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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

31542/2023

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

DATE	SIGNATURE
03 June 2025	N V KHUMALO.

In the matter between:

MUZA CONNEX FIDERLISI BERNADO

FIRST APPLICANT

MUZA ANNA NOMVULA

SECOND APPLICANT

and

NANCY M MOKOENA

FIRST RESPONDENT

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

SECOND RESPONDENT

REGISTRAR OF DEEDS PRETORIA

THIRD RESPONDENT

**THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOUSING**

FOURTH RESPONDENT

‘This judgment was handed down electronically by circulation to the parties’ representatives by email. The date and time of hand-down is deemed to be 03 June 2025

JUDGMENT

N V KHUMALO J

Introduction

[1] The Applicants seek an order against the Respondents in the following terms:

1.1 That the sale and subsequent transfer of the property known as Erf no 7[...] Ivory Park Extension 8 Township in the name of the 1st Respondent under Title Deed Number: T54097/2019 is cancelled and set aside;

1.2 An order directing the 3rd Respondent (the Registrar of Deeds, Pretoria) to cancel and set aside the Title Deed which holds the property known as Erf no 7[...] Ivory Park Extension 8 Township in the name of the 1st Respondent.

1.3. The abovementioned property known as Erf no 7[...] Ivory Park Extension 8 Township reverts back to its original owner, City of Johannesburg Metropolitan Municipality (“the 2nd Respondent), in order for them to facilitate that the 4th Respondent (Department of Human Settlement), Gauteng, holds an investigation and a hearing in terms of s 24A of the Gauteng Housing Act 6 of 1998 in order to determine who is rightfully entitled to the ownership of the property known as Erf no 7[...] Ivory Park Extension 8 Township;

1.4 It is ordered that a caveat be issued to prevent the alienation of this property until the matter is finalized;

1.5 That all subsequent transfer of the immovable property known as Erf no 7[...] Ivory Park Extension 8 Township be declared invalid.

1.6 That the Applicant be paid the sum of R350 000.00 as a fair and reasonable pay for the expenses incurred in improving the property;

1.7 And costs in the event of opposition.

[2] The 1st Applicant, Mr CFD Muza, and the 2nd Applicant, Ms A N Muza, are husband and wife married in community of property on 26 November 2016 and the occupants of erf no 7[...] Ivory Park Extension 8 (the property), the ownership of which is in dispute.

[3] Ms N M Mokoena, the 1st Respondent is the registered owner of the property which she holds under Title Deed number: T54097/2019, transferred to her subject to a pre-emptive right in terms of s10A of the Housing Act 107 of 1997.

[4] The 2nd Respondent is the City of Johannesburg Metropolitan Municipality Region A, cited as the Municipality as defined in the Municipality and Structures Act 117 of 1998 read together with the Municipal and Structure Amendment Act 33 of 2000 and Notice 6766/200.

[5] The 3rd Respondent is the Registrar of Deeds, Pretoria an entity appointed and regulated by the Deeds Registration Act 47 Of 1947, responsible for the registration of deeds and maintaining information on the real estates and mortgages. The 4th Respondent is the Director General of the Department of Human Settlement and an officer responsible for housing and urban development matters in terms of s 24A of the Gauteng Housing Act 6 of 1998 (GHA).

[6] The 1st Applicant has been in occupation of the property since 1997 till to date and alleges that he was at all relevant times due to receive transfer of the property until the unknown occurred and in consequence thereof, the 1st Respondent received transfer of the property instead, which he says was in error. hence the abovementioned reliefs sought.

Historical background to the title obtained

[7] The property was acquired by the 1st Respondent's deceased husband in December 1990 in terms of the Black Communities Development Act, 1984 (Act No.4 of 1984), by signing an agreement with the Transvaal Provincial Department as the lessor. In March 1997 he and the 1st Respondent signed a new lease agreement with the Department of Housing at the Local Ivory Park Municipality Offices which falls under the City of Johannesburg in terms of the Gauteng Housing Act 107 of 1997. They then held the property subject to leasehold from the Ivory Park Metropolitan Substructure.

[8] The properties were intended to provide sites for homeless people with the appropriate services plus services charges, and for incorporation into the area of jurisdiction of a local authority whereupon the Lessee shall have a pre-emptive right to purchase the property should it be available for sale. The properties were also not to be sublet, assign, ceded or any of the rights or obligations delegated without prior consent of the lessor. The lessor was also not to erect more than one structure without prior written consent of the lessor. Site competent person" means a competent person as defined in section 1 of the principal Act; (BCDA)

[9] The Applicant alleges that:

[9.1] by the time the transfer of the property to the 1st Respondent took place on 29 August 2019, the 1st Respondent was no longer qualifying for the subsidised housing (therefore not homeless) as she had acquired a property in the interim through a mortgage bond originated facility which was transferred to her name in 2012.

[9.2] The 1st Respondent and her deceased husband sold their subsidised property to him on 11 June 1997 for an amount of R3 500.00, which he paid in two instalments of R1 500,00. The last instalment of R500 was paid on August 1997 whereafter he continued to occupy the property without any issues. He has been paying the levies ever since.

[9.3] It was their agreement that they would approach the offices of the 2nd Respondent and change all documents therein to reflect the Applicant's name. He was not aware of any rules or law that pertains to the sale of the land. As a result of the sale, he effected improvements that amounts to a sum of R350 000.00 on the property. The property was just a stand with a shack at the time of the verbal sale agreement, with no concrete buildings at the time. He then built a house and outside structures wherein he resides with his wife and 3 children.

[10] The 1st Respondent is now reneging on the sale agreement and insists that his family vacate the premises. She has proceeded with an eviction action she instituted in the Magistrate Court which is pending.

[11] On 4 December 2009 a dispute arose in a meeting at the 2nd Respondent offices that was for the purposes of changing ownership. In the light of the dispute another meeting was scheduled on 14 January 2010 with no positive results, notwithstanding that an official of the 3rd Respondent, (later herein after referred to as Ms Makhubela) attended to the matter and had promised to furnish the 1st Respondent with an alternative property seeing that he made such significant improvements to the property.

[12] Furthermore, the Applicant claims that since the belated transfer of the property to the 1st Respondent was only in 2019, therefore in error, as at the time she no longer qualified for the subsidised housing, the transfer was in violation of the housing department rules that says 'a recipient of a state provided property must be "A FIRST-TIME HOME OWNER.'

[13] The Applicant therefore alleges that as a result, the transfer must be cancelled, with the property reverting to the 3rd Respondent. However in the meantime, the files with the content of their particulars had disappeared, therefore the 4th Respondent must then hold an investigation and a hearing in terms of s 24A of the Gauteng Housing Act 6 of 1998 (GHA) to determine the rightful owner.

[14] Alternatively, if it is the sale to him that is found to be invalid, he holds a lien over the property as security for repayment of the expenditure incurred. He therefore must be reimbursed all the money he spent on the improvements which totals R350 000.

[15] The 1st Applicant attaches amongst other things two notices from the City of Johannesburg Region A, one dated 4 December 2009, calling upon the occupier of the property to come and register for a title deed and the other one dated 14 January 2010 asking the occupier to bring water and lights statements with them. 1st Applicant has also attached a windeed search that indicates that the Maokeng property was registered on 13 August 2012 in the name of the 1st Respondent. Whilst the registration of the Ivory Park property took place on 29 August 2019. He attached proof of payment to the Municipality which shows a sporadic payment of amounts of R100.

Respondents answer

[16] The 1st Respondent disputes the allegations made by the Applicants that she or she and the deceased did not qualify for the housing subsidy when they acquired the property since her deceased husband applied for the subsidized housing in 1991. At the time they were staying with the deceased's parents and not owning any property. They were then allocated the site Erf 7[...] in Ivory Park. The deceased had to sign a lease agreement with the Transvaal Provincial Administration on 28 November 1990 and a further month to month lease agreement with the Ivory Park Metropolitan Substructure as the lessor on 15 March 1997. Both leases attached.

[17] She denies that they sold the property to the 1st Applicant. According to her they built a structure on the site that consisted of 2 bedrooms, a kitchen, a dining

room and an outside bathroom, using board and zinc roofing. They lived comfortably on the property with their four children for a period of +- 6 years but later had to make a choice to move away from the area for the sake of their small children. At the time crime was on the rise as it was not yet a fully built up area. The relocation was intended to be temporal with an intention to later build a proper structure and for their son to take occupation. They were able to buy a house in the Township Maokeng (referred to as the Maokeng property) through a mortgage bond. She and her husband took transfer of the Maokeng property in 2010 when registration took place.

[18] They let the 1st Applicant stay in the property without a sale or lease agreement concluded as he was destitute, squatting on a vacant land with no place to stay. He was also a friend of the deceased and was to look after the property as they could not leave it unattended. Consequently, the Applicant was to remain there until they were able to build so that their son could take occupation of the property or until her husband's cousin could move to Gauteng coming down from Limpopo who was the one supposed to occupy and look after the property until their son takes over occupation. The cousin, however, reneged. The deceased is the one who concluded the agreement with the 1st Applicant to look after the property. She is therefore not sure of the terms agreed upon, however it was never their intention to sell. As far as she knows the 1st Applicant was on his own when he moved in.

[19] After some time the 1st Applicant had moved in, they noticed that he had demolished the structures they had built and started building his own structures in the property without their consent. She and the deceased tried to seek an audience with him to initiate talks about it to no avail, the 1st Applicant refused to meet or to talk to them. As they could not get his attention, a notice to vacate was then served on him. The 1st Applicant resisted and undertook to continue the construction.

[20] She confirms that in 2010 she and the deceased received an invitation to attend the local Municipal Office from the Housing Department but was not told what it was all about. They found the Applicants already there. A Ms Caroline Makhubela, an official from the Housing Department, after talking to the Applicants alone, came and told them that the property now belongs to the Applicants without providing any

clarity why it would be so. They did not accept that as they never sold the property. After the meeting they never got a feed back.

[21] She denies that she ever signed anything for any sale or transfer of the property to the 1st Applicant and did not pursue the matter of the alleged sale any further. She disputes that she is not eligible to own the property, and argue that even if she was not, the Applicant could not be a receiver of a subsidy as he is a foreign national from Malawi.

[22] She points out that, on the passing of the deceased she as the executor of the estate appointed her son to assist her with the administration of the estates whereupon the property was transferred to her. On a further attempt to evict the Applicants from the property, the 1st Applicant told her son that he paid an amount to the Housing Department for the purchase of the property alleging now to be the lawful owner of the property. The said information was not put to her and the deceased when they were called at the Municipality Offices. And she was hearing it for the first time. It, however, did not make sense as she and her husband were the holders of the title and do not understand what the 1st Applicant was paying for. They also could not prove such allegations.

[23] She then attended the offices of the 2nd Respondent to investigate how it could have been possible for the Applicants to obtain ownership of the property without their involvement. The housing Department informed them that they sent several notices to the property and there was no response. The outcome of an investigation into the alleged sale conducted by the Head of Department at the request of her son did not find to have been any resale or re allocation of the property except to her and the deceased.

[24] The Applicants were notified of the 2nd Respondent's findings but continue to refuse to vacate the property despite the numerous requests and lawful demands. She was directed to attend head office and uplift her title deed in order to proceed with the evictions of the Applicants and all those who occupy the property through or under the 1st Applicant. As a result, in 2021 she launched the eviction proceedings at

the magistrate court which 1st Applicant is opposing. The matter was set down for oral evidence on 21 June 2022 and postponed sine die.

[25] The 1st Respondent also indicated that the utilities are owed on the property to the Municipality in varying amounts, inter alia, an amount of R57 282.41, owed as of 22 January 2016, R63 545.41 owed as of 16 March 2016 and an amount of R 111 279.70 owed as of 22 March 2019. Point 2 (b) of the title deed indicate that she and the deceased could not sell the property within 8 years of transfer without offering it to the Provincial Housing Department and obtaining their consent. The 1st Applicant cannot produce proof of any payments made in relation to the sale of the property as no sale of the property informal or formal has ever taken place.

[26] In relation to the construction, the 1st Respondent indicated that the 1st Applicant has proceeded to built whilst fully aware that he was not authorised to do so under a firm believe that this would confer ownership on him as he now relies on the building and reconstruction as grounds for setting aside and cancellation of her Title Deed. He did not obtain their consent to demolish the structures that were already there and to build his ones.

Applicant's reply

[27] In reply, the 1st Applicant disputed the averments in the 1st Respondent's affidavit. He denied that there were rooms built on the property except for a one room shack which was also on a very bad state and unoccupiable.

[28] He disagreed that the 1st Applicant and the deceased ever occupied the property, pointing out that the date of the sale of the Maokeng property is 2003 and he started staying at the property from 1997. From 1997 it is not clear where the 1st Respondent and her husband were staying. They had stopped qualifying for a home subsidy as soon as they qualified to purchase an immovable property. Therefore, at all relevant times until the property was transferred to the 1st Respondent in 2019 it remained the property of the 2nd Respondent and a state subsidy property as it was leased to the 1st Respondent. It remained so until July 2019 when it was transferred to the 1st Respondent.

[29] He points out that the 1st Respondent only started evicting him once she got the title deed and had done nothing since 1997. In the eviction action the 1st Respondent brought in the magistrate court the 1st Respondent alleges therein that the property was leased to him. He denies that the stand was leased to him but sold.

[30] On the invitations from the Municipality that he allegedly did not forward to the Mokoenas, he disputes that the 1st Respondent was not aware of the meeting. He alleges that he delivered the invitation to attend the meeting personally to the 1st Respondent. At the meeting the 1st Respondent and her husband agreed that they sold the property to him but could not abide by the agreement because their children were grown up then. The operations manager advised them that for fairness they must look for another stand to build on as he has done. The operations manager then asked him for his ID as well as birth certificates of his children and advised them that a new stand was going to be allocated to 1st Respondent and deceased and a new file opened for them.

[31] He alleges that the 1st Respondent only started to evict him recently after her husband passed away. Whilst her son has been harassing him telling him that he was prepared to reimburse him the purchase price he paid and laments that he lost the recording of the discussion. When all this time the allegations were on the basis that he paid the deceased and not the 2nd Respondent.

[32] He argues that the notice to vacate was only served in 2019 and 1st Respondent saw the house personally for the first time after two decades. There were no investigations made or concluded as alleged by 1st Respondent.

[33] He reiterated that the 1st Respondent and her husband sold the stand to him in 1997 before any title was issued and it was still an informal settlement. The 1st Respondent and the deceased delayed him when they had to approach the municipality to change the stand to his name. They started to pull back from the agreement after he had effected the improvements, that is why he approached the 2nd Respondent.

[34] The 2nd Respondent has nevertheless continued to issue the title deed to the 1st Respondent without proper procedure for the dispute resolution and or an enquiry in terms of s 24A of the GHA and the necessary report or outcome thereof. The title must revert to 2nd Respondent to enable the tribunal to exercise its powers without a hindrance. It will not be able to exercise its powers whilst the title remains in the hands of the 1st Respondent. The status quo of the title deed in the name of the 2nd Respondent is relevant to the enquiry. The 3rd Respondent does not have powers to cancel the title deed in the event that it surfaces that the property indeed does not belong to the 1st Respondent. property dispute started since 2010, but the

[35] He submits that the 1st Respondent received the title deed in error both in fact and law. At the time the stand was allocated to him per the 2nd Respondent and also per giving effect to their initial agreement of sale of the stand. Legally the 1st Respondent no longer qualified for the housing subsidy. The title deed came erroneously in the name of the 1st Respondent in 2019 disregarding the sale that came about more than 2 decades ago.

[36] The 1st Respondent only issued a letter of demand attempting to evict him in 2019 after she received a Title Deed when he has stayed in the property since 1997. Clause 2 (b) became applicable only after the property has erroneously been transferred to the 1st Respondent in 2019. He therefore seeks to correct the error by cancellation of the title deed.

[37] At the time of the sale he was not aware of requirements that he had to comply with and that the 1st Respondent was not in possession of a title deed yet. It was only in 2009 that he then discussed the matter with his family friends to arrange a date and time to go to the local offices of the 2nd Respondent to effect their agreement and there was no problem at all. That they were family friends is indicated by them allowing him to stay for 25 years at the time when his family friend was alive. He is certain that if he was still alive today all the legal action would not have commenced and everything was going to be resolved in a good way.

[38] The rooms were built before the area had title deeds. All occupants were informed by the area council that since the streets are properly made by the

municipality and the sewer pipes clearly installed, they need to be cautious of the boundaries when building at least to be two meters away from the EFR demarcation and not build on top of the municipal services. Whenever the title deeds come, they can submit the plans with no guarantee that plans will be approved. It is also possible that certain structures will have to be adjusted for approval. He alleges that the 1st Respondent only became aware of the developments recently, if she had an issue he could have stopped him long time ago.

[39] The provisions of the Housing Act became applicable once the property was transferred otherwise it remained the property of the 2nd Respondent then as an owner entitled to allocate and reallocate to anyone out of its own discretion. The invitation letter was clear regarding the subject of the invitation. The sole purpose of the issue was stand 7[...], the property. To date the covers of the office file still bears his name, but the contents of the file have disappeared. That started when the 1st Respondent's son became involved and was colluding with the HOD.

[40] On the meeting with Makhubela he alleges that Makhubela enquired on the property and the 1st Respondent agreed to have sold the property to him and needed it back, now that the children have grown. It was then that Makhubela told the 1st Respondent and the deceased that they will be allocated a new stand as he has already built on the property and it was now allocated to him. Makhubela's duty was to resolve stand disputes. She opened a new file for the 1st Respondent and the deceased for the allocation of a new stand.

[41] The 1st Applicant argues that the basis on which the property was allocated to him was due to the sale agreement he concluded with the 1st Respondent as well as the improvements he had effected. An investigation how the transfer took place will shed some significant light as transfer to the 1st Respondent was in error.

[42] There are numerous disputes of facts in this matter. Notwithstanding their likelihood foreseeable at the time of launching this application, as the parties were also party to an action in the Magistrate Court that involves the same property, and seeking a final relief together with ancillary relief, the Applicants nevertheless

proceeded on paper, without resort to oral evidence. The Plascon Evans¹ Rule is therefore applicable in deciding upon the disputes of fact inherent in the matter. In essence, the court will grant a final order if the facts stated by the Respondent, together with the admitted facts in the Applicant's affidavit, justify such an order. The general rule of resolving the disputes of facts in motion proceedings emanating from the decision of Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*² where it is further stated that:

“ Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.”

[43] There are exceptions applicable to the rule, that is when allegations or denials of the Respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on paper (see Botha AJA's remarks in *Associated South African Bakeries Pty Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere*).³ In certain instances the denial by Respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,⁴ *Da Mata v Otto, NO*,⁵).

[44] Inversely, since the 1st Respondent failed to avail herself of her right to apply for the viva voce evidence of the Applicant, if the court is to be satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed based on the correctness thereof and include this fact among those upon which it will determine whether the Applicant is entitled to the final relief he seeks.⁶

Issues arising are:

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] (3) SA 623 (

² 1957 (4) SA 234 (C) at p 235 G,

³ 1982 (3) SA 893 (A) at p 924A).”.

⁴ **1949 (3) SA 1155** (T) at pp 1163-5;

⁵ **1972 (3) SA 585** (A) at p 882 D - H

⁶ *Rikhoto v East Rand Administration Board*, 1983 (4) SA 278 (W), at p 283E-H).

[45] The Applicant alleges that the transfer was erroneous and should be cancelled on the basis that (1) the property was already sold to him at the time of transfer (2) and the 1st Respondent did not qualify to take transfer of the property in her name as she already at the date of transfer owned an immovable property. The question to be determined in that regard is therefore;

[45.1] whether or not there was a sale of the property de facto and de iure as alleged by the 1st Applicant that entitled him a right to own the subsidised property or to be considered for ownership thereof. It is therefore to be determined if 1st Applicant had proven factually the conclusion of such an agreement and its legality and his eligibility to buy the property.

[45.2] Whether ignorance of the law exonerates the ignorant from the application thereof. (It excuses no one from compliance)

[46] With regard to the second issue the question is whether the 1st Respondent was at the time of registration of transfer of the property in 2019 eligible to take transfer of the property even though she already held ownership of the Maokeng property. Whether or not the 2nd Respondent was authorised to pass transfer of the property to the 1st Respondent at the time of transfer,

Whether or not there was a sale of the property as alleged by the 1st Applicant? [

[47] Prior to determining the facts, it is apropos to determine the legal framework applicable with regard to saleability of the property at the time alleged. The starting point in determining that issue would be to look at the terms and conditions under which the property or site was held by the deceased and the 1st Respondent, the alleged seller, at the time the alleged sale supposedly took place.

The Leasehold and Lease agreement

[48] The salient terms and conditions under which the property was obtained by the deceased in 1990 are pronounced in the preamble of the Leasehold

agreement he entered into with the Transvaal Provincial Department, which, *inter alia* read as follows:

“Whereas the Transvaal Provincial Department as the Lessee who was in the process of acquiring certain land, being portion 1 (a portion of portion 4) of the farm Kaalfontein 12 IR, and generally known as “Kaalfontein Squatter Camp” (the property) through expropriation,

And whereas the Lessor intends transferring the property to the local authority in order to allow it to be incorporated within the jurisdiction of such local authority thus enabling the Lessees of the sites on the property to acquire the sites under Leasehold or Freehold Ownership.

And whereas the Lessor has agreed to let the sites on the property to certain Lessees in the interim pending the acquisition thereof by such Lessees as set out before;

[49] The lease agreement thereafter provides for, *inter alia*, the following selected pertinent conditions, cited verbatim hereunder:

[49.1] paragraph 1 thereof reads:

“The lessor hereby lets to the lessee who hereby hire site number 7[...] situated in the property (the premises) “

[49.2] paragraph 2 reads:

“Notwithstanding the date of signature of this agreement, the lease shall commence or shall be deemed to have commenced on 28 November 1990.

[49.3] paragraph 7 reads:

“The lessee shall not have a right to cede or assign this lease or sublet the premises or any building erected on the premises or any portion thereof, or to cede or assign his rights to this agreement, not to part with the occupational possession thereof to any person whatsoever without the prior consent of the lessor.’

[49.4] Paragraph 8 reads:

The lessee undertakes not to erect more than 1 structure on the premises or allow any other party to erect such additional structure.

[49.5] Paragraph 9 reads :

The parties place on record that the property is intended for incorporation into the area of jurisdiction of a local authority. However, the lessee’s right of occupation shall not otherwise be affected by such incorporation and he shall have a pre-emptive right to purchase the premises should it become available.

[49.6] Paragraph 10 reads:

It is noted that the intention of the parties is to provide sites for homeless persons with the appropriate services and service charges.

[50] The deceased’s signed a declaration for Resettlement of Squatters/Backyard Dwellers to Ivory Park on 24 September 1990 stating the following:

“I hereby declare that I am neither a Lessee of a Tembisa City Council dwelling nor an owner of property within the jurisdiction of the City or Council of Tembisa.

I consent to being resettled to Ivory Park as I am homeless and consent that should it be discovered that I do in fact lease or own a home of my own, the stand allocated to me at Ivory Park should revert back to Transvaal Provincial Administration and should then be allocated to a homeless person. (my emphasis”)

[51] In March 1997, (the year the 1st Applicant alleges that the property was sold to him), following the incorporation of the leased sites into the area of jurisdiction of a local authority, the deceased and the 1st Respondent concluded a lease agreement with the Ivory Park local Municipality that had acquired the property in the meantime. Some of the terms and conditions of the old lease were retained with the inclusion, inter alia, of the following pertinent clauses:

5.1 *the sites are solely for residential purposes*

5.2 *Lessee entitled to erect a prefabricated building on site*

5.3 *Before any building is erected on the site, the lessee shall submit a building plan in respect thereof to the Lessor for approval*

6. *The Lessee shall not sublet the site of building erected thereon or any portion thereof, cede or delegate any of this right or obligation in terms of this agreement of lease to any other person or body.*

7. *The Lessee shall not without the prior written consent erect more than one structure on the site.*

10. *This agreement shall terminate and shall cease to be of force and effect from the date upon which the Lessee enters into a deed of sale in respect of the site.*

10.3 The Lessor **may** terminate this lease if :

10.3.1 *The Lessee at the time of entering into the Lease made a false statement which was material into entering into this agreement of lease or*

10.3.3 *The Lessee breaches any other term of this agreement*

10.3.4. *The lessee vacates the site.*

10.4 *The site shall be deemed vacated if the lessee or his immediate family has not occupied the site for a period of 30 days without advising the Lessor in writing of the absence.*

[52] In the affidavit attached to the Lease Agreement the deceased confirms that he is a South African citizen possessing a South African ID. *He does not own or lease any other residential property* nor derive any benefit from the housing subsidy scheme. The documents were attached and referred to by the 1st Respondent in her response to the Application.

Analysis

[53] The 1st Respondent has stated in her affidavit that at the time of application and conclusion of the leasehold agreement, she and the deceased owned no property and were together with their children staying with the deceased's parents at Defateng in Tembisa. Only the deceased was employed. There is no cogent and factual disputation to those allegations which are confirmed in a declaration and an affidavit filed by the deceased as part of the documents when signing the lease agreements.

[54] The property was therefore obtained with the terms and conditions of the leasehold fully applicable, particularly those in relation to the cession, assigning of the rights therein, subletting, vacating or temporarily absencing oneself from the leased property or parting with the occupational possession of the stand to any person whatsoever without the prior consent of the lessor.

[55] The 1st Respondent confirms that the family's vacation of the premises did occur in 1997, albeit temporarily with the intention to retain the property for their son and rebuild a proper structure. The 1st Applicant was requested to stay in and look after the property at least for a period of 6 years until their son was old enough to take over ownership of the property. This happened when they could not secure the deceased's cousin who was supposed to look after the property. They agreed with the 1st Applicant, in accordance with their intention, to temporarily vacate the premises. It is not in dispute that the 1st Applicant moved in to the site or property in June 1997.

[56] The temporal absenteeism or permanent vacation was in terms of the lease prohibited without the consent of the Lessor upon which the lease could be terminated. The agreement further stated that the property shall be deemed vacated if the Lessee or his immediate family has not occupied the site for a period of 30 days without advising the Lessor in writing of their absence. The result of which was that the Lessor could cancel the lease following the proper protocol as per terms of the lease agreement. The reason for the temporal move is alleged by the 1st Respondent to have been due to the crime that was on the rise at the settlement with no proper structures and their children were still small for that environment. That fact is not challenged by the 1st Applicant.

[57] The 1st Applicant on the other hand disputes that his possession of the property and the move by the Mokoenas was temporal. He alleges that he bought the property from the deceased and the 1st Respondent for R3 500.00 which he paid in full by way of three (3) equal instalments of R1000 and the R500. However, there is no written agreement or proof of payment. He insists to have negotiated the terms thereof with the deceased. Furthermore, that he was at the time unaware of the law applicable on sale of land but they had agreed, as parties to the sale agreement that they will approach the 2nd Respondent for change of ownership. It is because of this sale that there is a dispute on ownership.

[58] Notwithstanding the point of view that the matter is to be decided on the facts as alleged by the Respondent unless the allegations are far-fetched and inherently improbable. The 1st Applicant disregards the fact that the 1st Respondent and the

deceased were not able to deal with the property in any way they wish except as per the terms of the Leasehold that was applicable at the time, unless they obtained consent to deviate from the terms thereof.

[59] It was nevertheless, inherently impossible for the deceased and 1st Respondent to sell the property at the time and guarantee ownership, when they did not own it, a fact that the Applicant himself points out that it was an informal settlement and they did not have a title deed. They could not derive any gain from it. The property was still held under a subsidised leasehold meant for the poor and the homeless, bestowing only a pre-emptive right to a subsidised Freehold ownership as and when it becomes available for transfer. As a result absent a real right, property ownership could not be sold.⁷

[60] Moreover as it has been pointed out by the 1st Respondent, that besides the fact that they lacked ownership at the time, the 1st Applicant was a foreigner therefore not eligible for consideration for either the Leasehold or Freehold ownership under the applicable subsidy scheme. As it has happened with the deceased, he, as the intended Lessee, had to confirm that he is a South African citizen in possession of a South African ID and further that he does not own or lease any other residential property nor derive any benefit from the housing subsidy scheme.

[61] In addition, the 1st Applicant's claim is based on an alleged oral agreement for the sale of the land, which is an immovable property. Verbal agreements in respect of sales of immovable property are invalid therefore not binding in law.⁸

[62] The 1st Applicant has also alleged that at the meeting that took place at 2nd Respondent's offices in 2009 or January 2010, one Makhubela an official at 2nd Respondent, told the 1st Respondent and the deceased that due to the sale, they will be furnished with another site, and that the property will now be registered in the name of the Applicants. This also could not be possible, for the fact that the 1st

⁷Wessels J in *Glutthaar vs Hussain* 1912 TPD 322

⁸ The Alienation of Land Act No. 65 of 1981 ("the Act") in s 2 provides that "*no alienation of land shall..... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.*"

Applicant was not a citizen of South Africa. It would have been interesting to see the documents that 1st Applicant alleges to have submitted to the 2nd Respondent, which he conveniently claims to have disappeared from his file. He could not prove the refuted sale either. It is also noted that he only got married to the 2nd Applicant in 2016. Nevertheless, the property could not be sold or alienated for gain.

[63] Therefore, the allegations by the 1st Applicant that the meeting was an enquiry in terms of s 24A of the GHA (even though the notice did not say so and there is no report or proof of outcome) whereupon a decision was made that the property was then to be transferred to him and that the subsequent transfer not to him but to the 1st Respondent was erroneous is ill advised. The conduct of such enquiries is regulated by the GHA.

Lack of awareness of the Law

[64] The 1st Applicant further alleges that he did not know or was not aware of the law applicable in relation to the sale of the property. Ignorance of the law is an excuse if it can be proven to be both genuine and material. In that case, the excuse is acceptable. No individual is blanketly exonerated from compliance with the law due to ignorance. Hence in *S v Waglines (Pty) Ltd and Another*^[4] Didcott J (as he then was) stated that:

'Ignorance of or a mistake about the law is indeed an excuse cognisable by our courts. The excuse does not always amount, however, to an acceptable one. That the ignorance or mistake must first be both genuine and material goes without saying. Less obviously, but in principle no less necessarily, it has to be reasonable in addition whenever culpa enters the reckoning, whenever that serves as mens rea. It cuts no ice otherwise, since the unlawful act which it explains is then committed through culpa. The question therefore posed by such a case is whether the person concerned should reasonably have realised that what he was doing or about to do might well be unlawful. And the answer depends largely on the care he took or did not take to acquaint himself with the true legal position. The duty to investigate this is clear,

to speak generally at all events and not of any area where the law's reach is suspected so little that the possibility of trouble and the consequent need for caution would never occur to a prudent mind. Strong demands are placed, by comparison, on all those engaged in trades, occupations or activities which are legally regulated and known by them to be. They are expected to learn the rules and obliged to make the effort.

Sometimes, to be sure, the duty to investigate will be performed satisfactorily when advice on the lawfulness or otherwise of the course envisaged is obtained from a source ostensibly qualified to furnish such, and to think it lawful will be reasonable once the assurance has thus been given that it is.' [Emphasis mine].

[65] The 1st Applicant's ignorance of the law does not exonerate him from the effect of non-compliance or to put it in another way, validate what is rendered invalid because of his non-compliance. To seek that the 2nd Respondent recognise the non-compliant questionable sale and give effect thereto is ill considered. No one is allowed to improve his own condition or to benefit by his own wrong (*Nemo ex suo delicto meliorem suam conditionem facere potest*).⁹ In *Coetzee v Steenkamp*¹⁰ the court opined as follows:

[16] *I am satisfied that in this matter the plaintiff sought from this Court to accord him its imprimatur to benefit from his own wrongful act, which the Supreme Court of Appeal has enjoined a person cannot do, and which precedent binds this Court. In **Brooks v Minister of Safety and Security** 2009(2) SA 94 (SCA) at 100E –F (para 16) in a different context but on the same principle **Ponnan JA** remarked:*

“[16] It is true that in matters of human behaviour we are often told not to judge by results, but in law, when considering whether a contention is well founded, the absurdity of the results to which it will give rise is

⁹ Roman Law. Ulpian in D50.17. 134.1

¹⁰ (579/2009) [2010] ZANCHC 25 (18 June 2010)

*not an immaterial consideration. That a person in the position of Brooks could by his own intentional wrongful act create in favour of his dependents a cause of action that would not otherwise exist is nothing short of preposterous; indeed in my view that would be a dangerous proposition. **After all it is a trite principle of our law, that a person should not be allowed to benefit from his/her own wrongful act.***"
(My emphasis).

[66] The attempt by the 1st Applicant of a deranged show of ignorance is devoid of all credence. The fact that he alleges the existence of a void sale agreement of the land to justify his erection of buildings on it and to garner sympathy cannot assist him. Particularly regard being had to the fact that he was aware that 1st Respondent obtained the property through a Leasehold or Freehold housing subsidy scheme for the homeless for which he didn't qualify for at the time as a foreigner. Likewise, to have interacted with the 2nd Respondent's office on numerous occasions. He seemed in any way to have been aware that ownership was not yet passed to the deceased and 1st Respondent, therefore they held no title deed to the property yet. Also of the restrictions applicable on alienation of the property and the erection of buildings or structures on the property.

[67] As to the purpose of him being in the property he said his friends allowed him to stay in the property for 25 years, to show that they were good friends, confirming 1st Respondent allegation that he was let in the property as the deceased's friend who was destitute, therefore with no likelihood of a sale agreement. He even laments that if his friend was still around he would still be staying in the property

[69] Absent a valid sale agreement, the 1st Respondent and the deceased remained the legitimate holders of the property in terms of the lease agreement. They were qualified at the time they obtained the subsidised leasehold and continued to hold a pre-emptive right to ownership of the property from 1991 which was not disturbed in 2010 by their acquisition of the Maokeng property. They still validly remained entitled to the ownership of the property and therefore registration of the property or transfer of ownership effected by the 2nd Respondent not erroneous.

Reimbursement

[70] The Applicant seeks also an order that he be paid the sum of R350 000.00 as a fair and reasonable pay for the expenses he incurred in improving the property without any proof of how the amount is constituted. He built more than 1 structure on the property without submitting any building plans and illegally sublet the said structures without permission from the lessee and or the 2nd Respondent contrary to the terms and conditions of the Leasehold. His reply of a mere shrug that the building plans were to be submitted thereafter and structures not required to be demolished nullifies his claim for the unsubstantiated reimbursement amount. He fails to make a case for that order, that is, reimbursement and the quantum thereof. This is notwithstanding the provisions of s 28 (1) of the Alienation of Land Act¹¹ as he has also failed to prove the applicability thereof since he could not prove the existence of a sale agreement.

[69] The Applicant has not made a case for an order for the reliefs sought against the Respondents. As a result the Application will have to fail.

[70] Under the circumstances the following order is made:

¹¹ **28. Consequences of deeds of alienation which are void or are terminated**

- (1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and—
- (a) the alienee may in addition recover from the alienator—
 - (i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;
 - (ii) a reasonable compensation for—
 - (aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or
 - (bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and
 - (b) the alienator may in addition recover from the alienee—
 - (i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;
 - (ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.
- (2) Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.

1. The Application is dismissed with costs.
2. The Applicant to pay the Respondent's costs on a party and party Scale B.

N V KHUMALO J
Judge of the High Court
Gauteng Division, Pretoria

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