

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A64/2006

In the appeal between:

HAMIDA BIBI KHAN N.O. 1st Appellant

AMOD KHAN N.O. 2nd Appellant

and

SETSENG SHOPPING CENTRE (PTY) LTD Respondent

CORAM: BECKLEY, J *et VAN DER MERWE, J*
et VAN ZYL J

JUDGMENT: BECKLEY, J

HEARD ON: 14 AUGUST 2006

DELIVERED ON: 31 AUGUST 2006

[1] The respondents (the applicants in the Court *a quo*) approached the Court *a quo* on an urgent basis for an interdict restraining the appellants (respondents in the Court *a quo*) from continuing with building activities on certain erven and an order directing the appellants to demolish and remove all fences and construction on the

same erven. A rule *nisi* was issued and was confirmed on 8 December 2005 by Hattingh, J. The appellants thereafter noted an appeal to this Court with the leave of the Court *a quo*.

- [2] It was not in dispute at the hearing in the Court *a quo* that the respondent is the registered owners of the erven in question, as appears from Title Deed TG23167/2001 and that the registration was effected in favour of the respondents on the 3rd of July 2001 pursuant to the provisions of the Deeds Registries Act, Act no. 47 of 1937. The appellants, however, contend that they have a competing, and in fact, better title to the said erven as the property in question comprises tribal land and was unlawfully transferred to the predecessors of the respondents without the knowledge or consent of the Makhalaneng Tribe, in which it is vested, without any regard to the provisions of the Interim Protection of Informal Land Rights Act, Act no. 30 of 1966. The appellants further contend that they acting as the Trustees of the Hannida

Family Trust purchased the erven concerned from the tribe in September 2005 for the sum of R100 000,00 and that they are therefore the lawful owners of the said erven.

[3] At the hearing of the matter in the Court *a quo*, Me. Gates requested that the matter be referred for the hearing for oral evidence. The Court *a quo* refused to accede to this request, and the reason advanced for the refusal was that it was not in dispute that the applicant was the registered owner of the property, and that no *bona fide* dispute of fact exists on the papers.

[4] In the course of the hearing of the appeal in this Court, Me. Gates raised several issues, which were disposed of in the course of the hearing of the matter and therefore need not to be considered. Her main and the only remaining contention was that the Court *a quo* erred in not referring the dispute regarding the ownership to trial or for the hearing of oral evidence. The only issue that could possibly have been so referred, is the question whether the respondent or Makhalaneng Tribe were the owners of the

said erven, and whether they, the tribe, have sold the erven to the appellants in their capacity as Trustees as aforesaid. In order to determine whether the appellants have shown on the papers that a *bona fide* dispute exists, the following aspects have to be considered:

In South Africa, we have a negative system of registration of immovable property, where the Deeds Registry does not necessarily reflect the true state of affairs; (per Streicher, JA, in **CAPE EXPLOSIVE WORKS LTD AND OTHERS v DENEL (PTY) LTD AND OTHERS**, 2001 (3) SA 569 (SCA) at 579 E – F); It is therefore possible that the legal owner of land may not be registered as the owner on the Title Deed if he has acquired his ownership by one of the original methods of acquisition of ownership; (**The Law of South Africa, Volume 14, page 27 paragraph 20**) and that, therefore, a transfer or registration of immovable property can be challenged on a variety of grounds. To determine whether the applicants have shown whether any of these grounds are present, some of the allegations in the Answering Affidavit have to be considered:

The allegation that the appellants have competing and in fact better title to the property as the respondent, is, with respect, far fetched and untenable. At best for the appellants, the trust which they represent might be the purchaser of some immovable property from the tribe, but that is not sufficient to vest the ownership of the property concerned in the appellants or the said Trust.

Nowhere in the papers however, is it alleged in what manner or when the tribe acquired ownership in the property concerned, nor is any reference made to prescription as a means of acquiring ownership or to the provisions of the Prescription Act, Act no 68 of 1969 in support of the allegation that the tribe is in fact the owner of the property concerned. In terms of the provisions of section 17 of the said Act, the Court may not of its own motion take notice of prescription. See also in this regard, **DE JAGER EN ANDERE v ABSA BANK BEPERK**, 2001 (3) SA 537 (SCA) at 543 C – D. Despite the fact that the papers contain no reference to prescription or the Act, the appellants have in any event not alleged that the members of the tribe have occupied the property as if they were the owners thereof. They, the members of the tribe, were allegedly in undisturbed possession and occupation of the property concerned at all material times – allegations which are insufficient to show on a balance of probabilities that they became owners of the property concerned by virtue of prescription, and therefore also insufficient to show that a *bona fide* dispute of fact exists regarding the ownership of

the property concerned.

[5] In the absence of sufficient details and particularity regarding the rights of the tribe, and in particular the failure to rely on prescription as a basis on which the tribe may claim ownership of the property, the appellants have failed to show that a *bona fide* dispute of fact exists, and accordingly, the Court *a quo* was justified in refusing the request that the matter be referred for the hearing of oral evidence. It therefore follows that the appeal cannot succeed.

[6] In the result the appeal is dismissed with costs.

A. P. BECKLEY, J

I concur.

C.H.G. VAN DER MERWE, J

I concur.

C. VAN ZYL, J

On behalf of the Appellants:

Adv. J. Gates
Instructed by:
Martins Attorneys
BLOEMFONTEIN

On behalf of the Respondent:

Adv. S.J. Reinders
Instructed by:
Claude Reid Inc.
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