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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO: 12356/2012

In the matter between:

LUCKY CECIL NXUMALO N.O.

APPLICANT

and

**PROVINCIAL DEPARTMENT OF HOUSING
KWAZULU – NATAL**

FIRST RESPONDENT

**ESTATE OF THE LATE DUDUZILE REGINA
SIKHAKHANE**

SECOND RESPONDENT

NONKULULEKO KHUMALO

THIRD RESPONDENT

REGISTRAR OF DEEDS, KWAZULU – NATAL

FOURTH RESPONDENT

JUDGMENT

Date of Judgment delivered: 17 September 2015

MARKS, AJ:

1) The applicant Lucky Cecil Nxumalo in his capacity as authorised representative of the estate of the late Mhlupheki Hamilton Nxumalo, seeks interdictory relief against the four respondents in the following terms:

1.1) an order interdicting the second and third respondents from alienating, burdening or dealing with the property known as Erf 1.....~~107~~ KwaMashu F pending the finalisation of this application;

1.2) an order that the Registrar of Deeds be directed to note a caveat on the Deed of Grant relating to such immovable property;

1.3) the First Respondent be ordered to transfer ownership of such immovable property to the KZN Department of Local Government and Housing so that the Estate of the Late Mr Nxumalo may be given the opportunity to purchase the aforesaid property (this relief is sought in terms of the notice of amendment dated 22nd October 2013); and

1.4) the Registrar of Deeds be authorised and directed to set aside the registration of transfer to Duduzile Regina Sikhakhane and (if necessary) the third respondent.

[2] **UNDISPUTED FACTS OR FACTS WHICH ARE COMMON CAUSE**

2.1) The applicant's late father, Mr M.H Nxumalo was issued a residential permit by the Township Manager on 20 September 1960 for the immovable property which is a dwelling situated at Erf 1....~~107~~ KwaMashu, KwaZulu-Natal¹.

2.2) On 2 August 1997, the applicant's father died intestate. Shortly after his passing both the applicant and the second respondent (being his biological children) and other relatives were residing in the residence². One Linda Thelma Nxumalo had been appointed representative of the estate.

2.3) On 5 June 1998 the second respondent, who is now deceased, purchased the above mentioned property from the first respondent, the KwaZulu-Natal Department of Local Government and Housing, for R3 000.00.³ The property was then transferred into her name on 13 November 2003⁴.

2.4) On 13 December 2006 the third respondent purchased the said property from the estate of the second respondent, duly represented by Mathobi Agnes

¹ Annexure B to the applicant's founding affidavit of the papers: p 15.

² Applicant's founding affidavit para 10 of the papers: p 8.

³ Annexure AA to the third respondent's answering affidavit of the papers: p 46, duly signed by Dr Sikhakhane and CJH Olivier in her capacity as Assistant Director.

⁴ Annexure BB to the third respondent's answering affidavit of the papers: p 47.

Sikakhane,⁵ for the sum of R43 506.00⁶. The property was duly transferred and registered in her name on 16 May 2012⁷. She has been residing in the property since 2007 or about eight years.

2.5) On 5 September 2007, the applicant was appointed as the representative of his father's estate by the Magistrates' Court Ntuzuma⁸. During these proceedings the Magistrate Mr Ngubane erroneously made an order that the said property belonged to the deceased and therefore the property remains the estate property which must devolve upon the heirs⁹.

2.6) During June 2009, the applicant discovered that the third respondent had purchased this property. He then approached the Verulam Justice Centre which dispatched a letter to the offices of Krish Naidoo who was the attorney dealing with the transfer of the property. A letter from the office of Krish Naidoo dated 3 June 2009 with the annexed Deed of Sale indicated the property had been legally sold and that the third respondent is a legal occupant of the property¹⁰.

⁵ Annexure I to the papers: p 76 (letter of authority to transfer the property issued by the Master of the High Court and dated 10 November 2008.)

⁶ Annexure CC to the third respondent's answering affidavit of the papers: p 48 – 51, duly signed by both parties.

⁷ Annexure DD to the third respondent's answering affidavit of the papers: p 52 – 54.

⁸ Annexure A to the applicant's founding affidavit of the papers: p 14.

⁹ Annexure C – D to the applicant's founding affidavit of the papers: p 17 – 26.

¹⁰ Annexure F of the applicant's founding affidavit of the papers: p 27 – 28.

2.7) On 27 February 2012 an email correspondence was sent by Verulam Justice Centre to Krish Naidoo enquiring whether transfer had been passed to the third respondent. The reply was that the file was closed.

2.8) On 15 February 2013 the applicant then launched the present application on an urgent basis. On that date the matter was adjourned *sine die* with costs reserved. On 14 January 2014 an application to amend the Notice of Motion was granted.

2.9) On 21 October 2014 when the matter was adjourned, both counsel for the applicant and the third respondent were present in chambers with Moodley J when discussions took place and certain issues were raised. The issues that were discussed were formulated in a typed memorandum which was signed by the Judge and attached to the order of court. Certain instructions were given to Mr Seedat and Mr Naidoo. The memorandum reads as follows: –

‘The following issues were discussed:

- 1 proper service of all the pleadings by the applicant on all the relevant parties;
- 2 Not satisfied with State attorney’s notice to abide. Need to explain transfer and whether alternative property can be allocated.
- 3 3rd Respondent purchased property via funding from the Dept. of Human Settlements. Wants to retain property.
- 4 Applicant requires property to be retransferred to estate. Family home and sentimental reasons.

- 5 Mr Naidoo to investigate Judicare appointment. 3rd respondent has difficulty placing him in funds.
- 6 Both legal representatives to investigate whether another property is available for allocation to the parties.
- 7 Parties to make relevant enquiries and revert by end February 2015.'

2.10) Notice of set down together with the returns of service on the parties were filed on 13 August 2015, and the matter was set down for argument on 27 August 2015. The first respondent filed a notice to abide the decision of the court.

3.1) At the hearing, it became apparent that counsel for the applicant, Mr *Seedat*, was attempting to introduce a new ground to the applicant's argument that did not form part of the papers, *inter alia* that the Director – General had not complied with the provisions of The Conversion of Certain Rights into Leasehold of Ownership Act 81 of 1988.

3.2) Mr *Khan* for the third respondent quite correctly objected which led Mr *Seedat* moving for an application for a postponement, in order to make application at a later date for leave to file supplementary affidavits. The application for a postponement was opposed and Mr *Khan* indicated that if it could be possible with the consent of Mr *Seedat* and leave of the Court, that if he was given leave to argue the matter first then Mr *Seedat* could decide whether he would still seek a postponement. This was done and Mr *Seedat* withdrew his application. The matter was then argued.

ARGUMENT

3.3) The applicant in its heads of argument, and Mr Seedat in oral argument, contended that only the representative of the estate of the late Mr Nxumalo had the right to purchase the property from the first respondent, yet the second respondent clandestinely and without permission of the applicant or his family purchased the property from the first respondent. When the second respondent passed away, the representative of the estate sold the property to the third respondent. As the second respondent had thus acted in *fraudem legem* and *contra bones mores*, the contracts of sale were both illegal. Further, he contended that the Court is obliged to take judicial notice of the Convention of Certain Rights into Leasehold of Ownership Act 81 of 1988. (hereinafter “the Act”). As the procedures laid down in the Act were not complied with, the initial sale of the property to the second respondent was rendered a nullity. Further, there is no evidence that the prescribed enquiry was held, the Court must draw an adverse inference and this will provide corroboration that the second respondent in purchasing the property, and the Director – General in selling the property to her, did not do so within the prescripts of the Act. On that basis, the court should grant the order prayed in the interest of justice and equity.

3.4) Mr Seedat then referred the court to *Nzimande v Nzimande and Another* 2005 (1) SA (W) and the Moodley J’s aforementioned memorandum.

3.5) The third respondent in its heads of argument, and Mr *Khan* in oral argument, contended that the relief sought cannot be granted for the following reasons: firstly, the applicant's late father was issued with a residential permit to occupy the immovable property and ownership of such property was not transferred to him before his death; secondly the property was legally purchased by the second respondent who took transfer into her name; and thirdly the third respondent *bona fide* purchased such property and transfer was registered into her name in 2012.

JUDICIAL NOTICE

4.1) A Court is obliged to take judicial notice of an act of Parliament, and I must therefore consider the provisions of the Act. The purpose of the Act was to provide for the conversion of certain rights of occupation into leasehold or ownership and for matters connected therewith.

Section 2(1) of the Act is pre-emptory and stipulates that the Director – General shall conduct an inquiry in the prescribed manner in respect of affected sites in order to determine who shall be declared to have been granted a right of leasehold or ownership in regard to such sites.

Section 2(2) requires the Director – General to publish a notice indicating that such enquiry is to be conducted.

Section 2(3) is discretionary and confers powers upon the Director – General to:

- a) give effect to any agreement or transaction in relation to the rights of a holder of site permit;
- b) give effect to any agreement or transaction in respect of such rights entered into or made before the death of the last holder;
- c) consider any intestate heir of the last such holder to have been granted a right of leasehold or ownership in respect of the site concerned;
- d) give effect to any court order.

4.5) However, there is no evidence to suggest that the Director – General or his delegate did not act within the prescripts and confines of the Act in making his determination. There is no *onus* upon the second or third respondents to produce evidence relating to the inquiry as envisaged in section 2(1) of the Act. Furthermore, section 2(3) of the Act is discretionary. In any event the second respondent was also the biological daughter of the deceased, and therefore entitled to occupy and purchase the property which she did. Moreover, these allegations are nowhere to be found in the papers or in the applicant's heads of argument for that matter.

THE JUDGE'S MEMORANDUM

5.1) The memorandum drafted by Moodley J is not an order of court. Moreover, paragraph 6¹¹ thereof does indicate that Moodley J on the 'face of it' indicated that it would appear that the correct party to which the house must be transferred to would be the applicant, as indicated in the letter at para 9.¹² However, even if this was mentioned in chambers, there is nothing untoward in having a *prima facie* view of a matter. However, only after having regard to all the papers, the affidavits, heads of argument and hearing oral argument can a court be in a position to evaluate the evidence in its totality and make a proper determination accordingly.

[6] The *Nzimande*¹³ decision that Mr Seedat referred to in oral argument does not assist the applicant's case either. It is distinguishable on the facts in that the court there was confronted with a customary law that did not allow transfer of ownership of immovable property to women, a law which is unconstitutional. In this matter, the Assistant Director – General transferred the property to the second respondent, who was also a heir to the deceased estate. She had been occupying, leasing and residing in the property with her children at the time she purchased it. This sale was thus legal and within the prescripts of the Constitution¹⁴. After the second respondent died, the sale of the property by the representative of her estate to the third respondent was also legal, and he thus remains the legal owner.

¹¹ Judges notes signed by Moodley J on 21 October 2014.

¹² Letter handed in by Mr Seedat on the date of argument (not objected to by Adv Khan)

¹³ *Nzimande v Nzimande and Another* 2005 (1) SA 83 W.

¹⁴ The Constitution of the Republic of South Africa Act, 1996.

[8] **CONCLUSION**

8.1) The applicant has failed to establish a case for the relief he seeks on the papers. This entitles the third respondent to an order dismissing such application.

[9] **COSTS**

9.1) In considering the issue of costs, the Court had a discretion which is to be exercised judicially. The Court is required to take into account the circumstances of the case, the issues at hand, the conduct of the parties and any other related circumstances.

9.2) The general rule is that the costs follow the result. There are no circumstances in this matter for the court to deviate from this general principle.

9.3) Notwithstanding the fact that the third respondent has been unnecessarily occasioned with costs in this matter the Court does not deem it fair and equitable that costs be awarded on the scale of attorney and client, as the Court must guard against censuring a party by way of a punitive cost order when with the benefit of hindsight a course of action taken by a litigant turns out to have been a lost cause.

[10] **ORDER**

10.1) The application is dismissed with costs, including the reserved costs occasioned by the adjournments on 15 February 2013 and 21 October 2014.

S MARKS, AJ.

APPEARANCES

For the Applicant: Adv Seedat instructed by Shaheen Seedat & Company,
Durban.

For the Respondents: Adv S Khan, instructed by Krish Naidoo & Associates,
Durban.

Date of Hearing: 27 August 2015.

Date of Judgment: 17 September 2015.