

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, BHISHO]**

CASE NO.: 702/2021

In the matter between: -

MVULENI MANYIFOLO

APPLICANT

and

BUFFALO CITY METROPOLITAN MUNICIPALITY

1ST RESPONDENT

NOMAKHAYA MINI

2ND RESPONDENT

DEEDS REGISTRY, KING WILLIAMS TOWN

3RD RESPONDENT

JUDGMENT

NORMAN J:

[1] The applicant seeks an order to have a deed of transfer dated 11 April 2016 made by the first respondent in favour of the second respondent, declared unlawful and invalid. He also seeks a cancellation of the deed of transfer and other ancillary relief.

[2] For the sake of completeness the relief sought is recorded in the notice of motion as follows:

- “1. That the deed of Transfer dated the 11th April 2016 under T18[...] in favour of the 2nd respondent be and is hereby declared unlawful, invalid and set aside;*
- 2. that the 3rd respondent be and is hereby directed and ordered to cancel the deed of transfer T18[...] registered in favour of the 2nd respondent (Nomakhaya Mini Identity Number) over ERF 3[...] within four weeks from the date of this order having been served upon him in terms of section 6(2) of the Deeds Registry Act No 47 of 1937;*
- 3. that the applicant be and is hereby declared the owner of the property known as ERF 3[...] , situated at T[...] Central, Bhisho;*
- 4. that the 3rd respondent be and is hereby ordered and directed to register the applicant (Mvuleni Manyifolo Identity Number) as the owner of the property known as ERF 3[...] , situated at T[...] Central, Bhisho;*
- 5. that the 1st respondent be and is hereby ordered and directed to pay costs of this application, such costs to be on a party and party scale, unless in the event of him opposing this application in which event, the 1st respondent shall pay costs on an attorney and client scale;*
- 6. there shall be no order of costs against the remainder of the respondent unless in the event of them opposing this application, in that event costs shall be sought against them on an attorney and client scale;*
- 7. such further and or alternative relief as the above honorable court may deem fit.”*

The parties

[3] The applicant describes himself as an adult male person who is presently residing at ERF 3[...] T[...] Central in the district of Bhisho, Eastern Cape.

[4] The first respondent is the Buffalo City Metropolitan Municipality (the municipality) that has offices at 117 Oxford Street, East London. The municipality is cited as the entity that signed a special power of attorney for the transfer of allegedly the applicant's property to the second respondent against the applicant's will and without his knowledge.

[5] The second respondent is Ms Nomakhaya Mini. She is the registered owner of ERF 3[...] T[...] Central in Bhisho. It is the deed of transfer in relation to this property that the applicant seeks to cancel. The applicant also seeks a costs order against the second respondent only if she opposed the application.

[6] The third respondent is the Deeds Registry situated at 113 Alexandra Road, King Williams Town. The relief sought against this respondent relates to registration of the property as indicated in prayers 2 and 4 of the notice of motion, above.

Applicant's case

[7] The applicant stated that:

7.1 During 2002, he, together with his wife bought a vacant site from a certain Mr Witbooi. At that time the area was under the control of traditional leaders and there were no title deeds to those sites. After buying the site from Mr Witbooi, he developed it, and erected one four-roomed house with thirteen flats (the property) which they let out for rental and thus generated income. In 2008 the couple separated. The second respondent showed interest in buying the property.

7.2 He informed the second respondent that indeed he was selling the property. Whilst he was waiting for the second respondent to pay the purchase price, the second respondent made sexual advances towards him. He rejected her. The second respondent undertook to pay him R20 000 as the purchase price. She failed to pay it instead she informed him that she will pay the money to a Mr Mrara who will in turn pay the money over to him. The second respondent also requested the applicant to depose to an affidavit to

acknowledge that the applicant had received the purchase price and also confirm the sale between the two of them. He alleged that Mr Mrara prepared the affidavit and he signed it.

7.3. The affidavit referred to recorded the following:

“AFFIDAVIT

I, Mvuleni Manyifolo I.D.... residing 3[...] T[...] Village. The place in which I am residing, I bought it from the late Mr V. Witbooi in 2002 for R8000.00. I am returning at Mthatha at Ncisa Administrative area.

I am now selling the property to Nomakhaya Mini I.D. ...for R45 000.00 who resides at the same area. I am not in a possession of Title deed as the area has been recently established as a township and property registration still underway. The affidavit made will assist the current occupant to register the property on her name.

The money paid in cash to me.

OWNERS NAME: M. MANYIFOLO

SIGNATURE: (signed) 10/09/08

WITNESS: (signed) 10/09/08

I, Nomakhaya Mini ID..., bought the four (4) roomed house with flats from Mr M. Manyifolo for R45 000- 00. I understood the absence of Title Deed and the affidavit given above advocate the sale agreement.

PURCHASER: N. MINI (signed) 10/09/08

WITNESS (signed) 10/09/08” (All identity numbers have been omitted)

7.4 At the time he was selling the property to the second respondent, the municipality was in the process of zoning the area and allocating the sites to various people. Some were receiving title deeds in respect of those

properties. When he demanded same, Mr Mrara simply made promises that he would get his title deed but failed to do so. When he realized that the money was not forthcoming from Mr Mrara, he cancelled the sale and retained his property. The money remained with Mr Mrara. He then informed the second respondent that he had cancelled the sale agreement.

7.5 During the same period he also received a house in terms of the Rural Development Project (RDP) as a subsidy without having applied for it. He kept the RDP house. On 30 June 2009 he, together with his wife, were called to the municipality offices where they met the second respondent. At that meeting they were advised that they had received the RDP house in a fraudulent manner. The entire property including the RDP house was then given to the second respondent. She was also given a deed of transfer which had been prepared in her favour. The applicant contends that the site belongs to him and that only the RDP house should have been given to the second respondent. He further contends that the transfer of the entire property to the second respondent was done without his consent.

7.6 He alleged that the statement of rates for the property from the first respondent still reflects Mr Witbooi. He purported to attach Annexure “MM4” which does not appear anywhere on the papers. The second respondent applied for his eviction from the property. The order was granted by the Magistrate sitting in Zwelitsha. He accused the second respondent of fraud in that she, on the one hand, stated that she bought the site from the municipality and on the other hand she said she bought the site from him. He sought an order for costs against the first respondent on the basis that the first respondent transferred and registered his property in the name of the second respondent in a manner that was not appropriate.

7.7 The applicant relied on the document quoted above. He also attached a document headed *‘Minutes of housing disputes meeting between Manyifolo and Ms Mini held at Bhisho Planning boardroom on 30 June 2009 at 9h00’*. It appeared from the minutes that the applicant, together with his wife, and the second respondent were present at the meeting. It is recorded further that the

applicant visited the offices for the housing department in King Williams Town. He requested that his name be removed as a beneficiary in respect of the property and that it be replaced with that of the second respondent. He informed Mr Mrara that the reason for that was because he was going back to the former Transkei and did not want to be denied the opportunity to get a housing subsidy.

7.8 He then proceeded to the finance section where he, together with the new owner, the second respondent, went to pay a reconnection fee so that she could receive the municipal accounts. It was conveyed to Mr Mrara's offices that a payment of R30 000 had been made by Ms Mini in respect of the property.

7.9 Mr Manyifolo further stated that he went to the Department of Home Affairs (Home Affairs) with Mr Mrara because at that time he had applied for a subsidy and was not successful. He discovered then that according to the records kept at Home Affairs, he was deceased. He disputed that and requested that Home Affairs should rectify the mistake. It is further recorded on the minutes that his wife Mrs Manyifolo confirmed that : she was married to him and that she had two identity documents which were both active ; she was employed by the provincial government and was earning a salary that is above the qualifying subsidy bracket; she received R15 000 from Old Mutual which was paid in respect of her 'deceased husband', the applicant; and she approached the applicant and demanded payment of some of the money that was paid for the property by the second respondent.

7.10 The title deed for the property in question reflects the second respondent as the owner. It also shows that the property was transferred by the municipality, as the previous owner, to her.

Second respondent's case

[8] The second respondent opposed the application. She denied that the applicant was ever the owner of the property in question. She stated that the

property was the registered property of the municipality prior to it being lawfully transferred to her. She confirmed that there was an eviction order that she sought and obtained, however, the applicant refused to vacate the property. She complained that the application was brought some twelve years after the conclusion of the agreement. The applicant had failed to bring a condonation application and advance reasons for bringing the application outside the one hundred and eighty (180) days provided in the Promotion of Access to Justice Act (PAJA).

[9] She also raised the fact that the applicant's claim to the property had prescribed. She also contended that the applicant knew that he did not own the property when he sold it to her. She believed him to be the lawful owner. She also stated that the allegation that the applicant bought the property from a certain Mr Witbooi was not true. The reason for stating so was because Mr Witbooi was never found although the applicant had promised that he would bring him as a witness. She concluded that in any event the applicant could not have lawfully purchased the property from a Mr Witbooi because the property belonged to the municipality. She confirmed that she paid R30 000 to the applicant and the agreement was that she would pay the balance of the purchase price once she occupied the property.

[10] She denied that she ever made any sexual advances towards the applicant and took offence to those allegations. She disputed the allegations that she was going to pay the purchase price to Mr Mrara, who was going to pay it over to the applicant. She attached an affidavit which the applicant had filed in resisting the eviction application. The second respondent contends that the allegations that the applicant made therein are contradictory to those that he made before this court. This court discovered that this affidavit was not complete and it requested the representatives of the applicant to make a full copy thereof available to court. A full copy was made available on 13 July 2023. I shall deal with the contents thereof later in this judgment.

[11] She submitted that the municipality had conducted extensive investigations into the allegations relating to the ownership of the property. It then allocated it to her, hence it was registered in her name in 2016. The applicant failed to pay back her deposit of R30 000. She challenged the applicant to produce proof that he once

owned the property. She stated that in the affidavit filed in respect of the application for leave to appeal the applicant had contended that he had minor children who would suffer once he is evicted and they would remain homeless. She stated that this was untrue because the applicant had no minor children living with him. She stated that the applicant has four children. Three of his children live in Cape and a nineteen year old daughter, a student, lives with her mother, the applicant's former wife, who lives at a different address in T[...] Village. She asked for the application to be dismissed with costs because the applicant has not been candid with the court.

[12] The report attached by the municipality prepared by Mr LM Mrara demonstrates that the property belonged to and was registered in the name of the municipality. After conducting investigations, they found that Mr and Mrs Manyifolo did not qualify for a government subsidy. The municipality had to decide who should be the beneficiary. It was decided that the second respondent qualified for an RDP house and it was accordingly awarded to her.

[13] In reply, the applicant denied that his claim to the property had prescribed on the basis that prescription in relation to land runs after a period of thirty years. He conceded that the best proof of ownership in respect of the immovable property is a title deed. He also conceded that he did not have one. He contends that the only property that the second respondent is entitled to is the RDP house.

[14] The applicant filed his replying affidavit eleven (11) months after the answering affidavit was filed. In the replying affidavit he sought condonation for the delay.

Reasons for the delayed replying affidavit

[15] The applicant stated that on 6 October 2021 his attorneys of record received a notice to oppose the matter from the first respondent. Subsequently, the first respondent's attorneys approached his attorneys with intentions to settle the matter.

15.2 The reasons that the applicant advances for the delay are that the answering affidavit was filed on 28 September 2021. A period of ten days for

filing of the replying affidavit lapsed on 12 October 2021. According to the applicant, the delay in filing the replying affidavit was 11 months.

15.3 The first respondent's attorneys sought indulgence to file their answering affidavit by 12 November 2021. On 12 November 2021 the first respondent's attorneys informed his attorneys that they had not yet consulted and they requested a further indulgence until 12 December 2021. On 12 December 2021 they advised his attorneys that they were negotiating a possible settlement of the matter and requested that the matter be put in abeyance until the resolution of the dispute.

15.4 On 30 January 2022 his attorneys enquired from the first respondent's attorneys as to what the position was in relation to the matter and the resolution thereof. He stated that he was also awaiting a report from the third respondent because his attorneys had indicated that it was a very important report. He stated that throughout the proceedings, the first respondent, was promising that they were trying to find another place for one of the parties who was willing to take it so that the dispute can be resolved.

15.5 During March his attorneys of record informed the first respondent's attorneys that the second respondent had filed her answering affidavit and that the applicant needed to file a replying affidavit. The attorneys for first respondent further sought another indulgence until 31 May 2022 when they indicated that they were going to file a notice to abide. On 31 May 2022, the first respondent's attorneys informed the applicant's attorneys that they were still awaiting for the housing officer who was on leave and would only report for duty in July 2022. During the month of July 2022 his attorneys were trying to make contact with the first respondent's attorneys without success.

[16] On 1 August 2022 he received a link for a virtual meeting with his attorneys which was scheduled for 2 August 2022. A virtual consultation was indeed held on 2 August 2022 with his attorneys. On 5 August 2022, he was advised that the affidavit had been finalized and that he was supposed to make himself available on Tuesday, 9 August 2022, to sign it. On Monday, 8 August 2022, he fell sick and could not

attend to the signing of the affidavit. He recovered from the illness on 27 August 2022, although not fully. During the week of 31 August 2022, he called his attorneys to arrange a date for signing of the affidavit.

[17] On 7 September 2022, the sheriff of the court came to evict him from the property. He spent the better part of that week looking for a place to stay. He submitted that non-compliance with the rules of court was not deliberate. He contends that these were matters that were beyond his control. He submitted that the matter is very important because it involves his constitutional right to property and shelter. He submitted that should the court refuse condonation that would mean that the court would be closing the doors at him and would be depriving him of his right to be heard in the matter. He contends that he is homeless because the second respondent evicted him from the property.

[18] He submitted that the other respondents stand to suffer no prejudice because the dispute dates back years ago and the second respondent has been surviving using the property in question. He is the one who depends on the property solely and not the second respondent. He sought the relief in terms of the notice of motion.

Title Deed

[19] A report dated 28 March 2022, from the Registrar of Deeds, sitting in King Williams' Town recorded that the property is indeed registered in the name of the second respondent. The property is unencumbered. According to the title deed it is shown that the property was sold by the municipality to Ms Mini for an amount of R8 169.31. The Registrar also confirmed that there are no immovable properties registered in the applicant's name. There were no interdicts noted against the property mentioned.

Applicant's submissions

[20] Mr Gxumisa appeared for the applicant. He relied on the provisions of section 25 of the Constitution for the contention that the applicant has a guaranteed right to property and that no one may be deprived of property except in terms of law of

general application. He further submitted that the applicant was the true owner of the property and the registration to the second respondent was fraudulent.

[21] He submitted that there was an agreement between the parties and when it was cancelled then his client was entitled to have the property registered in his name. When the court enquired about the 'deceased status' of the applicant, his submission was that it is common cause that the applicant was declared dead by the Department of Home Affairs and that he could not take that issue any further. He submitted that the only thing that did not belong to the applicant was the RDP house. Should the court be with the applicant, he should be entitled to costs, he argued. He submitted that the applicant should benefit from the *Biowatch* principle because he is protecting his constitutional right to housing.

[22] The applicant did not advance legal arguments except his reliance on section 25 of the Constitution which I have referred to. There is not a single legal authority upon which the argument was based either in the applicant's heads or before this court. Mr Gxumisa, however, correctly conceded that there were allegations of fraud which featured in the application against the applicant and his wife.

The first respondent's argument

[23] Mr Maseti appeared for the first respondent. The first respondent did not file any answering affidavits but simply dealt with the points of law. It raised the point that it could not file an answering affidavit because the founding affidavit is non-existent since it was not commissioned by a Commissioner of Oaths and thus it was fatally defective. In this regard, he submitted that the Court can only exercise its discretion to condone non-compliance with regulations 1 to 4 of the regulations governing the administering of an oath or affirmation, published in terms of section 10 of the Justices of the Peace and Commissioners of Oath Act, 1963 ('the regulations') where there has been an attempt to commission an affidavit and there has been substantial compliance with the said regulations.

[24] He submitted that in this case there has been no attempt at all on the part of the applicant to have the affidavit commissioned. He relied on the unreported

judgment of this Court in **Cibi and Others v Public Service Commission & Others**¹ where the Court stated:

'It is stated law that the court retains a discretion to refuse an affidavit which does not comply with the Regulations, such Regulations being directory rather than peremptory. It remains a question of fact in each individual case as to whether or not there has been a substantial compliance with the Regulations promulgated in terms of the Justice of the Peace and Commissioners of Oath Act 16 of 1963.'

[25] He further referred the Court to **S v Msibi**². He also relied on **Mndiyata & Others v Umgungundlovu CPA & Others**³ where the court dealt with the commissioning of an affidavit. He submitted that in that case the court raised the issue that the gender of the deponent was female instead of the male:

'...It will be noted that the word "she" forms part of the pre-typed document that must have been placed before the Commissioner. If the Commissioner had, for instance, personally written the word "she" in the attestation clause, it could have made for a stronger case for the applicants. It is, therefore, clear that this must have been an error on the part of the Commissioner.'

[26] He submitted that on this basis alone this court should refuse the application with costs and that the applicant should be ordered to pay punitive costs. He submitted that the *Biowatch* principle does not extend to the applicant because the applicant had been found to have been untruthful.

Second respondent's argument

[27] Mr Mdladlamba appeared for the second respondent. The second respondent raised a point *in limine* that the applicant ought to have reviewed the administrative decisions taken by the first respondent if he was dissatisfied. In this regard, he relied

¹ [2022] ZAECKMHC 44 28 July 2022 para 19.

² 1974 (4) SA 821 (T).

³ (1606/20) [2021] ZAECKMHC 6 (28 January 2021) para 14.

on the provisions of section 7(2) of PAJA, that applicant ought to have brought a review application within the period prescribed in PAJA. He further submitted that the applicant launched the application knowing that there was a dispute of fact between the parties which dispute made the matter incapable of resolution without evidence being led.

[28] He submitted that the disputes of fact are immaterial and that the final relief can only be granted if the facts deposed to by the respondent read together with undisputed facts deposed to by the applicant justify the order. In this regard, he relied on the ***Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd***⁴.

[29] He also relied on the Alienation of Land Act 68 of 1981 (Land Act) for the submission that in terms of section 2(1) which provides '*no alienation of land after the commencement of this section shall , subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.*' He submitted that even if there was such an agreement between Mr Witbooi and the applicant as he alleged, it was of no force and effect because it was never reduced into writing.

[30] He stated that the issue to be decided is whether the applicant has been able to demonstrate that he holds ownership rights in the property entitling him to the final relief that he is claiming. He submitted that where there are disputes of fact the court must resolve those disputes based on the respondent's version. He submitted that the applicant failed to show that he was deprived of his property by the first respondent. He also failed to show that the transfer to the second respondent was unlawful. He submitted that on all those bases, the application should be dismissed with costs.

Discussion

Condonation

⁴ 1984 ZASCA 3 SA at 634 H – 635 C.

[31] The application for condonation is located towards the end of the replying affidavit and is not accompanied by a notice of motion. It is common practice that the respondents do not have an automatic right of reply to a replying affidavit. In fact, the Uniform Rules of Court do not make provision for that unless a party applies to court and is permitted to file further affidavits⁵.

[32] There are several difficulties with the condonation itself. First, the applicant's replying affidavit was filed way out of time. On his version, the replying affidavit, was filed after some eleven months. The applicant, having been advised by his legal representatives that the replying affidavit was out of time failed to bring a substantive application for condonation. It sought to bring an application for condonation in the replying affidavit.

[33] A replying affidavit is, in terms of Rule 6, to be filed ten days after receipt of the answering affidavit. Condonation for the late filing of any court process is not something to be taken lightly. First, the applicant must have been aware that respondents have no right to reply to his replying affidavit. Second, by immersing a condonation application in the replying affidavit, the applicant, deprived the respondents of an opportunity to oppose the condonation application and file opposing papers to it. Third, he failed to properly seek an order for condonation because no proper condonation application accompanied by a notice of motion, was brought. Fourth, no argument was made in relation to condonation by the applicant's counsel and it is not even addressed in his heads of argument.

[34] When a party is obliged to make a condonation application there are certain requirements that the applicant must meet. A full explanation for the entire duration of the delay must be placed before the court. In ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Company Ltd & Others***⁶ the Supreme Court of Appeal when dealing with an application for condonation had this to say:

⁵ Rule 6 (5) (e) provides: “(e) *Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph(ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits*”.

⁶ (619/12) [2013] ZASCA 5 [2013] 2 ALLSA 251 (SCA) 11 March 2013.

“[12] In Uitenhage Transitional Local Council v South African Revenue Service⁷ this Court stated: one would have hoped that the many admonishes concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparations of appeals to this Court; condonation is not to be heard merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.’

[35] Similarly, in this case, there are some gaps in relation to facts that have not been placed before this court. The suggestion that there were overtures on the part of the first respondent to have the matter settled is not supported by any correspondence. There is no confirmatory affidavit from the applicant’s attorney of record. It would have been expected of him to confirm the interactions with the first respondent’s attorneys. In any event, the alleged requests for indulgence were not made to the applicant directly but were allegedly between his attorneys and those of the first respondent. This information was placed in a document that cannot be replied to by any of the parties and were thus deprived of an opportunity to consider and oppose same.

[36] I find that the delay of 11 months is inordinate. I have alluded to the fact that there is no full and detailed explanation. However, the first and second respondents did not invoke any of the rules to, for instance, have the replying affidavit struck out due to its lateness. They were content to have the matter disposed of. The dispute raised is important to both parties. I am of the view that it is in the interests of justice to condone the late delivery of the replying affidavit.

The attestation point raised by the first respondent

⁷ 2004 (1) SA 292 (SCA) para 6.

[37] The first respondent did not file an affidavit or a notice where it took the objection. It was submitted on its behalf that it was not necessary to do so because the affidavit was a nullity. I allowed argument to be advanced on behalf of the first respondent because it had filed heads of argument ahead of the hearing of the matter. The point taken in relation to the applicant's affidavit were raised after the applicant had filed his heads of argument, on 7 June 2023. It was also raised after the second and third respondents had filed the answering affidavit and the reports, on 28 September 2021 and 28 March 2022, respectively. Those respondents who were actively participating in the litigation did not take issue with the affidavit. The first respondent delivered its heads of argument raising the point on 08 June 2023. The first respondent's notice to oppose is dated 6 October 2021. For a period of over a year, the first respondent remained supine.

[38] As a result of the stance taken by it, litigation progressed to a stage where the matter was set down for argument. The second respondent who is directly affected by the relief sought did not object to the founding affidavit and did not associate herself with the objection raised by the first respondent, even in argument. Litigation is very costly for all the parties. First prize for the court is to deal with the dispute and resolve it as soon as possible. This matter has a long history and dismissing the application on the point raised by the first respondent will not be just.

[39] The fact that the applicant stood by what he stated in the now challenged founding affidavit, in his replying affidavit, fortifies my view that the late intervention by the first respondent does not add value to the resolution of the dispute between the parties. The manner in which the objection was raised did not afford any of the parties an opportunity to react to it.

[40] Rule 6 (5)(d)(iii) provides:

(iii) if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub- paragraph, setting forth such question.

[41] The preceding paragraph referred to, above, reads:

“(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and

(iii) (quoted above)”

[42] In ***Absa Bank v Bota N.O***⁸, the court found that the application for summary judgment constituted an irregular proceeding, which fell to be set aside on the grounds that the plaintiff’s verifying affidavit was not an affidavit.

[43] Non-compliance with the provisions of the regulations is not mandatory but directory. In this case there has been substantial compliance with the regulations. It is on this basis that condonation for non- compliance should be condoned. All the parties were ready to proceed and had filed heads of argument, justice demanded that the matter should be finalized. To the extent necessary, the non – compliance with the regulations, is hereby condoned.

Applicant’s lack of candour

[44] When a person approaches court for anything ranging from personal, commercial or constitutional claims, he must do so with absolute honesty.

[45] There are certain facts that raise suspicions about the applicant’s candour in launching these proceedings. The applicant contends in the ‘condonation application’ that he was homeless. However, in paragraph 1 of the replying affidavit he put in as introduction the following:

‘I am an adult male person presently residing at ERF 3[...] , T[...] Central in the district of Bhisho, Eastern Cape. I am the applicant in the matter and the deponent to the founding affidavit and thus deposed to this affidavit to deal with the answering affidavit deposed to by the second respondent.’

⁸ 2013 (5) SA 563 (GNP) para 17.

[46] The applicant alleged that he was caused to sign an affidavit by a Mr Mrara confirming the sale of the property to the second respondent. Although he denied that there was a sale where he was paid an amount of R30 000.00, he does not deny that he went to the first respondent for the transfer of the municipal account to the second respondent.

[47] According to a memorandum prepared by the senior legal advisor of the first respondent, Mr M Mlotana, the applicant was advised at a meeting held on 30 June 2009 at the first respondent's offices that the property in question still belonged to the first respondent because it was never transferred to any of the parties who were involved in the dispute. At that meeting the applicant also confirmed that he sold the property to the second respondent and received an amount of R30 000,00 from her.

[48] The second respondent's evidence as recorded in her answering affidavit is consistent with the minutes attached to it by her and also the minutes attached to the applicant's founding affidavit. In those minutes the amount of R30 000.00 that was paid to the applicant by the second respondent is confirmed, the details of the purchaser, full names, identity number and the details of the erf, *to wit*, ERF 3[...] are clearly recorded. The applicant relied on these minutes of the meeting of 30 June 2009 and had attached a copy thereof to his founding affidavit.

[49] The applicant also attached to the founding affidavit, an affidavit deposed to by the second respondent in eviction proceedings under case no. 148/2020. That affidavit, demonstrated at paragraphs 7.1 to 7.5, that the second respondent had been consistent throughout in her version. It confirms the evidence of the second respondent in how the applicant sold the property to her, how much she paid for it, the erf number and the fact that the actual owner of the property, the first respondent, transferred it to her on 30 May 2016.

[50] The applicant, on the other hand, has not been candid with this court. In the proceedings under case number CA16/2021, the applicant deposed to an affidavit on 13 July 2021 wherein he stated:

“8. During 2002 I bought a piece of land situated at ERF 3[...] , T[...] Central, Bhisho from Witbooi with a shack in it. We then developed the land and erected 13 flats for rentals so that we can generate income out of them.

9. We were also residing in those premises until 2008, I decided to sell the premises to our neighbor, but whilst still on the process my wife intervened and told the 1st respondent that the property is not for sale. Because I was frustrated by her, accepted the monies from the 1st respondent who then later refused to pay the balances and I then cancelled the agreement between myself and the 1st respondent and returned her monies and retained my property.”

[51] Those allegations are contrary to what the applicant stated at paragraphs 14 to 17 of the founding affidavit where he stated:

“14. Having told her, the 2nd respondent said she will give me R20 000-00 in respect of the purchase price of the site, whilst still waiting for the purchase price of the site, the respondent told me that she has spoken to someone in the establishment of the 1st respondent in the housing department (one certain Mr Mrara).

*15. The 2nd respondent advised me that I will get my money from Mr Mrara, but before I could get my money from Mr Mrara, the 2nd respondent requested me to make an affidavit acknowledging that I have received the purchase price and also acknowledge that I am selling the property to her. The affidavit was prepared by this Mr Mrara and I was caused to sign same. The copy of the affidavit is annexed hereto marked “**MM 1**”.*

16. At the time I was selling the property to the 2nd respondent, the 1st respondent was already zoning the area and people were getting title deeds in respect of their properties, and applied for same, but I was never furnished with it. When I demanded same, Mr Mrara of the 1st respondent would inform me that it is coming.

17. *Having seen that the money was not forthcoming, I cancelled the sale and retained my property and the money remained with Mr Mrara, I informed the 2nd respondent that I have cancelled the sale agreement. I must also mention that whilst all this was happening, our village was given RDP house subsidy including myself even though I never applied for it and I told myself that since everyone in the village was given the RDP house I should not question anything about it.”*

[52] Evidence given under oath in an affidavit is accorded the same weight as evidence given *viva voce* in court. It must be truthful. Annexure “MM1” attached to the applicant’s founding affidavit is consistent with the second respondent’s averments that she paid R30 000.00 to the applicant. It also evinces an agreement between the applicant and the second respondent. In the affidavit under Case No. CAS 16/ 2021, the applicant confirmed receipt of monies from the second respondent in respect of the sale of the property. I must accordingly reject the applicant’s version in this regard⁹.

Was the property owned by the applicant?

[53] As aforementioned, the applicant put up “MM1” as a document that he signed, although he stated that, he was caused to sign it by Mr Mrara. He has not put up any document as proof that he owned the property. The deed of transfer shows that the property was owned by the municipality. The registrar of deeds had reported that the applicant does not own any immovable property. The municipality was therefore entitled in law to dispose of the property as it wished. It appears that the applicant purportedly sold a property that did not belong to him. If he built the flats on a property that he did not own, he may explore other legal avenues, but he does not have a right to have the deed of transfer cancelled.

[54] The sale, exchange or donation of land is governed by the Alienation of Land Act, 68 of 1981 (the Land Act). The Land Act provides for certain formalities that must be adhered to when one wishes to dispose of land. Section 2(1) provides:

⁹ Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 ZASCA (3) SA at 634 H – 635 C.

“2. (1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

[55] The Land Act also makes provision for instances where the alienation of land is invalid or terminated. In this regard the Land Act provides in section 28(2) as follows:

“Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.”

[56] In *casu*, the situation contemplated in section 28 (2) does not arise because the property did not belong to the applicant in the first place and he was never authorized to sell it. He had no right in law to alienate it. The applicant failed to prove that, first, he owned the property and second, that the municipality alienated it to the second respondent unlawfully. The evidence placed before me demonstrates that no case is made out for the relief sought.

[57] Although the second respondent had raised certain points in *limine* such as non-compliance with the provisions of PAJA and prescription of the applicant's claim, this court did not deem it necessary to deal with those points because of the approach adopted in dealing with the merits of the matter.

Costs

[58] The general rule is that costs follow the result. Mr Gxumisa submitted that the Biowatch¹⁰ principle must be applied in this case. Both respondents disagreed. The applicant has not been candid in the evidence he placed before this court. The

¹⁰ Biowatch Trust v The Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC).

property in question was never his to sell and he should not have 'sold' it to the second respondent. He still retains the monies paid to him by the second respondent. To invoke the *Biowatch* principle in these circumstances would undermine the rationale behind the principle, that of ensuring that when people approach courts to vindicate their rights, they should not be mulcted in costs. The applicant had no constitutional right to protect in these proceedings and he should bear costs of the application.

59. I accordingly make the following Order:

- 1. The application is dismissed with costs.**

T.V NORMAN
JUDGE OF THE HIGH COURT

Matter heard on: 13 June 2023

Judgment Delivered on: 20 July 2023

APPEARANCES:

For the APPLICANT: MR GXUMISA
Instructed by: M. NZIMA ATTORNEYS INC.
NO. 21 OWEN STREET
MTHATHA
CELL: 072 130 4772
EMAIL: brnzima2@gmail.com
REF: MR NZIMA
c/o:BAKUMENI ATTORNEYS
NO.19 LEOPARD STREET
KING WILLIAMS TOWN

For the 1st RESPONDENT: MR MASETI
Instructed by: MAKHANYA ATTORNEYS

**SUITE 201, 2ND FLOOR
WERNERS BUILDING, ARGYLE STREET
EAST LONDON
TEL: 043 742 3049
EMAIL: Makanyaelias70@gmail.com
c/o:POTELWA INC.
17 ARTHUR STREET
KING WILLIAMS TOWN**

For the 2ND RESPONDENT:

Instructed by:

**MR MDLADLAMBA
LEGAL AID SOUTH AFRICA
KING WILLIAMS TOWN
2ND FLOOR, OLD MUTUAL BUILDING
CATHCART STREET
KING WILLIAMS TOWN
EASTERN CAPE
TEL: 043 704 4700
EMAIL :NicoleKM@legal-aid.co.za
REF: Nicole Mitchell/x894080121**

For the 3RD RESPONDENT:

**DEEDS REGISTRY
113 ALEXANDRA ROAD
KING WILLIAMS TOWN**