REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023-032999

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
17 January 2025	
DATE	SIGNATURE

In the matter between:

DEVINE PROPERTY DEVELOPMENT NPC	First Applicant
WELGEDACHT RESIDENTIAL CLUB	Second Applicant
And	
KGOSIHADI TRADING AND PROJECTS CC	First Respondent
MALESELA MORRIS MOTIMELE	Second Respondent
MATSEMELA KRAUSES AND NGUBENI INCORPORA TED	Third Respondent
REGISTRAR OF DEEDS: JOHANNESBURG	Fourth Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fifth Respondent

MANYAWA ISAAC MOKOBI Sixth Respondent

JUDGMENT

Marais, AJ

[1] In this application the applicants, Devine Property Developers NPC and Welgedacht Property Club, seek certain orders against the first respondent, Kgosihadi Trading and Projects CC, relating to an immovable property known as Portion 1 of Erf 1[…] Welgedacht ("the property"). The main relief sought is a declarator that the applicants are the owners of the property, together with an order that the property be transferred to applicants (and further orders ancillary thereto). In the context of the evidence presented by the applicant, the relief sought can only be in favour of the first applicant.

[2] The notice of motion contains prayers for the setting aside of the transfer to the first respondent and / or the "cancellation" of the first respondent's title deed in respect of the property. On the facts of the matter, this relief is entirely inapposite and should be disregarded.

[3] It must be recorded that all the parties who actively participated in this matter were prone to factual inaccuracies, misstatements and colloquialisms, was well as a gross disregard for relevant legal principles. Consequently, it was necessary to wade through these issues to reach a just result.

[4] The deponent to the applicant's founding affidavit in this matter is Ms Leah Motimele. Her uncontested evidence is that she caused the first respondent to be

incorporated in 2010. After she married her late husband, Mr Mashilo Abel Motimele ('the deceased"), she caused him to be added as a member of the first respondent and subsequently, the second respondent, the son of the deceased, was also added as a member. During 2016 the second respondent allegedly requested the deponent and the deceased to remove themselves as members of the first respondent, in view of the deceased's over-indebtedness that affected his credit rating, as well as that of the deponent to whom he was married in community of property. Documentary evidence placed before the court by the sixth respondent indicate that the deponent and the deceased resigned as members of the first respondent with effect from 4 March 2019. The uncontested evidence was that the agreement was that their membership would be restored once their financial situation improved.

[5] On 7 May 2029 members of the second applicant addended an auction by invitation, where they have decided to purchase the property in question on the auction. The deponent states that the members of the second applicant made a bid for the property at the auction, which was successful. Because the second applicant was not an incorporated legal entity, it was then decided that the agreement of sale would not be concluded in the name of the second applicant, and the deceased suggested that the first respondent be utilised as a temporary vehicle to conclude the sale and obtain transfer of the property. Consequently, an agreement of sale was indeed concluded between the seller and the first respondent in respect of the property.

[6] The deponent also stated that at the same time the arrangement was that an entity would be incorporated to develop the property for the benefit of the members of the second respondent, and the property would be transferred from the first respondent to the newly incorporated entity.

[7] The members of the second applicant caused a banking account to be opened in its name in which the members deposited funds for purposes of paying the purchase price of the property. The funds so collected was paid over to the transferring attorney, the third respondent herein, to be held pending the transfer of the property to the first respondent. The transferring attorney was formally instructed to invest the funds in an interest-bearing account by the second applicant.

[8] It is undisputed that the purchase price of the property was paid through the contributions made by the members of the second applicant. There is no evidence that the first respondent (or any member of the first respondent) contributed anything towards the purchase price of the property.

[9] On 19 December 2019 the property was registered in the name of the first respondent.

[10] During January 2020, the deceased, purporting to act as a member of the first respondent, took certain steps on behalf of the first respondent towards the rezoning of the property for purposes of township establishment. Despite the fact that the deceased was not a member of the first respondent anymore, it seems clear that he did have authority to act on behalf of the close corporation.

[11] On 11 June 2020 the first applicant was incorporated as a non-profit company. It is the applicants' case that the first applicant was incorporated specifically for purposes of owning the property and the development thereof for the benefit of the members of the second applicant.

[12] The deceased, evidently the driving force behind the planned development, died on 23 July 2020 and according to the applicant, this then prevented (more accurately, delayed) the property from being transferred from the first respondent to the first applicant.

[13] The applicants then alleged that it came to light during February 2022 that the second respondent approached the town planning service provider who previously assisted with the development of the property. The applicants do not explain why the second applicant approached the service provider. However, the applicants then state that the second respondent was never involved in the purchase or development of the property. Reading between the lines, it would appear that the deponent suggests that the second respondent took steps towards the development of the property for his own benefit, as opposed to the benefit of the applicants.

[14] During March 2023 a meeting of the members of the second applicant was held, during which meeting it was formally resolved that the first applicant would be the vehicle for implementation of the intended development and housing scheme.

[15] Confirmatory affidavits attached to the founding affidavit indicate that the second respondent, being the member of the first respondent, refused to have the property transferred from the first respondent to the first applicant.

[16] The sixth respondent alleges that he purchased a 70% membership in the first respondent from the second respondent during 2022. On this basis, the sixth respondent now incorrectly (if not falsely) alleges that he is the “title holder” of the property. On the undisputed evidence presented by the applicants, this would mean that the second respondent unlawfully and opportunistically sold a majority stake in the first respondent to the sixth respondent with the intention of placing control over the property in the hands of the sixth respondent. The effect of such unlawful actions will be discussed hereunder.

[17] The applicants launched this application during April 2023.

[18] There is no record that the application was opposed by the first respondent and the matter was set down for hearing on the unopposed roll, on 14 December 2023.

[19] On 14 December 2023 the second respondent made an appearance in court, resulting in the matter being removed to the opposed court. The first and second respondents were ordered to deliver answering papers by the end of January 2024. The were also ordered to pay the wasted costs in the attorney and client scale.

[20] The first and second respondents failed to deliver an answering affidavit, as ordered, with the result that the matter was again enrolled for hearing on 25 April 2024.

[21] However, on or about 11 April 2024 the sixth respondent launched an application for his joinder as a respondent in the matter, which resulted the matter being postponed on 25 April 2024, pending finalisation of the joinder application.

[22] The basis for the joinder application was that the sixth respondent allegedly was the majority member in the first respondent, and that the sixth respondent was allegedly the current holder of the title deed of the property.

[23] The joinder application was not opposed and during May 2024 the sixth respondent's joinder was ordered by this court.

[24] On the basis of the allegation that the sixth respondent was the current title holder of the property (i.e. the owner) the sixth respondent would have been entitled to intervene in the matter, having a clear legal interest. However, in the process the sixth respondent misled the court, in that he was never the holder of the title deed (i.e. the owner of the property), and did not have a legal interest in the matter on that basis.

[25] The sixth respondent also did not have *locus standi* in the matter on the basis of his alleged membership in the first respondent.

[26] In the premises, the joinder of the sixth respondent was both erroneously sought and, the court having been misled, erroneously granted. Although the order has not been rescinded, the order is nevertheless a *brutum fulmen* as the sixth respondent objectively does not have any *locus standi* and / or the required legal interest in the matter.

[27] The sixth respondent subsequently filed an answering affidavit in the matter. From his answering affidavit, and the annexures thereto, it is evident that his attorneys of record were also acting on behalf of the second respondent.

[28] It remains unexplained why the two alleged members of the first respondent did not resolve on behalf of the first respondent to oppose the application, and why

the sixth respondent, is before the court, and not the first respondent as a juristic person.

[29] Despite a degree of co-operation between the second and sixth respondents, there was no attempt whatsoever to present any evidence from the second respondent, who was the sole member of the first respondent at the time of the sale of the property.

[30] Instead, the sixth respondent resorted to bald denials of the applicants' factual allegations, despite also confessing to having no knowledge of the facts that occurred before he allegedly became a member in 2022.

[31] The sixth respondent attempted to cast doubt above the applicants' version, by referring to the fact that after he became a member of the first respondent, there were indications that there was some sort of joint venture agreement between the first respondent and the applicants in relation to the development of the property, which he purported to cancel due to the fact that it was not being implemented. However, in the process the applicants' attorneys questioned that sixth respondent's "involvement in the property". The allegations regarding this alleged joint venture were so vague and speculative, that no conclusion can be drawn from it.

[32] The absence of any opposition by the first respondent, and the absence of evidence by the second respondent, leads to the inescapable conclusion that the application cannot be opposed by the first respondent on any proper factual basis, and that the joinder of the sixth respondent was a stratagem to shield the second respondent from the court, and to prevent his evidence from being placed before the court. In the process the sixth respondent resorted to bald denials of the applicant's allegations. This stratagem cannot be countenanced.

[33] Due to the fact that the sixth respondent has no *locus standi* to oppose this application, this application is in essence an unopposed application.

[34] Given the somewhat confused manner in which the applicants presented their case, the court was constrained to have regard to the undisputed facts and then

make a finding on the applicable legal principles regardless. The Registrar of Deeds also rendered a report to the court, in which it was correctly pointed out that the relief sought by the applicants were contradictory and could only be granted in the alternative.

[35] In *Strydom en 'n Ander v De Lange en 'n Ander*[1] it was held that an informal trust existed between two parties in terms of which the one party, being the registered owner of an immovable property, held the *nudum dominium* of the property, whilst the beneficial ownership of the property vested in the other party. In terms of this informal trust, the registered owner had to deal with the property in accordance with the trust agreement.[2]

[36] In this regard the court followed the judgment of the Appellate Division in *Adam v Jhavary and Another*[3], where it was held[4] that term "trustee" is freely employed in our practice, as denoting "a person entrusted (as owner or otherwise) with the control of property with which he is bound to deal for the benefit of another." The court acknowledged that a verbal trust can be enforced.

[37] In *Dadabhay v Dadabhay and Another*[5] the Appellate Division also recognised this trust construction, which entitles the beneficial owner to transfer of the property from the registered owner. It is to be noted that it was held that this kind of trust agreement does not involve the “sale”, “donation” or “exchange” of property for purposes of the application of enactments like the Alienation of Land Act, which would result in the invalidity of the arrangement due to failure to comply with required formalities.

[38] On the undisputed facts presented by the applicants, at least a verbal trust was established between the second applicant and the first respondent, in terms of which the beneficiary would be a company to be incorporated in future. The first respondent, as registered owner of the property, would temporarily hold the *nudum*

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[1] 1970 (2) SA 6 (T)
[2] At 12C
[3] 1926 AD 147 *at 150*
[4] Also following *Estate Kemp v McDonald's Trustee* 1915 AD 491
[5] 1981 (3) SA 1039 (A)

dominium of the property, subject to the eventual transfer of the property to the beneficiary once it came into being. This is not dissimilar to a trust conferring benefits on future descendants of the trust donor or future descendants of a named beneficiary.

[39] In the process, the requirements for the validity of a *stipulatio alteri* or pre-incorporation contract do not come into play.

[40] Consequently, the first applicant is entitled to an order declaring that it is the beneficial owner of the property in terms of the aforesaid verbal trust and is entitled to the transfer of the property, with orders ancillary thereto.

[41] It goes without saying that it was an implied term of the trust agreement that the entity that would eventually be incorporated would be an entity which has as its sole purpose the aim of developing the land and distributing subdivided portions amongst the members of the second applicant, in particular those members who contributed towards the purchase price of the property. As such it also implies that the incorporated entity would comply with the provisions of the Companies Act, 2008.

[42] To the extent that the first applicant is entitled to the transfer of the property, it can only be so entitled if it is demonstrated that the constitution of the first applicant (a non-profit company) has as its sole purpose the development, subdivision and distribution of the subdivided portions of the land to its members on a non-profit basis. To give effect to the trust agreement, it must also be demonstrated that the members of the first applicant entitled to benefits are the members of the second applicant, in particular those that contributed to the payment of the purchase price of the land. In this regard, additional appropriate orders should be granted.

[43] As far as costs as concerned, the costs should follow the result.

[44] In the normal course of events, the members of the first respondent would not be saddled with costs. However, it is evident that the second respondent made an appearance during December 2023 and caused the application, which was

unopposed at the time, to be turned into an opposed application, and persuaded the court to grant time to the first respondent, and himself personally, to deliver an answering affidavit. In the event, they failed to file an answering affidavit, leading to the inescapable conclusion that the second respondent was reprehensibly perpetrating a delaying tactic. When the matter was enrolled again, the sixth respondent, arrived on the scene and obtained a postponement, through an ill-founded joinder application which was later granted because the court was deceived. Through this joinder, the filing of opposing papers and appearance in court, the sixth respondent turned an application that was in essence an unopposed application into an opposed application, with the associated costs.

[45] It is quite evident on the papers before me that despite efforts to create the impression that the second and sixth respondents were not pulling the same yoke, they were indeed jointly implementing a strategy to delay the matter and to frustrate the granting of the relief to which the first applicant is entitled.

[46] This must also be viewed in the context of the second and sixth applicants clearly opportunistically attempting to appropriate the benefit of the ownership of the property, in respect of which neither they, nor the first respondent, made any contribution, to the detriment of the members of the second applicant.

[47] Consequently, I am of the view that the second and sixth respondents should be held personally liable for the costs of this application.

[48] In my view the first, second and sixth respondents also acted reprehensibly and that a punitive costs order should be granted against them.

[49] Consequently, the first, second and sixth respondent should be ordered to pay the costs on the attorney and client scale, jointly and severally.

[50] In the premises, the following order is granted:

Order

1. It is declared that in terms of a verbal trust agreement between the second applicant and the first respondent:

1.1. The immovable property, Portion 1 of Erf 1506 Welgedacht, was registered in the name of the first respondent subject to the provisions of the trust agreement;

1.2. That only the *nudum dominium* of the immovable property vested in the first respondent upon registration into its name;

1.3. That the first applicant was the beneficiary of the trust agreement and was entitled upon its incorporation to the beneficial ownership of the immovable property and the to the transfer of the immovable property into its name.

2. The first applicant is ordered to compile a formal register of members in terms of the Companies Act, 2008, reflecting the names of all the members of the second applicant who have contributed towards the purchase price of the immovable property, supported by signed written applications for membership by these members containing the names, identity numbers and addresses of the members.

3. The first applicant is ordered to adopt a constitution, to the extent that it had not already done so, reflecting the purpose of the company as the development and subdivision of the immovable property, and the distribution of the subdivided portions to the applicant's members, on a non-profit basis.

4. The first respondent is ordered to forthwith cause the fourth respondent, the Registrar of Deeds, to register the immovable property the name of the first applicant.

5. The first respondent is ordered to sign all documents necessary for the aforesaid transfer to be effected on demand, failing which the sheriff is authorised and ordered to sign such documents on behalf of the first respondent.

6. The fourth respondent shall only register the immovable property in the name of the first applicant if proof of compliance with the provisions of paragraphs 2 and 3 have been provided.

7. The first, second and sixth respondents are ordered to pay the costs of this application, jointly and severally, on the attorney and client scale.

DAWID MARAIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing:	26 November 2024
Date of Judgment	17 January 2025

Appearances:

For the Applicants:	BZH Madonsela (Attorney with right of appearance in High Court)
Instructed by:	Madonsela Attorneys
For the Sixth Respondent:	C Stewart (Attorney with right of appearance in High Court)
Instructed by:	Khumalo Masondo attorneys