IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

17/2/15

CASE NO: 61719/13

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
2015/02/17 ....
DATE SIGNATURE

IN THE MATTER BETWEEN

LUKHELE SIFISO FRED — Applicant

and

FERNBROOK ESTATE HOMEOWNERS ASSOSICATION — First Respondent

REGISTRAR OF DEEDS, PRETORIA — Second Respondent

THE STANDARD BANK OF SOUTH AFRICA LTD — Third Respondent

JUDGMENT

LEGODI, J

[1] In this matter, the applicant Mr S F Lukhele initially asked for relief as follows:

"*1. That the claim by the First Respondent for outstanding levies and penalties against Ignatia Lindi Molefe, the current registered owner of Erf 1198, Moroeladal X36, Registration Division IQ, Gauteng, is declared to be personal right.*

2. The endorsement of the right referred to in paragraph 1 above by the Second Respondent against the title deed of Erf 1198, Moroeladal X36, Registration Division IQ, Gauteng is declared to be null and void, alternatively, non-pro scripto.

3. The Second Respondent is to remove from the Deed of Transfer T2976/05 the condition(s)/endorsement(s) referring to the First Respondent's right(s) referred to in paragraph 1 above.

4. The Second Respondent is ordered to effect transfer of Erf 1198, Moroeladal X36, Registration Division IQ, Gauteng, held by Deed of Transfer T2976/05 to the applicant and his wife Xolile without requiring the consent of the First Respondent.

5. In alternative to paragraphs 1, 2, 3 and 4 above:

5.1 that against payment by the Applicant to the First Respondent of the amount of R147 000.00 the First Respondent be ordered to issue the Applicant with a clearance certificate and/or take such other steps as are required by the Second Respondent in order to effect transfer of Erf 1198, Maroeladal X36, Registration Division IQ Gauteng, held under Deed of Transfer T2976/05, situated at 14 Bushwillow Avenue, Fernbrook Estate, Inchanga Road Craigavon, into the name of the Applicant and his wife Xolile;

5.2 *in the event the First Respondent fails and/or refuses to issue the clearance certificate in prayer 1 within fourteen calendar days of payment of the amount of R147,000.00 by the Applicant to the First Respondent, that the Second Respondent hereby be ordered to transfer Erf 1198, Maroeladal X36, Registration Division IQ Gauteng, held under Deed of Transfer T2976/05, situated at 14 Bushwillow Avenue, Fernbrook Estate, Inchanga Road Craigavon, into the name of the Applicant and his wife;*

5.3 *that the Sheriff of this Honourable Court hereby be authorised and directed to sign such documents and to take such steps as may be further required for purposes of transfer of Erf 1198, Maroeladal X36, Registration Division IQ Gauteng, held under Deed of Transfer T2976/05, situated at 14 Bushwillow Avenue, Fernbrook Estate, Inchanga Road Craigavon, into the name of the Applicant and his wife;*

6. *costs of this application, only if opposed; and*

7. *further and/or alternative relief".*

[2] In the light of the decision in the unreported matter of *Willow Waters Homeowners Association (PTY)Ltd v Jerry Sezde Koka NO and others (768/13)[2014] ZASCA 220* handed down on the 12 December 2014, the applicant confined himself to relief sought in prayer 5 quoted above. The R147 000.00 tendered in prayer 5 is in respect of the amount which the applicant says is not affected by prescription. A background to the dispute is necessary: One Ignatia Lindiwe Molefe ("Molefe") is the registered owner of property situated at Erf 1198 Maroeladal X36, Registration Division IQ Gauteng ("the property"). The mortgage bond was registered against the property in favour of Standard Bank, the third respondent. Standard Bank is not participating in these proceedings, although cited as a party. Molefe defaulted in servicing the bond and as a result default judgment was obtained against him. Subsequent thereto, the property was sold to the applicant at a sale in execution on the 14 June 2011.

[3] When the applicant wanted to have the transfer of the property to be registered in his names, the first respondent refused to issue a clearance certificate in respect of rates, levies and other services. Its contention being that until the arrear amount owed to it in respect thereof is paid, it was not prepared to issue a clearance certificate. It took the point that, it has a real right registered in Deeds Registry. The first respondent's right in this regard also forms part of the conditions of sale, in execution. That is, the applicant is required, *inter alia*, to pay rates, taxes and other charges necessary to effect transfer subject to all conditions specified in the deed of transfer of the property upon the request of Standard Bank's attorneys.

[4] As on the 13 September 2013, the first respondent insisted that it was entitled to payment of an amount of R339 104.44 which included levies, penalties and seemingly untaxed legal fees, which amount goes further back than three years from the time the figures were provided to the applicant. The amount is said to increase by round about R7208.29 per month with compounded interest accruing on the balance.

[5] Initially, the applicant saw the dispute as revolving around the question whether the right of the first respondent is a real right against the home owner at the time the property is registered in his or her name and as such capable of being registered against its title deed as a conditional endorsement and enforceable against subsequent owners of the property. The question was settled in the affirmative in *Willow Waters Homeowners Association (PTY) Ltd.* As a result the applicant abandoned his main relief quoted in paragraph 1 above.

[6] The second question is whether the normal prescription period of three years applies to the charges levied as per annexure F, being a breakdown of the amount owed to the first respondent. This in my view, was the only crucial issue to be decided in this matter. Of course, counsel for the first respondent persisted with his two points in *limine* raised in the first respondent's heads.

[7] The point raised was that the Standard Bank has not been served with the present application. At one point, the submission moved to the suggestion that there has not been a proper service, in that the application was not served by the Sheriff.

That is, every initial legal process must be served by the sheriff on the party against whom the process has been issued. I find the point raised as being on a fishing expedition. The application was served on Standard Bank's attorneys who are attorneys of record in the action proceedings instituted against Molefe. They were accepted and there has not been any objection. But, most importantly, the point was not raised in the answering affidavit. The suggestion was that it was not necessary as it was a point of law that did not need to be raised in the answering affidavit. In my view, there is no basis for the submission. It is a factual issue.

[8] The other issue raised as a point in limine was the non-joinder of Molefe and the Sheriff. It was urged that both of them have substantial interest in the relief sought by the applicant. That might be so, but I do not think that the interest of Molefe or the Sheriff is substantial or material, seen in the context of the relief sought. The dispute is between the first respondent and the applicant. That is, whether the applicant is obliged to pay to the first respondent an amount in respect of levies, rates, taxes and other services before clearance certificate can be issued. In any event, insofar as Molefe is concerned, she cannot be traced. Perhaps that explains why judgment and execution by Standard Bank proceeded without Molefe participating in those proceedings and why the first respondent never enforced its claim against Molefe.

[9] Turning to the prescription defence, the suggestion was that it is not available to the applicant. The applicant is not a debtor to the first respondent Molefe is, so the argument went. That cannot be correct. Refusal to issue clearance certificate required for the purpose of having transfer registered, is as a result of the Molefe's indebtedness to the first defendant. Therefore, if in law, Molefe would have been entitled to raise a prescription as a defence against the first respondent's claim, so should the applicant.

[10] The amount of R147 000.00 is said to have been calculated by the applicant's attorneys, based on the figures provided by the first respondent. It was calculated by adding the amounts for the three years directly preceding the date upon which the first respondent indicated its refusal to give the applicant a clearance certificate without payment thereof by the applicant. The attorney is said to have prepared

Annexure A. the annexure was not part of the founding affidavit. The first respondent therefore did not have the opportunity to deal with the correctness of the calculation based on the fact that prescription applies. Therefore the relief in prayer 5 cannot be granted as it is.

[11] Inasmuch as counsel for the first respondent sought to argue that the relief in prayer 5 is not based on prescription, I find it necessary to deal with the concern before I conclude. The initial contention was that no allegation of prescription was made in the founding affidavit and that it was only raised in the replying affidavit, to which the first respondent had no opportunity to respond thereto. Of course this is not correct.

[12] In paragraph 5.2.2 of the founding affidavit the applicant raises one of the two issues as follows:

> "*Whether the normal prescription period of three years applies to the charges levied as per annexure F hereto*"

[13] Annexure F is a printout from the first respondent. The amount outstanding and due to the first respondent is indicated as R333 553.66 dating as far back as 1 March 2007. At that time, an opening balance was recorded as R2884.52. Apparently, since then there has never been any payment by Molefe. So as on the 31 July 2012, the closing balance was R333 553 66.
The applicant further in the founding affidavit deals with the prescription issue as follows:

> "*6.5.1 All the items listed in annexure F constitute an ordinary debt which prescribes within three years*".

[14] I am therefore satisfied that the prescription point was not raised for the first time in the replying affidavit. In its answering affidavit, the first respondent and dealing with prescription, dismissed it as being irrelevant, alleging that the applicant agreed to payment thereof in terms of the conditions of sale in execution. Similarly, in dealing with paragraph 6.5.1 as quoted above, the first respondent states:

> *"25.2 The applicant has conveniently failed to appreciate that he agreed to conditions of sale in so doing agreed to pay all the amounts charged owed in respect of the property. Similarly, the debt relates to the property. Whether it is a real or personal is with respect irrelevant".*

[15] Of course the debt owed to the first respondent by Molefe also relates to the property in question. An undertaking by the applicant to pay all arrears, in my view, cannot be a waiver of the applicant's right to raise whatever defence is sustainable in law. It cannot be that by concluding the sale agreement in execution, the applicant, revived all the claims that might have prescribed.

[16] Consequently, I hereby make an order as follows:

16.1 The applicant is hereby ordered to pay to the first respondent an amount to be recalculated taking into account any amount for rates, taxes, levies and other charges etc. due to the first respondent which may not have prescribed and calculated by adding the amounts for the three years directly preceding the date upon which the first respondent indicated its refusal to give the applicant a clearance certificate.

16.2 Upon payment thereof, the first respondent shall within 15 days from date hereof issue the applicant with a clearance certificate and or take such other steps as are required by the second respondent in order to effect transfer of Erf. Maroeladal X36, Registration Division IQ Gauteng, held under Deed of Transfer T2976/05, situated at 14 Bushwillow Avenue, Fernbrook Estate, Inchanga Road Craigavon, into the names of the applicant and his wife Xolile.

16.3 In the event that the first respondent fails and or refuses to issue the clearance certificate referred to 16.2 above within 15 days upon payment thereof, of an amount so calculated as in 16.1 above, the second respondent is hereby directed to transfer the said property held under Deed of Transfer T2976/05 into the names of the applicant and his wife.

16.4 The Sheriff of this court is hereby authorised and directed to sign such documents and to take such steps as may further be required for the purposes of transfer of the said property held under Deed of Transfer T2976/05 into the names of the applicant and his wife.

16.5 The first respondent to pay the costs of this application, such costs to include the costs of two counsel.

M F LEGODI
JUDGE OF THE HIGH COURT

FOR THE APPLICANT: Adv. C F J BRAND SC
Adv. A GRANOVA

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Matter heard: 04 FEBRUARY 2015

Judgment handed down: 17 FEBRUARY 2015