IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 4028/16

Heard on: 08/02/18

Delivered on: 20/02/18

In the matter between:

CONGREGATION SERVICE COMMITTEE OF THE JEHOVA'S WITNESS CHURCH CONGREGATION-ENGCOBO	Applicant

and

ENGCOBO MUNICIPALITY	1st Respondent
OLD APOSTOLIC CHURCH OF AFRICA	2nd Respondent
REGISTRAR OF DEEDS	3rd Respondent

JUDGMENT

NHLANGULELA DJP

[1] The Applicant seeks a relief that the registration of erf 2216, Engcobo that took place on 19 June 2001 into the name of the Second Respondent be declared null and void *ab initio*; that the Third Respondent be ordered to cancel such registration; and that the First and Second Respondent be ordered to cause such property to be transferred into the name of the Applicant.

[2] The relief sought is based on the contentions made on the founding affidavit that the First Respondent perpetrated fraudulent acts manipulated the transfer and deliberately altered and/or swapped around erven 2216 and 2215 to benefit the Second Respondent unduly. Those assertions are premised on the documents, attached to the founding affidavit, described as annexures “B”, “I”, “J” and “K”.

[3] Annexure “B” is an agreement of sale of erf 2216 by the First Respondent in favour of the Applicant. It was signed by the “Purchaser” on 24 July 2003 and only one of two witnesses. The representative of the Seller, the Municipal Manager appended his/her signature but without an indication being made as to the date when signing could have taken place. Therefore it cannot be said that the document was properly signed. But for present purposes the Court will proceed on the premise that the Applicant and First Respondent did sign the agreement of sale in 2003.

[4] Annexure “I” is a letter written by one Mr M. Giqo on 21 May 2012, and addressed it to the Presiding Elder of the Applicant. What the letter says is that on 21 January 1994 erf 578, the property of the First Respondent, was sold to one Mr S.M. Mase at R880.00. However, following upon a survey that was sanctioned by the government in 2000, that property was changed to erf 2216. Then on 24 July 2003 the Applicant did not only become the buyer but the First Respondent executed a Power of Attorney to transfer erf 2216 in favour of the Applicant. A Clearance Certificate was also executed on the same date as a preparatory step towards transfer of the property to the Applicant.

[5] Annexure “K” is a letter written on 13 January 1999 by the Acting Town Clerk of the First Respondent to the Third Respondent requesting an advice concerning the legal steps that the Applicant may take to obtain a title deed.

[6] The allegation that the Applicant and First Respondent signed the documents as aforesaid with a purpose of achieving transfer of erf 2216, *albeit* that had already been transferred and registered into the name of the Second Respondent in 2001, serves to trigger a conundrum that the Applicant had to explain convincingly.

[7] Based on annexures "B", "I", "J" and "K" it was contended on behalf of the Applicant that on the causal theory of transfer of an immovable property the underlying cause for the transfer of erf 2216 was marred by fraud, manipulation, wrongful swapping/confusion of erf 2216 and 2215 and irregularities. It was also argued on behalf of the Applicant that the First Respondent did not have the intention to sell erf 2216 to the Second Respondent because a written agreement of sale and the Power of Attorney were not made. In support of these submissions the case of *Mvusi v Mvusi N.O. and Others* 1995 (4) SA 994 (Tk S) at 999 B─H was referred to the Court. The following appears at 999 B─H:

> "What was, in principle, necessary in order that *dominium* should pass? Carey Miller, in his work *The Acquisition and Protection of Ownership,* deals with the matter at 118 onwards. The first requirement, he says, is that the parties must be in a position to pass and acquire ownership, which means normally that the transferor must be the owner or authorised by the owner. I would add that in regard to property in a deceased estate the transferor must clearly be the executor or representative or a person authorised by him. There are exceptions to the rule that the transferor must be the owner (or authorised by him) but they are irrelevant in the present case. The second requirement listed by the learned author – that the parties must be legally competent to give and receive ownership – does not call for consideration here. And the third requirement is that the parties must intend the passing of ownership. In this regard the learned

author deals with the difference between the 'abstract' and the 'causal' approach to the transfer of dominium. He states at 123 para 9.2.2.3 (*a*) that:

> 'An abstract approach to the transfer of dominium is concerned with the parties' intention to pass and receive ownership, in the abstract, regardless of whether this is supported by an underlying causa or basis. On the other hand, the causal approach requires a linking *causa* or basis – typically, an underlying contract – which can be seen as the *raison d'être* for delivery.'

He thereafter reviews the authorities and cases and comes to the conclusion, in para 9.2.2.3 (*c*) at 128 onwards, that in modern law the abstract approach and not the causal approach has now to be accepted. This is clear from the cases cited by him, particularly *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369 and *Trust Bank van Africa Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A). In Transkei the same conclusion was reached in the case of *Centane Distribution and Wholesalers (Pty) Ltd and Others v Bontsi,* a decision of the Full Bench of this Court delivered on 18 March 1982 and which is – somewhat surprisingly – not yet reported."

[8] The complaints raised by the Applicant against the First Respondent are quite evidently not directed to the intention governing the registration of transfer of erf 2216. It is directed to the underlying cause of ownership from the First to Second Respondent.

[9] In the *Randles Brothers* case, *supra*, Centlivres JA made profound statements which read as follows at 411:

> "The legal transaction preceding the *tradition* may be evidence of an intention to pass and acquire ownership, but

> there may also be direct evidence of an intention to pass and acquire ownership *and, if there is, there is no need to rely of a preceding legal transaction*... To put it more briefly it seems to me that the question whether ownership passed depends on the intention of the parties and such intention may be proved in various ways."

[10] What the *Randles Brothers* case means is that for the Applicant to succeed it must show that the registration of transfer of erf 2216 itself, as a separate transaction from the underlying causa for the sale, is vitiated by fraud and/or irregularities from which an intention to pass ownership would not arise.

[11] There is paucity of facts that support the contentions made by the Applicant to impugn the title deed on erf 2216 or for that matter the underlying cause (s) that preceded the registration of transfer in 2001. For this reason the Second Respondent resists the Applicant's case on facts and law. It states on affidavit that it bought erf 2216 from the First Respondent at a fair market price, without fraud or any irregularities and the requisite intention of being a legal owner as is confirmed in the title deed. It states that the current manager of the First Respondent has not filed an affidavit supporting the Applicant's case.

[12] On law, the starting point must be that the Applicant has not disclosed its right in erf 2216 for which a declaratory may be decided in its favour. The whole issue of the conversion of erf 578 to erf 2216 is so remotely connected to the contractual arrangements between the First and Second Respondents that it can be safely regarded as irrelevant. I find re-inforcement for the correctness of this conclusion from the fact that erf 2216, a separate property from erf 578, was sold and registered in 2001, some two years prior to the conclusion of the agreement of sale between the Applicant and the First Respondent. In my view such a belated step, assuming it to be correct, cannot impact on the causa for the sale and the registration of erf 2216 that followed. The allegations of fraud,

manipulation and irregularities against the registration of erf 2216 have not been substantiated in the evidence and as matters stand one cannot phantom the

essence of such allegations. The allegations based in annexures “B”, “I”, “J” and “K” are disconnected from the events preceding the registration of erf 2216 on 19 June 2001. Such documents have no bearing on the intention of the First Respondent at the time when it sold erf 2216 to the Second Respondent. The allegation that there was swapping/deliberate confusion and alteration of erf 2215 for 2216 that resulted in the Applicant obtaining registration of erf 2215 is equally preposterous.

[13] The minutes of the First Respondent dated 6 January 2002 referred to in annexure “G” a letter by the Applicant’s attorneys addressed to the First Respondent, have not been made available. Thereupon the allegation that the Council and First Respondent had resolved to sell erf 2215, not erf 2216, to the Second Respondent cannot be true and correct.

[14] In a nutshell, the Applicant has failed to make out a case of either a defective underlying cause or defective intention of transfer of erf 2216 from the First to Second Respondent. An issue of disputed rights has not arisen in this case. A declaratory is, therefore, an incompetent relief here. The same goes about the relief for cancellation of the title deed on erf 2216. In the circumstances the Third Respondent cannot be directed to transfer erf 2216 to the Applicant.

[15] The costs shall follow the result.

[16] In the result the following order shall issue:

The application is dismissed with costs.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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