



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **2846/2021P**

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

and

UNITY AFRICA TRADING CC

FIRST RESPONDENT

HEDRAPHASE INVESTMENTS (PTY) LTD

SECOND RESPONDENT

LOWE AND WILLS ATTORNEYS

THIRD

RESPONDENT

FIXTRADE 1507 (PTY) LTD t/a NATHI ZULU

FOURTH

RESPONDENT

PROPERTIES

(Registration number 1999/034203/23)

KATHIJA LIMALIA AND ASSOCIATES ATTORNEYS

FIFTH RESPONDENT

SAMUEL KHUMALO

SIXTH RESPONDENT

INGONYAMA TRUST

SEVENTH

RESPONDENT

REGISTRAR OF DEEDS, PIETERMARITZBURG

EIGHTH

RESPONDEDNT

ORDER

The following order is granted:

The first respondent is directed to pay the costs of the application, including those costs reserved on 11 October 2023.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] Samuel Butler, the English novelist, once observed that in law, nothing is certain but the expense. Those words remain true to this day. This matter involves the expense of litigation, in the form of costs. The applicant brought an application citing several respondents. The first respondent, against whom the application was principally directed, ultimately conceded the relief claimed by the applicant in an order granted by this court (the consent order). The applicant therefore requires the first respondent to pay the costs of its application. The first respondent resists such an order being granted and suggests that the fourth respondent and two other individuals not yet joined to this application be ordered to pay the costs.

[3] Before dealing with the merits of the application, I must deal with the application brought by the first respondent to join the two further parties referred to above to the matter. That application was refused by me. I indicated that the reasons would follow and these are the reasons. The only purpose behind the joinder was an attempt by the first respondent to obtain an order that they and the fourth respondent pay the applicant's costs. The applicant opposed the joinder, for it holds the first respondent liable for those costs, not the parties whose joinder was sought. The parties sought to be joined had no direct and substantial interest in the application nor was there any counter-application brought by the first respondent alleging that they were to be responsible for the costs. I accordingly refused the application.

[4] On 11 October 2023, Sipunzi AJ granted the consent order. The notice of motion has eight sub-paragraphs. The first seven sub-paragraphs of the consent order are identical¹ to the first seven sub-paragraphs of the order contained in the

¹ In so saying, I acknowledge that the wording of subparagraph 1.6 has been amended, but the meaning of that sub-paragraph has been retained.

notice of motion.² Sub-paragraph 1.8 of the notice of motion is different to the one contained in the consent order. The consent order reads as follows:

‘1.1 The first respondent is interdicted and restrained from selling, alienating, transferring ownership, or any part of ownership, of Portion 4 of Erf 1295 Umlazi V, Registration Division FT, Province of KwaZulu-Natal in extent 5,114 square meters (“Portion 4”).

1.2 The eighth respondent is ordered to endorse its records in accordance with the order in subparagraph 1.1 above.

1.3 It is declared that the purported agreement of sale between the applicant and the first respondent which is annexure “J” to the founding affidavit is of no force or effect.

1.4 The transfer of Portion 4 from the applicant to the first respondent, under deed of transfer T17/17293 is declared to be of no force and effect and is set aside.

1.5 It is declared that the applicant is the true and lawful owner of Portion 4.

1.6 The eighth respondent is ordered to take all necessary steps to give effect to the above orders, including, but not limited to, transfer of the property to the applicant in terms of section 33 of the Deeds Registries Act or any other provision it may deem necessary.

1.7 Should it be necessary for any directors or representatives of the first respondent to sign documentation to give effect to paragraph 1.6 then it is declared that they are required to do so within 7 calendar days of provision to them of such documents, failing which the Sheriff of this court or his deputy is authorized and directed to sign such documents in the place and stead of any such director or representative of the first respondent.

1.8 The applicant is granted leave to correct the citation or the name of the first respondent wherever it appears in the application papers as the Close Corporation.

1.9 The matter is adjourned to 20 February 2024 for arguments on the issue of costs.

1.10 Today’s costs are reserved for arguments on 20 February 2024.’

[5] By virtue of the fact that the first respondent consented to the order sought by the applicant, none of the facts alleged by the applicant are in dispute and they are mentioned hereafter only to the extent that they may have a bearing on the issue of costs.

[6] Briefly stated, the facts of the matter revolve around a fraud being perpetrated on the applicant. The fraud related to the sale of the immovable property described in sub-paragraph 1.1 of the consent order. In that paragraph, the immovable property is referred to as ‘Portion 4’, and so to avoid confusion, I shall also refer to it by that name.

² Sub-paragraphs 1.8, 1.9 and 1.10 of the consent order do not appear in the notice of motion.

[7] Portion 4 initially vested in the seventh respondent, the Ingonyama Trust, and then was erroneously transferred to the applicant, who was then required to retransfer it to the State, its true owner. In the grand tradition of the bureaucracy in this country, all of this happened at a snail's pace and covered a span of several years. This sad reality is hardly surprising, for as the Supreme Court of Appeal noted in *Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd and others*:³

'... sight should nevertheless not be lost of the fact that the bureaucratic machinery is notorious for moving slowly even though the exigencies of a particular case might require that matters be dealt with expeditiously. However, it must be emphasised that recognising this reality in no way seeks to excuse laxity. It is more to say that, notwithstanding the constitutional dictates of a responsive and accountable public administration, the reality is that public administration in our country has over time been allowed to slide to a quagmire of inefficiency.'

[8] The applicant's council, however, acknowledged that Portion 4 must be retransferred and ultimately passed the necessary resolution to permit its retransfer to occur. It was then ascertained that Portion 4 was not registered in the applicant's name, but was registered in the name of the first respondent.

[9] This apparently happened because the sixth respondent had allegedly claimed to be the owner of Portion 4 and had concluded a written sale agreement with the first respondent on 28 September 2016 (the first sale agreement). In the first sale agreement, it was recorded that Portion 4 had been sold by the sixth respondent to the first respondent for the amount of R800 000. On the same day that the first respondent concluded the first sale agreement, it appears to have also concluded another sale agreement (the second sale agreement).

[10] In the second sale agreement, the seller was no longer the sixth respondent but was the applicant. The purchaser remained the first respondent. The second sale agreement also dealt with the sale of Portion 4. It recorded that the applicant sold Portion 4 to the first respondent for R800 000. The second sale agreement was

³ *Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd and others* [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) para 85.

purportedly signed by an official of the applicant, identified as being a Mr Keith Matthias (Mr Matthias).

[11] Mr Matthias, however, flatly denied signing the second sale agreement. Various other documents were prepared to permit transfer to occur from the applicant to the first respondent pursuant to the terms of the second sale agreement: a power of attorney, signed by Mr Matthias; an affidavit made by Mr Matthias confirming his authority to sell Portion 4; a further affidavit made by Mr Matthias confirming his personal details; and a document signed by Mr Matthias requesting a certified copy of the title deed pertaining to Portion 4.

[12] Mr Matthias, again, disavows all knowledge of these documents and asserts that he never signed any of them.

[13] There is no reason to doubt his latter denial regarding the last mentioned document: his name is incorrectly spelt in the document (his surname was spelt with three T's, viz 'Matthias'), a fact that he would undoubtedly have noticed if he had, indeed, been the person who signed that document. The same spelling error regarding his surname manifests itself in a further document that Mr Matthias allegedly signed requesting a certificate of registered title in respect of Portion 4. There is no reason to doubt any of Mr Matthias' other denials regarding his signature. Certainly, the first respondent does not dispute his denials and regards them as being truthful for it assented to the taking of the consent order.

[14] If there was any doubt that the transfer of Portion 4 to the first respondent was anything but fictitious arising out of the faked second sale agreement, it is assuaged by the evidence of the applicant that there is a defined internal process that must be followed before land owned by the applicant may be sold. This is a three step process and it would generate at least eight distinct documents across those three steps. None of these documents exist in respect of Portion 4, indicating that the prescribed internal process has not been followed. That Portion 4 had not been sold by the applicant is put beyond doubt by the fact that it has not been paid for Portion 4.

[15] Faced with this powerful narrative of ostensible wrongdoing set out in the applicant's founding affidavit, the first respondent, nonetheless, delivered a notice of intention to oppose the application and delivered an answering affidavit. At paragraph 4 thereof, the following is stated:

'At the outset of this affidavit, I wish to summarise the First Respondent's defence as follows...'

The first respondent then sets out the basis of its defence to the applicant's claim which, in summary, is that:

- (a) It was not knowingly a participant to any fraud;
- (b) It obtained bona fide title to Portion 4;
- (c) It claimed that the applicant was not entitled to be viewed as the owner of Portion 4 as it, on its own admission, had received it in error;
- (d) It claimed that the applicant's entitlement to claim retransfer of Portion 4 had become prescribed; and
- (e) The applicant was estopped from disputing the first respondent's ownership of Portion 4.

[16] Thus, a considered and vigorous defence was raised by the first respondent. In the light of these defences, the applicant was, naturally, compelled to deliver a replying affidavit dealing with them. It actually delivered a replying affidavit that covered some 11 pages and it delivered a supporting affidavit that covered a further 6 pages. It also delivered a supplementary affidavit deposed to by Mr Matthias, now retired from the applicant, that filled another 14 pages.

[17] The strength of the first respondent's defence, however, was illusory for the first respondent abandoned all those defences abruptly when the matter was last before this court on 11 October 2023 and consented to the terms of the consent order.

[18] In its answering affidavit, the first respondent claims itself to have been the victim of fraudsters, alleging that the fourth respondent and other unidentified members of staff of the applicant are those fraudsters. There may be a smidgen of truth to that. While it is so that fraud:

'... vitiates every transaction known to the law',⁴

it is equally so that motion proceedings are generally not designed to permit a court to easily make findings of fraud.⁵ As Seegobin J said in *Commissioner for the South African Revenue Service v Sassin and others*:⁶

'Our courts have consistently held that it would be unwise to decide a disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth.'

[19] This is sage advice. It is simply not possible on the papers to determine whether the first respondent was a participant in a fraud or a victim of a fraud. There are indications that it was a victim of a fraud for it is difficult to understand why it would sign two agreements on the same day, for in doing so, it potentially became liable to pay twice for the same portion of land.

[20] The person that represented the first respondent in the acquisition of Portion 4 was a Mr Ismail Dhooma (Mr Dhooma). His version is presented through the evidence of the deponent to the first respondent's answering affidavit, Mr Hassen Essa Suleman (Mr Suleman).⁷ Mr Suleman states that Mr Dhooma cannot remember every document that he signed but submits that there could be no valid reason why the second sale agreement should be signed. Mr Dhooma cannot, in any event, recall signing the second sale agreement. Moreover, Mr Dhooma's signature on the second sale agreement:

'... differs from Dhooma's usual signature.'

How this difference manifests itself is not specified. In all, the explanation is vague and unimpressive. Nonetheless, for the purpose of the resolution of this application, I shall accept, without deciding, that the first respondent was itself a victim of a fraud.

⁴ *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) para 25. In *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712, Lord Denning uttered these well-known and oft repeated words:

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .'

⁵ *Korff v Scheepers en Andere* 1962 (3) SA 83 (W) at 85.

⁶ *Commissioner for the South African Revenue Service v Sassin and Others* [2015] ZAKZDHC 82; [2015] 4 All SA 756 (KZD) para 47.

⁷ Mr Dhooma did later, however, deliver a confirmatory affidavit.

[21] But notwithstanding this assumption, it is plain that prior to consenting to the order, the first respondent unequivocally resisted the relief claimed by the applicant and strove to ensure that Portion 4 remained registered in its name. The first respondent cannot have it both ways: it cannot be a victim yet resist the relief claimed by the applicant at the same time. By so doing, it delayed the relief sought by the applicant. The application was brought on 28 April 2021, the answering affidavit is dated 26 August 2021, the replying affidavit is dated 14 November 2022 and the consent order is dated 11 October 2023. Almost one year after the replying affidavit was delivered, the consent order was taken.

[22] Ultimately, the first respondent recognised that it could not succeed with its defence and so conceded as much in agreeing to the consent order. But before it threw in the towel, the applicant had been compelled to incur legal costs directly as a result of the first respondent's conduct. I mentioned earlier in this judgment that sub-paragraph 1.8 of the notice of motion was different to sub-paragraph 1.8 in the consent order. It originally read as follows in the notice of motion:

'Any party opposing the application shall pay the costs thereof, jointly and severally with any other opposing party, the one paying the other/s to be absolved.'

Had there thus been no opposition, there would be no basis for an order of costs. Only one party has opposed the relief claimed and that is the first respondent.

[23] It follows that the applicant has been entirely successful in obtaining the relief that it initially sought. The general rule is that costs follow the result.⁸ I see no reason to deviate from that general rule.

[24] In the result, I grant the following order:

The first respondent is directed to pay the costs of the application, including those costs reserved on 11 October 2023.

⁸ *Maclachlan and another v City of Johannesburg Metropolitan Municipality and others* [2022] ZAGPJHC 243 para 17.

MOSSOP J

APPEARANCES

Counsel for the plaintiff : Mr P C Prior
Instructed by: : Luthuli Sithole Attorneys
56 Henwood Road
Morningside
Durban
Care of:
Austen Smith Attorneys
Walmsley House
191 Pietermaritz Street
Pietermaritzburg

Counsel for the respondent : Ms J P Jantjies
Instructed by : Anand-Nepaul Attorneys
9th Floor, Royal Towers
30 Dorothy Nyembe Street
Durban
Care of:
Cajee Setsubi Chetty
195 Boshoff Street
Pietermaritzburg

Date of Hearing : 20 February 2024

Date of Judgment : 20 February 2024

