 4 of the report the following was stated:

*"4. Except for my comments in paragraph 3 above, I have no objection to the granting of an order as prayed provided the proposed amendment complies with all the relevant statutory provisions and the Deeds Office procedures."*

[The aforementioned report will be referred to below as "*the Registrar's initial report*"]

[21] As no documents attached to these affidavits nor any of those filed in the Deeds Office ever reflected the properties as having been registered in the name of the Applicant, the content of the Registrar's initial report - insofar as it identified the Applicant as the previous owner of the properties - was clearly incorrect.

[22] After noting the error in the Registrar's initial report, the Second Respondent's attorneys addressed correspondence to the Registrar on 10 June 2022, advising the Registrar of the correct position and requesting that an amended report clarifying the position urgently be filed. The Registrar's initial report was relied upon by the Applicant in an urgent application which was struck from the roll.

[23] On 13 June 2022, the Registrar issued a second report and stated the following in paragraphs 2 and 3 thereof:

"2. *The previous report refers and be amended as follows in respect of para 3.2, paragraph 2.*

*It is evident from the referred section that the Registrar of Deeds will only cancel the title which is mentioned and the property will then revert back to the previous owner to the extent of the title in which the property was held immediately prior to the registration of the deed which is cancelled which will be the NATIONAL GOVERNMENT OF SOUTH AFRICA.*

3. *Except for my abovementioned comments, I have no objection to the granting of an order as prayed provided the proposed transfer complies with the relevant statutory provisions and Deeds office requirements." (sic).*

[The aforesaid report will be referred to below as "the Registrar's amended report"]

[24] In paragraph 7.1.6 of the Applicant's heads of argument, the following was stated:

*"7.1.6 The Government of the Republic of South Africa, Department of Agriculture, land reform and rural development through the Office of the Registrar of Deeds filed a Report to the Court dated 13 June 2022 [i.e. the Registrar's amended report], which confirms that they do not have an objection to the cancellation of the said title deed T156656/2003. A Report is uploaded into case lines page **016-20 to 016-21** annexure to the applicants replying affidavit." (sic)*

[25] The Registrar's amended report self-evidently does not constitute a report from the Government of the Republic of South Africa or the Department of Agriculture, Land Reform and Rural Development ("the Department of Agriculture"), as submitted. Furthermore, the Registrar of Deeds' lack of objection can, on no conceivable basis, be construed as there being no objection to the relief sought by the Government of the Republic of South Africa or the Department of Agriculture. The Second Respondent's counsel submitted that the Applicant's erroneous suggestion that the Registrar of Deeds is somehow the Government of the Republic of South Africa is a misguided attempt to overcome its fatal non-joinder of the Government of the Republic of South Africa to these proceedings. The non-joinder point is dealt with in detail below.

### **SUMMARY OF THE PARTIES' CONTENTIONS**

[26] In the Applicant's heads of argument, the following was submitted:

- [26.1] the Applicant is the owner and registered Title Deed holder of Portion 4 of Boschplaats 91, under Title Deed T164/1993. [As explained above, the evidence does not show this.];
- [26.2] in 2003, Portions 6, 7 and 8 were subdivided by the Second Respondent from Portion 4. The subdivision led to the Second Respondent being the alleged owner of Portion 6, 7 and 8 and this was done without the knowledge of the Applicant. [The Second Respondent's counsel pointed out in his heads of argument that the allegations to this effect were made for the first time in reply but were in any event wrong. Based on the documentation considered by the Court, the properties were not subdivisions of Portion 4.];
- [26.3] Portion 8 does not exist and is not recognised by the Surveyor-General diagram. [That aspect has been dealt with above and this submission is also incorrect and not supported by evidence];
- [26.4] the Applicant had no knowledge of the sale of the properties by the Government of the Republic of South Africa to the Second Respondent;
- [26.5] the Government of the Republic of South Africa and the Department of Agriculture, through the Registrar, filed the Registrar's initial report which confirms that the Registrar did not have any objection to the cancellation of the 2003 Title Deed.

[The Registrar's initial report is not a report by the Government of the Republic of South Africa or the Department of Agriculture.]; and

[26.6] the Government of the Republic of South Africa and Department of Agriculture, through the offices of the Registrar of Deeds, filed the Registrar's amended report which confirms that "*they*" do not have an objection to the cancellation of the 2003 Title Deed. [The Registrar's amended report is also not a report by the Government of the Republic of South Africa or the Department of Agriculture.].

[27] It is clear from the above that, from the above submissions made by the Applicant, only one could be correct.

[28] In reply, the Applicant (impermissibly) sought to introduce a new basis for justifying the relief sought by it (which was persisted with in the Applicant's heads of argument), namely that the Second Respondent had failed to produce a written agreement of sale as required in terms of the Alienation of Land Act, 68 of 1981 ("the Alienation of Land Act"). Although not expressly stated, it was implied that the transfer to the Second Respondent should never have taken place by virtue of the fact that there was no sale agreement concluded in writing. The Second Respondent explained that it had not been able to locate the sale agreement as 20 years had passed since it was concluded and that it was also not able to locate a copy of the agreement.

[29] Although no written agreement of sale could be located or produced, there is no basis to say that a written agreement of sale in full compliance with the Alienation of Land Act did not exist at the time of the transfer. It was pointed out by the Second Respondent that the transfer of the properties could not have taken place without a written agreement by virtue of the very prohibition that the Applicant raised. It was further pointed out that the 2003 Title Deed refers to the date of sale as being 5 May 2002 which must have been inserted based on the date in the agreement.

[30] In addition to the above, the Second Respondent referred to the top right-hand corner of the 2003 Title Deed which records that "*Kruger LJ [c]onveyancer*" prepared it. It was explained that this "*prep clause*" is inserted pursuant to the provisions of Regulation 43 of the Regulations promulgated under section 10 of the Deeds Registries Act ("the Regulations"). Regulation 44A of the Regulations provides that the person signing the "*prep clause*" accepts responsibility for the correctness of the facts stated in the deeds or documents concerned. I agree with the Second Respondent that Mr Kruger would not have been able to prepare the Deed of Transfer without having had sight of the sales agreement and would not have signed the "*prep clause*" unless he had seen the date of sale in the sale agreement.

[31] Insofar as the Second Respondent's opposition is concerned, it contends that the application should be dismissed with punitive costs for the following reasons:

[31.1] the Applicant has no *locus standi*;

- [31.2] there was no basis for the properties to be “*transferred back*” to the Applicant and the relief sought was incompetent;
- [31.3] since the Applicant seeks to have the properties registered in its name to the exclusion of the Government of the Republic of South Africa, being the previous owner, the Government of the Republic of South Africa obviously has a direct and substantial interest in the proceedings. As such, it ought to have been joined but was not and this non-joinder is fatal to the application; and
- [31.4] even if the relief was competent (which the Second Respondent denies), the Applicant had not made out a case for the relief it seeks;
- [31.5] the allegations of fraud are unsubstantiated and reckless. The transfer made was not pursuant to fraud and was not null and void *ab initio* or at all; and
- [31.6] the Applicant is not seeking to pursue truth or justice but is using the court proceedings, in the form of this application, as a mechanism to obtain registration of very valuable properties for no consideration and, as such, the application constitutes an abuse of process.



[32] Insofar as the Third Respondent's opposition is concerned, she contends that no cause of action has been made out which would justify the cancelling of the 2003 Title Deed and submits that:

[32.1] in terms of section 4 and 6 of the Act, the Applicant is expected to prove some form of fraud and forgery and that this has not been done;

[32.2] the Applicant's suggestion that the powers of attorney that the Third Respondent relied upon, acting merely as the correspondent for the conveyancing team, were somehow flawed, or forged, or presented or relied upon fraudulently, is baseless;

[32.3] the alleged fraud and forgery is ostensibly drawn from an indirect, non-descript form of an inference, by referring to the value of the property at the time of its transfer in 2003, which was R1 400 000.00;

[32.4] the Third Applicant's role and function was strictly limited to acting as a correspondent and thus as a creature of instruction, with the specific and narrow mandate limited to executing the documents before the Registrar. This involvement could not be interpreted in any other manner or be placed and viewed in any other context either;

- [32.5] the Third Respondent was in no way whatsoever involved in the drafting of any of the documents in respect of the transaction in dispute, in any sense, context, construction or understanding whatsoever. She pointed out that the author and responsible person was one “LJ Kruger”, the inhouse conveyancer at Hofmeyr Herbstein & Gihwala Inc. (as it was then known) who procured, drafted and prepared the documents. It was further pointed out by the Third Respondent that the statutory responsibilities as well as the identity of the responsible person are found in *inter alia* Regulations 43, 44(1) and 44A read with section 15A(1) and (2) of the Registration of Deeds Act, 47 of 1937, as amended;
- [32.6] the founding papers failed to set out how the valuation ostensibly accepted by the parties as well as the powers of attorney that the Third Respondent executed upon as correspondent, may cause, prove, point or impute any involvement in fraudulent activities attributed to, or perpetrated, by the Third Respondent, or how it created the nexus for citing the Third Respondent;
- [32.7] the Applicant failed to record averments that reflect the elements of fraud and forgery or any other crime and furthermore failed to point out, identify and name the role players, and was silent on their alleged roles, contribution or participation; and

[32.8] the Applicant also failed to lay any foundation for some undefined form of professional failure as a conveyancer that could be attributed to the Third Respondent.

[33] The Third Respondent further contended that the vexatious and defamatory averments which were made in the founding affidavit made it necessary to file a notice of intention to oppose and answering papers in order to defend and protect her good name and professional and personal reputation.

### **POINTS IN LIMINE**

#### **(a) No locus standi**

[1] A party wishing to institute legal proceedings must have a direct and substantial interest in the dispute which is the subject-matter of the proceedings. The Applicant must have a right to assert a claim.<sup>1</sup>

[2] The Applicant's *locus standi* in this matter was (initially) based on its allegation that it was the lawful owner of "*Portion 10 (a portion of Portion 4 of the Farm Boschplaats 91)*" and, in addition, that "*the filling station situated on the aforementioned land has fuel reserve tanks storage on the portions in dispute*".

[3] In paragraph 52 of the Second Respondent's answering affidavit, the following was stated:

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<sup>1</sup> *Smyth v Investec Bank* 2018 (1) SA 494 (SCA) at para [54].

“52 I am aware that there are fuel storage tanks located across the road from the Properties. These fuel storage tanks are not located on property owned [by the Second Respondent] but rather on property that is owned by the Govt of the RSA. Even if the filling station across the road from the Carousel did have fuel reserve storage tanks located on the Properties, this would also not confer on [the Applicant], whose relationship to the filling station is not explained, locus standi to institute the current proceedings.”

[4] The aforesaid paragraph is merely met with a bald denial in paragraph 20 of the replying affidavit. In the circumstances, as final relief is sought in these proceedings, the Respondents' version is to be accepted based on the *Plascon-Evans* principles.<sup>2</sup>

[5] The Deeds Office records reflect that the Applicant is the owner of Portions 4 and 10 of the Farm Boschplaats 91 and that it does not own any of the other portions of the Farm Boschplaats 91, including the properties in question.

[6] It was contended by the Second Respondent's counsel that the Applicant's ownership of nearby or neighbouring properties of immovable property does not bestow any rights on it to make claims in respect of the 2003 Title Deed. I agree with this and point out that the Registrar's amended report also confirms that if the 2003 Title Deed is cancelled, the properties will revert back to the previous owner which will be the Government of South Africa.

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<sup>2</sup> *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 627 C.

[7] Insofar as the new case made out in reply to the effect that the properties are subdivisions of Portion 4, this is not supported by any of the evidence and, based on the documents this court has seen, is incorrect. The Applicant has not claimed that it represents the Government of the Republic of South Africa and the Second Respondent alleges that the Government of the Republic of South Africa has never raised any irregularities in relation to the properties and their subsequent transfer to the Second Respondent.

[8] In the circumstances, I am of the view that:

[8.1] the Applicant has not established that it has any right to apply for the cancellation of the 2003 Title Deed;

[8.2] the Applicant has not provided any evidence which would support a finding that it has a direct and/or substantial interest in the properties;

[8.3] it appears that, although the Government of the Republic of South Africa could legitimately challenge the ownership of the properties and pursue the relief sought, it has never done so.

[9] In the light of this, I am satisfied that the Applicant had no *locus standi* to bring this application for the relief sought by it and the application stands to be dismissed on this basis alone.

**(b) Non-joinder of the Government of the Republic of South Africa**

[10] In order for a joinder to be necessary, the party to be joined must have a direct and substantial interest in the subject-matter of the litigation, the relief claimed and the likely outcome thereof, such that the order claimed could not be carried into effect without impacting on a legal right or obligation of that party.<sup>3</sup>

[11] It is contended by the Second Respondent that the Government of the Republic of South Africa should have been joined for the following reasons:

[11.1] the Applicant made far-reaching allegations of fraud implicating not only the Second Respondent but also the Government of the Republic of South Africa (which would then have been a fellow participant in the alleged fraud). In this regard, it was contended that the Power of Attorney criticised by the Applicant as disregarding the laws of democracy was signed on behalf of the Government of the Republic of South Africa;

[11.2] the 2003 Title Deed records the Government of the Republic of South Africa as the previous owner of the property; and

[11.3] the Registrar's amended report made it clear that the properties would be transferred into the name of the Government of the Republic of South Africa upon cancellation of the 2003 Title Deed and, contrary to this, the Applicant claimed in the founding affidavit that it seeks to have the properties transferred into its name.

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<sup>3</sup> *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) at [9] to [11].

[12] In the circumstances, I agree that the Government of the Republic of South Africa would be materially and adversely impacted by the relief sought and ought to have been joined in these proceedings. The non-joinder of the Government of the Republic of South Africa also renders this application defective. In the replying affidavit, the Applicant reserved the right to join the Government of the Republic of South Africa but this was not done.

[13] The non-joinder of the Government of the Republic of South Africa, despite being forewarned that this point would be raised and the Applicant reserving the right to bring a joinder application but failing to do so, also justifies the dismissal of this application.

**(c) No cause of action made out on the basis of fraud**

[14] Despite the very serious allegations made of fraud, there is not a shred of evidence before the Court to sustain such a cause of action and, in fact, the essential allegations to be made when relying on fraud are not made.

[15] The onus of proving fraud has to be discharged on the balance of the probabilities, however, where fraud is alleged, the courts will not likely infer it. Fraud must be clearly established.<sup>4</sup>

[16] The evidence before the Court does not support the bald allegations of fraud and the Second Respondent and the Third Respondent have denied any fraud.

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<sup>4</sup> *Loomcraft Fabrics CC v Nedbank Limited and Another* 1996 (1) SA 812 (A) at 817 F-H.

[17] The allegations of fraud were, in my view, made recklessly and demonstrate *mala fides* on the part of the Applicant.

[18] In the circumstances, I am of the view that no cause of action was made out for the relief sought under sections 4 and 6 of the Act.

**(d) Abuse of process**

[19] The Second Respondent argued that the application constitutes an “*abuse of process*” and referred the Court to, *inter alia*, section 173 of the Constitution which vests in the judiciary the authority and power to prevent any possible abuse of process.<sup>5</sup>

[20] Having considered the authorities referred to in the Second Respondent’s heads of argument and the facts of this case, I am of the view that there has not been “*an abuse of process*” in the context set out in the authorities referred to. It would appear that the Applicants were advised to proceed with the litigation after receiving legal advice and were advised that there was merit in their case. There is no evidence of abuse of the Rules of Court or the procedure for a purpose extraneous to the objective of facilitating the pursuit of truth.

[21] In light of what is stated above, the application falls to be dismissed with costs.

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<sup>5</sup> *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734 C-G.



## COSTS

[22] Insofar as the costs of this application are concerned, the Court needs to consider the position of the Second Respondent and the Third Respondent separately.

[23] The Second Respondent has been successful in its opposition to this application and, in my view, costs should follow the result. Insofar as a punitive cost order is concerned, I am of the view that: (i) the allegations of fraud made without any evidence to substantiate this; and (ii) the drastic change in the Applicant's case – going from acknowledging that the Government of the Republic of South Africa was the previous owner of the properties to falsely and opportunistically stating that the Applicant, in fact, was the previous owner (without a shred of evidence to support it), justify the granting of a punitive cost order in this matter.

[24] Insofar as the Third Respondent is concerned, it is highly regrettable that the Applicant saw fit to make serious and vexatious allegations of fraud in respect of a professional person without any substantiation, thereby tarnishing her reputation without any basis in Court papers which are available to the public. The Third Respondent was dragged before this Court without the Applicant even seeking any relief against her and she had no option but to oppose the matter in order to set the record straight about her role in the matter and to address the baseless allegations of fraud. In my view, the Applicant's conduct warrants censure.

[25] In paragraph 3.4 of the joint practice note prepared by the Advocates' Counsel the following was stated:

*"3.4 The applicants' seeks no relief from the Third Respondent in this application. But the applicant reserved it rights to argue costs against the third respondent, should the third respondents' persists in its opposition of the relief sought applicants'." (sic)*

[26] At the hearing, counsel for the Applicant indicated that there was "*no basis for this application against the Third Respondent*" and she should not have opposed the application. I disagree with the Applicant's counsel's contention that the Third Respondent should not have opposed this application. She is a duly admitted attorney and conveyancer and had no option but to oppose it having regard to the serious allegations levelled against her which were entirely unsubstantiated and in order to put her version before the court.

[27] In the circumstances, I am of the view that the Applicant should be directed to pay punitive costs in respect of the Third Respondent on the attorney and client scale.

### **ORDER**

In the light of the above, I make the following order:

1. The application is dismissed; and

2. The Applicant is directed to pay the costs of the Second and Third Respondents on the attorney and client scale.

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**LG KILMARTIN**  
ACTING JUDGE OF THE HIGH COURT  
PRETORIA

Dates of hearing:	14 March 2023
Date of judgment:	12 June 2023
For the Applicant:	Adv P Tshavhangwe
Instructed by:	Molati Attorneys Inc.
For the First Respondent:	No appearance
For the Second Respondent:	Adv T Dalrymple
Instructed by:	Edward Nathan Sonnenbergs Inc.
For the Third Respondent:	Adv J Vorster
Instructed by:	John Walker Attorneys