

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON)**

Case No:493/12
ECD:193/12
Date Heard: 7/08/2012
Date Delivered: 24/08/2012

In the matter between:

BUFFALO CITY MUNICIPALITY

1ST APPLICANT

**THE MUNICIPAL MANAGER OF
THE BUFFALO CITY MUNICIPALITY**

2ND APPLICANT

And

JOHAN RUDMAN KOEKEMOER

RESPONDENT

JUDGMENT

SMITH J:

Introduction

[1] The Applicants seek an order setting aside the default judgment granted by Hartle J on 3 April 2012. In terms of that order, the Buffalo City Municipality (the First Applicant) was directed to take all necessary steps to transfer certain immovable property to the Respondent.

[2] The Respondent had moved that application pursuant to a resolution

adopted by the municipality to sell a portion of public open space, i.e. Erf 11578, “*measuring approximately 515 square metres in extent*” to his predecessor- in-title, one Mrs Saunders, by way of private treaty, for R8800. The sale was made subject to various conditions; one of which was that the approval of the Premier should be obtained.

[3] In order to succeed with the application for rescission the applicants must:

- a) provide a reasonable explanation for the default. If it appears that their default was wilful, or due to gross negligence, the court may decide not to come to their assistance;
- b) show that they have a *bona fide* defence to the main application. It is sufficient for them to put up averments which, if proved at the hearing of the main application, would constitute a comprehensive defence to the Respondent’s claim; and
- c) show that the application is *bona fide* and not made with the intention of merely delaying the Respondent’s claim.

(Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 at 476-477).

[4] I am of the view that the Applicants have failed to establish any of

these prerequisites. My reasons for this conclusion are as follows.

Explanation for the default

[5] The Second Applicant, Andile Fani, avers that he only became aware of the default judgment on 10 April 2012. The application papers had apparently been served on one Ms Dyakopu, who is the municipality's general receptionist. Ms Dyakhopu could not recall what she had done with the papers.

[6] Mr Fani stated that Ms Dyakopu is not his personal assistant or his receptionist. He avers that the application had therefore not been properly served in terms of the Court Rules and section 115(3) of the Local Government: Municipality Systems Act, 32 of 2000.

[7] On 30 March 2012, Mrs Mtati, an attorney in the municipality's Legal Services Department, was advised telephonically by Respondent's attorneys that the application would be heard on 3 April 2012. According to Fani, she was unable to locate the application papers despite a "diligent" search.

[8] Mrs Mtati subsequently took sick-leave from 31 March 2012 to 11 April 2012. On the 3rd of April 2012 she did however send an sms to her

colleague, Mr Dotwana (who is also an attorney in the Legal Services Department), reminding him “*not to forget this case which was appearing on the same date*”. Dotwana was however in a meeting, and by the time that he had left the meeting it was already too late for him to attend court. He tried in vain to establish what had happened in court by phoning the Registrar and the Respondent’s attorneys.

[9] Mr *Swartboo*i, who appeared for the Applicants, submitted that the service upon the municipality was fatally defective. He argued that Rule 4(1) (a) (vii) of the Uniform Rules of Court requires legal process to be served on municipal managers or their secretaries. Similarly, he submitted, section 115(3) of the Local Government: Systems Act requires that legal process be served on the municipal manager, or a person in attendance at the municipal manager’s office. He argued that the service on Ms Dyakopu did not satisfy these legal requirements because she is the municipality’s general secretary, and not attached to the office of the municipal manager.

[10] In my view these submissions are without any merit.

[11] The Sheriff’s return states that the application was served on Ms Dyakopu, a receptionist ostensibly in control of, and at the principal place of business of the municipality. It is common cause that Fani’s office is located

at the Municipal Buildings, Oxford Street, East London, where the application papers were served. The sheriff's return is therefore *prima facie* valid, and I agree with Mr *Cole*, who appeared for the Respondent, that it is not open to the Applicants to contest the validity of the service simply because Ms Dyakopu could not remember what she had done with the papers.

[12] I am also not convinced that the explanation for the default is reasonable. It is clear that Matiti, who is an attorney, had known on 30 March 2012 that the application would be heard on 3 April 2012. She had apparently told Dotwana, another attorney employed by the municipality, about the date of the hearing, and she had reminded him about it on the morning of the 3rd of April 2012. They have both been grossly negligent in failing to ensure that the municipality had legal representation on the date of the hearing. The municipality is a metropolitan entity with vast resources at its disposal, including a Legal Services Department. It also regularly instructs various firms of attorneys to act on its behalf. I am therefore of the view that the failure by Matiti and Dotwana to ensure that the municipality was legally represented at the hearing amounted to gross negligence.

Bona fide defence

[13] Fani has averred that the sale had lapsed because one of the

suspensive conditions, namely that the approval of the Premier must be obtained, had not been fulfilled. He stated that no such application had been made, and the Premier had in fact not granted her approval for the disposal of the immovable property.

[14] Fani has however been less than forthcoming with the court in this regard. At the hearing of the matter Mr *Cole* had successfully applied for the admission of a circular which the office of the Premier had addressed to municipalities during February 1995. That circular instructed municipalities that:

“...it has been decided that the disposal of all Council owned land shall, from the date of this circular be subject to the prior approval of the Member of the Executive Council enlisted with the portfolio of Housing and Local Government. All Local Authorities are therefore required to obtain the necessary approval before the process of disposal of land is set in motion.”

[15] Furthermore, during August 1996, the Regional Director of the Department of Housing and Local Government, M.J. Sulelo, wrote to the municipality informing it that:

“The Minister of housing and Local Government has approved your application for sale the above land in terms of Section 124 (1) (a) of the Municipal Ordinance 20 of 1974.”

[16] In addition, it is also instructive that during October 2011 the Municipality’s interim Executive Director for Development Planning and Management, Ms Mbali Majeng, was of the view that all the conditions had been fulfilled. In a letter to the municipality’s attorneys, Bax Kaplan, dated 3

October 2011, she stated that:

“...all conditions of establishment have been complied with and the consolidation diagram has been approved by the Surveyor-General.”

[17] Mr *Swartboo*i submitted that these facts, which were disclosed by the Respondent, still do not establish that the Premiers’ approval had indeed been granted. He submitted that approval by the MEC for Local Government and Housing, in circumstances where the council resolution and the law require that the Premiers’ approval be obtained, do not suffice.

[18] I do not agree. The Premier had instructed municipalities to follow a certain procedure if they wanted to dispose of land. It appears that the municipal officials had duly lodged an application in accordance with the Premier’s directives. That application had resulted in approval by the MEC. The municipal officials appeared to have been of the view that the approval had been properly granted, and have acted in accordance with this understanding.

[19] In the event, Mr *Swartboo*i was constrained to concede that it was the municipality’s responsibility to apply for the Premier’s approval. He could therefore hardly challenge the validity of the resolution on the basis of the municipality’s own failure to comply with the suspensive condition.

[20] Mr *Swartboo*i has also submitted that the Respondent has not established that he was entitled to the order, as the original contract was between the municipality and Mrs Saunders. This submission in my view also has no merit. The Respondent has averred that Mrs Saunders sold the property to her husband, who in turn had sold it to him. He has therefore established that he is the lawful successor-in-title to Mrs Saunders, and therefore entitled to take transfer of the property. The Applicants have not been able to put up any facts or averments to gainsay these allegations. The basis on which they challenge the Respondent's *locus standi* is spurious and without any merit.

[21] Mr *Swartboo*i also submitted that the resolution referred to the erf as being "*approximately 515 square metres in extent*". It appears that after the erf had been surveyed it was established that it was in fact 547 square metres in extent. He argued that because there was now a "substantial difference" between the size mentioned in the resolution and the actual size established after survey, the municipality could no longer sell the land for the original price.

[22] I disagree. The property was clearly defined in the resolution and there could therefore not have been any confusion as to what had been sold. The extent of the property was deliberately estimated because it had not yet

been surveyed. It was therefore not open to the municipality to insist that the price be re-negotiated if the land turned out to be in excess of the estimated size. Likewise could the buyer not insist on a reduced price if it turned out to be smaller than the estimated 515 square metres.

[23] It appears at some stage, and out of frustration with the inactivity on the part of the municipality, the Respondent had made an offer to pay R70 000 for the land. He had however subsequently withdrawn the offer before it was accepted, apparently on the basis of legal advice, and insisted that the sale proceed on the original terms.

[24] Mr *Swartboo*i argued that these subsequent developments mean that the parties had in effect re-negotiated the price, but had failed to reach agreement in this regard. He submitted that there is therefore no binding agreement regarding price, and hence the contract of sale is inchoate and invalid. I disagree. It is clear that the offer made to the municipality was borne out of frustration on the part of the Respondent, and in an attempt to accelerate the transfer of the land. He was however entitled to withdraw the offer before the municipality accepted it, and to insist that the transfer proceed on the basis of the original resolution.

Is the application *bona fide*?

[25] Mr *Cole* has submitted that the Applicant should be ordered to pay costs on a punitive scale because Fani had deliberately and disingenuously withheld important and relevant facts from the court. He referred in particular to Fani's categorical and unambiguous assertion that no application had been submitted for the Premier's approval, and that the approval had in fact not been granted as required in terms of the resolution.

[26] He argued that Fani had deliberately withheld documents which clearly show, not only that the necessary approval been granted, but also that the relevant municipal functionaries were aware of this fact, and have in fact acted in accordance with the understanding that all conditions had been fulfilled.

[27] Mr *Swartboo*i however submitted that Fani's assertions in this regard were made in the *bona fide* belief that the approval of the Premier, and not that of the MEC, was required. His averments in this regard were therefore factually and legally correct as the Premier's approval had in fact not been obtained.

[28] I agree with Mr *Cole* that Fani's failure to disclose the relevant documents and the fact that approval had purportedly been granted by the

MEC, ineluctably leads one to the conclusion that this was done deliberately and disingenuously in the hope that the Respondent would not have been able to source these documents. Even if he had genuinely believed that the MEC's approval did not suffice, he should still have disclosed this fact; instead of bringing the court under the impression that no approval had been granted. His conduct was regrettable and becoming of an official of his status.

[29] In summary then, my findings are as follows:

- First, the explanation for their default provided by the Applicants is most unsatisfactory. It is common cause that at least two of the municipality's senior functionaries, who are both attorneys, were aware, as early as 30 March 2012, of the set-down date. They have been grossly negligent in not ensuring that the Applicants were legally represented at court;
- Second, the defences proffered by the Applicants have no merit. There are virtually no prospects that the main defence, namely that the Premier's approval had not been obtained, can succeed in the face of incontrovertible documentary proof that the approval of the MEC had been obtained in accordance with the Premier's directives. The other defences similarly have no merit for the reasons which I have stated

above; and

- Third, I am not persuaded that the application is *bona fide*. The Second Respondent, being the statutory custodian of the municipal files pertinent to this matter, was under a duty to disclose all the relevant facts to the court. I am convinced that he has disingenuously withheld documents which are relevant to the adjudication of this matter in an attempt to advance the municipality's case. I agree with Mr *Cole* that his conduct is deserving of censure by way of a punitive costs order.

[30] For these reasons I am of the view that the Respondents have failed to establish any of the prerequisites for rescission of the default judgment, and the application must therefore fail.

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

- (a) The application is dismissed.
- (b) The applicants are ordered to pay the costs of the application on the attorney and client scale.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

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