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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NUMBER: 9612/2023

In the matter between:

CITY OF CAPE TOWN

Applicant

and

EREOMAX (PTY) LTD

First Respondent

REGISTRAR OF DEEDS

Second Respondent

**ALL CONTRACTORS AND OTHER PERSONS
OCCUPYING OR BEING ON REMAINDER ERF 9[...],
RICHMOND PARK, CAPE TOWN**

Third Respondent

RICHLAND (PTY) LTD

Fourth Respondent

JUDGMENT DELIVERED ELECTRONICALLY, WEDNESDAY 27 NOVEMBER 2024

NZIWENI J*Introduction*

- [1] This case concerns a claim of ownership of land. The controversy finds its genesis in whether the applicant has a legal right and entitlement to the land by virtue of the operation of the law. The application is brought on behalf of the City of Cape Town (“the City”). Although four respondents were cited in this matter, it was argued only between the City and the first respondent.
- [2] This is due to the following reasons: First, the third respondent withdrew its opposition and its counterclaim. Subsequently, the second respondent indicated it would not contest the order sought by the City. The fourth respondent, who developed the township in 1984 and sold the property to the first respondent in 2016 filed a notice to abide on 02 October 2023.
- [3] The property at the centre of the controversy is described as the remainder of erf 9[...] Richmond Park, Cape Town, (“the property”) measuring 2 7876 hectares in extent. The property is currently registered in the registry of deeds under the name of the first respondent. In other terms, it is established that the registry of deeds indicates the first respondent as the owner of the property. As such, the first respondent claims title to the property by virtue of what is recorded in the registry of deeds.
- [4] In this instance, the City, however, contends that the property in question was erroneously registered in / under the name of the first respondent. Therefore, it seeks amongst others, a declaratory order.

[5] The application was originally divided into two sections referred to as Part A and Part B. In Part A, the City sought an interim relief pending the relief sought in [Part B] this application. Part A dealt with an interdict aimed at, among other things, preventing the first and third respondents from proceeding with 'unlawful' construction activities or using the property in a manner inconsistent with its Open Space 2 zoning and designation as a public park. Slings J granted the requested interdictory relief sought under Part A.

[6] In Part B, the applicant seeks amongst others, a final interdict to prohibit the respondents from continuing with construction works; an order declaring that the property vests in the applicant in terms of section 24 of the Township Planning Ordinances 33 1934; alternatively, directing the second respondent to deregister the property from the name of the first respondent and register the property in the name of the applicant pending the outcome of an action to be instituted by the first respondent within 15 court days, claiming vindicatory or other relief regarding its alleged ownership or rights in the property. Additionally, directing that if final relief is not granted in terms of paragraph 2.3 of Part A, the first respondent must act within 30 days to:

Reinstate property to the state it was prior to commencement of the unlawful construction.

Demolish any unlawful structures located on the property.

[7] At the commencement of this hearing, the first respondent requested a postponement of the proceedings, to have an opportunity to respond to the City's supplementary affidavit. Pursuant to the application for postponement, the City's counsel did not persist in seeking leave from this Court to file the supplementary affidavit. The City, in essence, chose to abandon the supplementary affidavit.

- [8] To that end, the City's counsel submitted that this Court should exclude the part of the record starting from page 213. The parties have reached an agreement to exclude the City's supplementary affidavit from this hearing and have moved forward with the hearing of this application.

Factual background

- [9] The factual background of this case is largely agreed upon. A concise summary of the background necessary to comprehend the parties' contentions may be briefly summarised as follows:
- [10] In 1984, the fourth respondent undertook a township development project. Therefore, the fourth respondent held the ownership of the township. The township was established in terms of the Town-Planning and Townships Ordinance, 1986 (Ordinance No 15 of 1986). The property in question constituted the remainder of the township, following the subdivision of the land.
- [11] The subdivision plan designates the property as a public space under the zoning classification of "Open Space Zone 2". Despite this, the property in the deed's registry remained registered in the name of the fourth respondent [the developer].
- [12] In 2016, the fourth and the first respondent entered into an agreement for the sale and the purchase of the property. On 28 August 2016, the property was transferred from the fourth respondent to the first respondent. The first respondent bought the property for the sum of R725 000,00.
- [13] The City only became aware of the property transfer in 2019. This is after a City's employee realised that the property was privately owned.
- [14] In July 2020, the City instructed attorneys to investigate the matter and to register the property in the name of the City. Following investigations by the City, in May

2023, the City instructed its lawyers to attend to the transfer of the property to the City.

[15] In May 2023, the City was alerted to a contractor working on the property and building a boundary wall. At that point, the property featured playground equipment and park installations that had been installed by the City 2-3 years earlier.

[16] The boundary wall was constructed without obtaining approval for a building plan. The first respondent was then served with notices to cease construction activities. However, according to the City, the construction continued. The City, then launched this application on urgent basis.

The scope of the application

[17] At the commencement of the oral submissions, Mr Fisher, on behalf of the first respondent, informed this Court that it is the defendant's intention to clearly delineate the specific issue upon which he wanted to confine his argument. Although this application concerns various issues, however, the concern raised by the first respondent pertains solely to a factual dispute. As such, the first respondent's written heads of argument were notably quite brief and did not fully pursue all the assertions made in the answering affidavit. Thus, in the written submissions filed by the first respondent and during oral arguments, the counsel for the first respondent chose to concentrate his submissions on a single aspect of this application.

[18] The first respondent's opposition to the application therefore proceeded primarily along one clear line of reasoning. The first respondent focused its argument on insisting that this Court is not best equipped to deal with the nature of disputes presented by the City in its papers. The first respondent argued that this is the case because the aspect he chose to confine his submissions on should be

determinative and dispositive of this application. Indeed, Mr Fisher argued that he is not raising the matter as a preliminary issue, but as a substantive one.

[19] The first respondent, in advancing this argument, clearly defined and narrowed the issue it sought for this Court to decide on. The controversy, as summarised by the first respondent, revolves around whether the issues ought to have been resolved through action proceedings.

[20] To that end, Mr Fisher made much of the dispute of facts in his submissions, insisting that, the matter ought to have been referred to trial.

[21] With that in mind, it bears noting that, while the first respondent expended much of its energy arguing that the matter should be referred to trial and chose to primarily limit its submissions; the applicant on the other hand, has nonetheless comprehensively addressed all the issues raised in the papers during its oral submissions, including the aspect concerning the dispute of facts.

The parties' submissions

Applicant's submissions

[22] In the present case, the City has been at pains to point out that the application pertains to matters of ownership and unlawful construction. The City asserts that the property vested in it by operation of law, dating from as far back as 1984. For the proposition that the property vested in the City, the City places reliance on section 24 (1) of the Township Planning Ordinance No. 33 of 1934 "Township Planning Ordinance").

[23] According to the City, in the subdivision approval, the property is designated as a public space. And the land use designation for the property is public park. The City then provides the background as follows: As previously outlined, in 1984, the

fourth respondent undertook a township development. The remaining portion of the land from the subdivision for the development was designated as a public place.

[24] It is the City's assertion that the property remained designated as a public place with open space zoning for some 32 years.

[25] According to the City, though vesting occurs automatically after confirmation of the approved subdivision, formal registration in the name of the City seldom occurred, at least before the advent of the Planning Bylaw. Thus, according to the City, registration of the properties in the name of the City was seldom necessary.

City's assertion regarding dispute of facts

[26] According to Mr Greig, the answering affidavit does not reveal a dispute as far as vesting of ownership in terms of township ordinance is concerned. Mr Greig further argued that the Court would seek in vain to find any dispute of facts regarding the vesting of ownership in terms of the township ordinance. Accordingly, Mr Greig submitted that, there is no dispute about the township ordinance situation. The City reinforced its argument by stating that the first respondent does not assert that;

- a. there was something irregular about the township ordinance;
- b. that the township ordinance does not apply as the City alleges;
- c. does not deny that the piece of land was developed in 1984; and
- d. there is no dispute of facts about the township ordinance situation.

- [27] Mr Greig developed these submissions during the course of his oral argument. He submitted that as far as ownership is concerned, the law is unequivocal. He pointed out that it is not disputed that the City is the true owner of the property.
- [28] It is further asserted by the City that nothing is stated the first respondent's papers as to what occurred and how the sale had taken place in 2016.
- [29] In this regard, Mr Greig emphasised that if the first respondent believes that it was misled into thinking that they could register a public park and commence construction on it, then their recourse is against Richland [fourth respondent] or the auctioneers, not the City. This is so because the argument continues; the law stipulates that the remaining portions vest in the City in terms of statute. As I have already mentioned, Mr Greig predicates this contention upon the Township Planning Ordinance.
- [30] This being so, the argument proceeds to assert that the registered ownership is not determinative and conclusive. The City's counsel emphasised that in South Africa the negative system of deeds registration is used.
- [31] Mr Greig further submitted that the information contained in the deeds of registry is not necessarily determinative or dispositive of the issue of ownership rights. If an individual believes that the information in the deeds registry signifies ownership or guarantees complete ownership of land, then that individual lacks understanding of the registrar of deeds and what can be conveyed.
- [32] Furthermore, the City argued that the Deed of registry merely serves as public acknowledgement of ownership rights. In support of his argument, Mr Greig cited an authority namely, *Union Government (Minister of Justice) v Bolam* 1927 AD 467.

- [33] Regarding the issuance of the rates clearance certificate by the City to the first respondent during the transfer of the property from the fourth respondent to the first respondent], it was submitted on behalf of the City that first respondent cannot claim that the City indicated that the property could be transferred to them. The City asserts that none of this ensures that genuine ownership of property has been secured.
- [34] Equally, the City contends that the issuance of a rate certificate does not imply any representation regarding ownership in any manner. Rather, it serves as a straightforward representation in terms of section 118 of the Municipal systems Act, indicating that the rates and other end costs of the property have been settled. It does not mean that the person can take ownership. The City only gave approval to go ahead with the transfer, but this did not imply ownership.
- [35] It is further submitted by the City that, although the first respondent does not categorically state that it is relying on estoppel, there is a suggestion in the answering affidavit that the City, by issuing the rates clearance certificate, authorised the transfer. According to Mr Greig, in terms of relevance, this assertion by the first respondent can only be understood through the lens of estoppel. However, the City remains adamant that the first respondent cannot say the City represented that the property can be transferred to them.
- [36] Mr Greig further submits that estoppel must be based on unequivocal and unambiguous representation. It is not representation by conduct. According to the City's counsel, the issuance of a rate certified is at best ambiguous regarding property ownership. It does not meet the unequivocal requirement.
- [37] As far as the building without approved plans is concerned, it is submitted on the behalf of the City that it is not in dispute that the construction work on the property was commenced without approved plans.

First respondent's submissions

- [38] As previously mentioned, according to the first respondent, this matter involves issues that should be litigated through a trial. Mr Fisher asserts that the first respondent should be afforded an opportunity to show how he acquired the property. This is particularly so due to the allegation made by the City that the first respondent did not acquire the property in good faith.
- [39] Mr Fisher further submits that; in order for the City to interfere with ownership rights, it must do so through legal action. The discussion persists suggesting that through this application, the City seeks to avoid action proceedings. Consequently, complete justice remains unattainable. According to Mr Fisher, the matter can only be adjudicated by way of action, specifically through *rei vindicatio*.
- [40] To that end, Mr Fisher contends that it is not fair for the City to bring the issues through motion, as this procedure does not allow for the full ventilation of all issues involved. Mr Fisher submits that the City is required to substantiate their claims, and must prove what they allege hence the matter cannot be resolved through motion proceedings.
- [41] Mr Fisher further asserts that once the property is registered in an individual's name, that person is recognised to be the owner unless proven otherwise. It is further submitted on behalf of the first respondent that the City by issuing the rate certificate was indicating that everything was in order. Mr Fisher also submits that estoppel is a classical defence reserved for action proceedings.
- [42] According to Mr Fisher, the City's denial that the property was purchased innocently constitutes a factual dispute. It is the first respondent's contention that it bought the property innocently and the law safeguards such owners. According to the counsel for the first respondent, the issue of the import of the rate certificate is a factual dispute.

[43] In addition to the above, the respondent alleges before this Court that it is not unlawful to build without approved plans. Mr Fisher submits that because this Court has the version of the first respondent that states that it is allowed to build first and then afterwards ask for permission. The first respondent contends that that indicates a dispute of facts.

The issue

[44] While the papers highlighted several points, the issues were greatly focused during argument to whether there are genuine dispute of facts that require a referral to trial.

Evaluation

[45] The starting point is not that where there are disputes of fact, the disputes should be determined at trial. In *Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 the following was stated:

“when factual disputes arise in circumstances where the Applicant seeks final relief, the relief should be granted in favour of the Applicant only if the facts alleged by the Respondent in their Answering Affidavit, read with the facts it has admitted to justify the order prayed for.”

[46] In this particular case, Mr Fisher faced a challenge in identifying the disputed/contested facts. Instead, he maintained strongly that a dispute of this kind, by its very nature, ought to have been litigated by way of action. The only dispute of fact that he mentioned was the City’s assertion that the first respondent did not acquire the property innocently, which constitutes a dispute of fact. Additionally, the first respondent contends that construction without approved building plans is not unlawful.

- [47] The City did not state in its papers that the first respondent did not obtain the property innocently. In actual fact, it is discernible from the papers that it is not in dispute how the parties claim entitlement to the property.
- [48] It is as well to remind oneself at this stage that as far as the erection of the boundary wall is concerned, it is a common cause fact between the parties that the wall was erected without the approval from the City's planning department. The City also requires that this Court should decide whether the building work was lawful. The dispute concerns whether construction work can proceed without approved and sanctioned plans.
- [49] In *Walele v City of Cape Town and Others* (2008 (6) SA 129 (CC)), the law is succinctly restated and set out by the Constitutional Court that the Building Standards Act requires building plans to be approved for every building erected within a municipal area and thus prohibits construction of buildings without the prior approval of plans by the local authority within whose area a building is to be erected. The Constitutional Court further acknowledged that a breach of this prohibition constitutes a criminal offence punishable by means of a fine. The same is true here. It is clear, therefore, that the first respondent in so far as it suggests, it does not place reliance on any law for its proposition. Indeed, in my view, the case of *Walele supra* provides an obvious contrast to the first respondent's proposition.
- [50] I cannot quite comprehend and accept the proposition by the first respondent that suggests that it is okay to break the law and remedy the consequence after the fact. After all it is a striking known fact that no building work can commence within a municipal area without prior approval of plans. Hence, there is an obvious oddity around the fact that Mr Fisher argues with conviction that building work can commence without prior approval of plans from the City. Obviously, such a proposition may not, at the end of the trial, be found to be sufficient to carry the

day. Moreover, as noted above, such submission is fundamentally flawed. As such, it can never be regarded as a genuine dispute of fact.

[51] This Court is also called upon by the City to decide whether the property vests in the City in terms of an ordinance. In other words, whether the ordinance trumps a registered owner in the deeds of registry. As I have mentioned there was minimal, if any disagreement, about the law contained in their submissions.

[52] While the parties differ as to how they are entitled to the same property, the parties do not dispute what led to each one claiming ownership of the property. This difference does not give rise to a genuine dispute of facts. In my view, the issues presented by this application are purely legal in nature.

[53] It is therefore clear to me that whatever factual disputes present, does not establish the existence of a genuine dispute of facts, but rather highlights the parties' dispute in legal conclusions based upon undisputed facts. Consequently, there exist a degree of contention as to the legal import of the facts. As far as the parties' averments are concerned, the singular issue for determination concerns the question as to which party is on the right side of the law.

[54] It follows then that the dispute between the parties' centers upon the consequences of applying the law to the undisputed facts.

[55] The City requests this Court to make a determination as to who is entitled to judgment in terms of the law. Thus, it is a matter of the law. Put differently, the questions involved here are questions of law and not questions of facts.

[56] To my mind the issues raised by the first respondent do not raise a legitimate triable issue of genuine dispute of fact. The disputes between the City and the first respondent are not factual disputes that necessitate a fact-finding exercise that

would require a referral for oral evidence or trial. Hence, I even venture to say that, in this case, the record does not present factual issues.

- [57] Equally, this case does not present a situation where there is a disagreement about the inferences that should be drawn from undisputed facts. Further and significantly, the facts underlying all the relevant legal questions raised by the pleadings or otherwise are undisputed. Even the facts concerning the construction without approved plans.
- [58] The papers in this matter do not set out any facts which suggest that there is dispute of fact related to the issuance of the clearance certificate. The first respondent does not sufficiently explain how the City's issuance of clearance certificate is a material fact regarding the ownership of the property, let alone one requiring trial. The existence of the clearance certificate, in my view, is insufficient to buttress the first respondent's claim of genuine dispute of facts. In any event, it does not advance the matter of ownership any further.
- [59] It is so, that whether a representation was made could be a factual dispute. However, a question that immediately begs is whether the representation is material to the claim by the City such as to require a trial? In my opinion, it is not. As far as the issuance of rate certificate, the lack of the essential requirements to satisfy the defence of estoppel, renders the defence and the material facts surrounding the alleged representation [as set out in the answering affidavit] immaterial and irrelevant in this application.
- [60] The answering affidavit in its current form, and even when interpreted generously, only alleges a mere representation. The allegation of representation is merely a bold solitary allegation that the City made a representation by issuing the rate certificate. Even assuming for a moment that the City made such representation. In what way does that deprive the City from the right that flows from the operation

of the law? Perhaps it would have been different if it was alleged that the representation was based on fraud.

- [61] As mentioned earlier, the first respondent took a bold stance to assert that this application can be disposed of on a narrow issue. Consequently, the narrow issue argued by the respondent in response to the City's application did not constitute a defence to defeat the City's claim for the relief mentioned in the notice of motion.
- [62] What does appear plainly is that the narrow argument approach adopted by the first respondent, is that it did not account for the possibility of failure, regarding the narrow point raised. At that moment, when Mr Fisher reduced the issues, I distinctly did not get the impression that, in this application the issue is not about the burden of proving ownership of the property; given the approach adopted by the first respondent during the hearing.
- [63] For that matter, during oral submissions, the City's counsel submitted that there is no dispute of facts in this application. In my view none of the first respondent's submissions have merit.
- [64] If a respondent is opposing an application solely on the basis that there is a genuine dispute of facts, an applicant is entitled to a relief if it is proven that there is no genuine dispute fact. More so, if the facts demonstrate that the applicant is entitled to such relief as a matter of law.
- [65] The City's contention is simple and straight forward: that the property vests in the City by virtue of the law. On the other hand, the law states that the South African system of registration is a negative system. According to the City, it acquired the property in terms of the law and the acquisition does not reflect on the deed's registry.

[66] In *Cape Explosive Works LTD and Another v Denel (Pty) LTD* 2001(3) SA 569 at para 16 the following was stated:

“A real right is adequately protected by its registration in the Deeds Office (see *Frye’s (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582A). Once Capex’s rights had been registered they were maintainable against the whole world (Frye’s case at 583E). They were not extinguished by their erroneous omission from subsequent title deeds and the fact that Denel’s title deed, registered in the Deeds Office, did not reflect those rights does not assist Denel. We have a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs and third parties cannot place absolute reliance thereon (see *Knysna Hotel CC v Coetzee NO* (396/96) [1997] ZASCA 114; 1998 (2) SA 743 at 753A-D; *Barclays Nasionale Bank Bpk v Registrateur van Aktes* 1975 (4) SA 936 (T); and *Standard Bank van S.A. Bpk v Breitenbach* 1977 (1) SA 151 (T) at 156C-E). In *Sakereg op cit* at 342 the negative system of registration is explained as follows:

“In die geval van 'n negatiewe registrasiesistelsel word nie gewaarborg dat die inligting wat in die register vervat is, korrek is nie. Indien 'n bona fide derde dus op die registers staatmaak, doen hy dit op eie risiko en word hy die slagoffer van valse inligting in die register. Die ware eienaar verloor in geen omstandighede sy reg ten gunste van die bona fide verkryger nie. Hierdie stelsel bied dus groter sekuriteit aan die ware eienaar as aan die bona fide derde wat die slagoffer van 'n foutiewe inskrywing kan word.”

And later on the same page:

“Hoewel eiendom en beperkte saaklike regte nie sonder registrasie oorgedra kan word nie, word nêrens gewaarborg dat die aktesregister 'n juiste beeld van die ware toedrag van sake gee of dat derdes absoluut daarop kan staatmaak nie.”

- [67] In light of the facts of the current matter I have no hesitation whatsoever that the submissions of Mr Greig are to be preferred. I, of course, also agree that if a party is referred to as an owner of a property in the deed's registry, it does not necessarily mean that the party in every case is the true owner. Put differently, the registration of title in the deeds office does not establish incontrovertible evidence of ownership of the immovable property. This is so because the deeds office cannot guarantee the accuracy or truthfulness of the information on their registration system. Therefore, a party cannot rely exclusively on the accuracy or completeness of information contained therein, to claim ownership of a property.
- [68] The argument presented by the City is further supported by the case of *Union Government supra*, where the Appellate Division succinctly articulated that when a statute regulates the ownership of land, registration must necessarily give way to the provisions of the statute.
- [69] In these circumstances, the applicant's argument is made with much greater plausibility. Accordingly, the City has succeeded to prove its entitlement to the property and the unlawfulness of the building work on the property. Another significant issue is that of costs

Costs

- [70] The City requested that costs in respect of the first respondent should be awarded on a punitive scale. In so far as the third respondent is concerned, the City seeks an order in respect of its opposition of the matter and its counter application.
- [71] The ordinary rule is that the costs follow the event. Of course, this Court still has a discretion. The exercise of that discretion can be informed by the particular facts before the court. The question that readily springs to mind is whether the normal rule is unsuitable on the facts of this case.

[72] This matter raised unique facts in relations to parties claiming title to ownership of the same property and no blame can be attached to either party for the stalemate. It cannot be said that the issue that was involved in this matter has been frequently and recently litigated in previous cases.

[73] In the context of this matter, it is my view that no blame can be attached to the first respondent for opposing the matter out of a *bona fide* concern to vindicate its perception of ownership. Similarly, it can also not be said that the first respondent engaged in vexatious, frivolous or abusive conduct. These factors weigh heavily in favour of departing from the usual approach to costs. This also applies to the third respondent

[74] In the result, I make the following order:

ORDER:

1. It is declared that the property described as the remainder of erf 9[...] Richmond Park, Cape Town, ("the property") vests in the City of Cape Town ("the applicant") arising from section 24 of the Township Planning Ordinance 33 of 1934, Western Cape, and/or section 58 of the Municipal Planning Bylaw, and so vested since 1984.
2. The second respondent is hereby directed to register the property in the name of the applicant;
3. The first and the third respondent are interdicted from:
 - 3.1 Carrying on any excavation, building or other construction works at or on the property;
 - 3.2 Taking any vehicles onto the property; and

- 3.3 Occupying or using the property in any manner other than as a public park or as permitted by zoning of the property as “Open Space 2” in terms of the Planning By law;
4. It is further declared that any building structure erected on the property by the first and the second respondents, has been unlawfully erected.
5. The first respondent is hereby directed to demolish any unlawful structures located on the property within 30 days.
6. Failing compliance with paragraph 5, the applicant may apply on the same papers, duly supplemented as may be necessary, for an order authorizing it or its agents or contractors, assisted as may be necessary by the Metropolitan and South African Police Service, to reinstate property to the state it was prior to commencement of the unlawful construction, and to demolish any unlawful structures located on the property, at the first respondent’s costs.
7. Each party to pay its own costs.

CN NZIWENI
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant:	Adv. MA Greig
Instructed by:	Fairbridges Wertheim Becker
Ref:	D Olivier

Counsel for First Respondent:

Adv. W Fisher

Instructed by

Karin Houston Attorneys

Ref:

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