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**IN THE HIGH COURT OF SOUTH AFRICA,
NORTHERN CAPE DIVISION, KIMBERLEY**

**Not Reportable
Case No: 19/2023**

In the matter between:

CHARLES PIETER VAN DEN HEVER N.O.

FIRST APPLICANT

PIETER MARTHINUS STEYN STRAUSS N.O.

SECOND APPLICANT

And

SOUTH AFRICAN NATIONAL ROAD AGENCY LIMITED

FIRST RESPONDENT

THE REGISTRAR OF DEEDS, KIMBERLEY

SECOND RESPONDENT

Neutral citation: *Van Der Hever N.O and Another v South African National Road Agency and Another* (Case no 19/2023) (8 March 2024)

Heard: 10 November 2023

Delivered: 8 March 2024

Judgment

Phatshoane AJP

[1] The first and second applicants, Mr CP Van den Hever N.O and Mr PMS Strauss N.O, in their capacities as the trustees of the Hever Trust (the trust), approached

this Court on 10 January 2023 for an order that the first respondent, the South African National Road Agency Limited (SANRAL), cause the transfer of a property described as Erf 2[...] (a portion of Erf 7[...]), C[...], Northern Cape Province, held by the trust in terms of Deed of Transfer no: T[...] (the property) into SANRAL's name and that the purchase price together with interest be paid to the trustees. That in the event that SANRAL was unable to take transfer, it be confirmed that the agreement is forthwith cancelled and SANRAL is evicted from the property. Further ancillary relief pertaining to costs of the application was also sought.

- [2] The transfer of the property into SANRAL's name has, in the interim, been finalised. Therefore, the main relief sought was rendered moot. What remains for consideration is the question of costs of the application.

- [3] On 14 February 2017 the trustees and SANRAL concluded a deed of sale in terms of which the trustees sold to SANRAL the property. The agreement was further to the effect that SANRAL would secure the purchase price of R407 167.04 within 60 days from the date of sale and would appoint conveyancers to effect the transfer of the property to itself. It was further agreed that in the event SANRAL took possession and occupation of the property, prior to the date of transfer of the property, the trustees would be entitled to interest on the purchase price.

- [4] It was contended for the trustees that they had complied with all their contractual obligations. SANRAL took possession and occupation of the property shortly after the agreement had been concluded. It also appointed Malebye Motaung Mthembu Attorneys to attend to the transfer of the property into its name. SANRAL also paid the purchase price into the trust account of the said attorneys who were mandated to pay over these funds together with the interest to the trustees upon the registration of the property.

[5] On 29 March 2018, a year later after the agreement had been entered into, SANRAL's attorneys informed the trustees' attorneys that the registrar of deeds, Kimberley, the second respondent, rejected the transfer of the property on the basis that certain signed certificates from Umsobomvu Municipality had to be obtained to enable the attorneys to relodge the transfer documents in the deeds' office.

[6] What emerges from the founding papers is that more than two years later, after the agreement had been concluded, the trustees' attorneys directed an e-mail to SANRAL attorneys on 17 May 2019, which reads in part

"Kindly advise us whether you will be in a position to lodge [the transfer documents] with the Deeds office Kimberley within fourteen days as from the date of this letter.

If not, we will obtain final instructions from our client to bring an application to compel SANRAL for the registration and payment.

Alternatively, we suggest that SANRAL pay the full amount plus interest to date after which they can on their leisure decide when they want to do the relevant registration."

The response from SANRAL's attorneys of the same date was to the effect that land surveyor be afforded:

"time and space to work through the necessary process. Once we receive the correctly endorsed subdivision diagram from the land surveyor writer hereof will apply for a fresh rates clearance certificate at the local authority and once we are in possession of same, writer will re-lodge the transfer documents in the deeds office".

[7] Approximately four years later, on 10 January 2023, following the above sufficient indulgences to cause the transfer, the trustees brought the present application. This was almost six years later after they had concluded the deed of sale with SANRAL. It was contended for the trustees that a reasonable time had expired in terms of which SANRAL was afforded the opportunity to comply with the deed's office requirements and to cause transfer of the property. As far back as 17 May 2019, it was argued, SANRAL had been warned to comply failing which the application would be launched.

- [8] The trustees further argued that throughout SANRAL had the use and enjoyment of property whereas they had been deprived of immediate payment of the purchase price which remained inaccessible in SANRAL's attorneys trust account. The trustees were of the view that the transfer could not be wantonly delayed. They therefore urged for an order in terms of which SANRAL would be compelled to comply with its contractual undertakings within 30 days from the date of the order failing which that the deed be cancelled and SANRAL be evicted from the property.
- [9] SANRAL filed a notice of intention to oppose the application on 21 February 2023 but did not file an opposing affidavit. It contends that it did not cause any delay in the transfer of the property and acted bona fide in respect of the transaction. It further argued that no case was made out that it ought to have taken steps to expedite the registration process. It was further argued for it that a reading of the founding papers suggested that the delay ought to be attributed to the registrar of deeds and local authority. Insofar as the parties had agreed that the purchase price would bear interest, it was argued, the trustees could not contend that they were worse off compared to SANRAL which had the use and enjoyment of the property. It was further argued that the trustees should never have approached the Court as there had been no basis for the relief and its concomitant costs against SANRAL. SANRAL, so it was argued, tendered on 17 July 2023 that each party pay its own costs to avoid further unnecessary legal fees and costs.
- [10] In my view, the time-line is important to determine where liability for costs lie. As already stated, the deed of sale was concluded on 14 February 2017. Shortly thereafter SANRAL took occupation of the property. Apparent from a few contemporaneous written exchanges between the parties there was some attempt to register the transfer of the property around 29 March 2018, almost a year later from the date of sale, which was rejected by the registrar possibly due

to lack of proper endorsement of the subdivision diagram. Following this, an unexplained period of four years lapsed before the application to compel was lodged. Quite remarkably, six months following the launching of the application, the transfer was passed and the purchase price paid.

- [11] For reasons I am wholly unable to comprehend SANRAL did not file an affidavit, following its notice of intention to oppose, to explain the delay in the registration of the transfer or why it ought not to be held liable for the costs of the application. The trust may not have been financially prejudiced, as SANRAL sought to argue, but the inordinate period of six years which lapsed before the transfer could finally be registered clearly inconvenienced the trust. Absent any explanation for the delay this smacks of remissness. In my view, the trustees were entitled to approach the Court for relief. Had SANRAL acted conscientiously and promptly the application could have been avoided. It follows therefore that it must bear the costs. In the result:

Order:

1. The first respondent, the South African National Road Agency Limited, is to pay the costs of the application on party and party scale.

MV PHATSHOANE AJP

Appearances:

For the applicant:	Adv SJ Reinders
Instructed by:	Engelsman Magabane Inc, Kimberley.

For the respondents:	Adv JL Olivier
Instructed by:	Haarhoffs Attorneys, Kimberley.