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

Case No: **A291/2024**

High Court Case No: **29560/2021**

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED:

DATE: 4 DECEMBER 2025

SIGNATURE

In the matter between:

**SIPHO NOAH MTHETHWA**

First Appellant

**SYLVIA SIZIZWE MTHETHWA**

Second Appellant

and

**MAILULA ALBERT ATTE OBED**

Respondent

In re:

**MAILULA ALBERT ATTE OBED**

Applicant

and

|                                                                                                        |                    |
|--------------------------------------------------------------------------------------------------------|--------------------|
| <b>NATIONAL HOUSING FINANCE CORPORATION (PTY) LTD</b>                                                  | First Respondent   |
| <b>NU-WAY HOUSING FINANCE DEVELOPMENTS (PTY) LTD</b>                                                   | Second Respondent  |
| <b>HLANO HOUSING SOLUTIONS (PTY) LTD<br/>(PREVIOUSLY KNOWN AS<br/>KHAYALETHU HOME LOANS (PTY) LTD)</b> | Third Respondent   |
| <b>PIERE ANDRÉ BRUYNS</b>                                                                              | Fourth Respondent  |
| <b>SONJA BRUYNS</b>                                                                                    | Fifth Respondent   |
| <b>SIPHO NOAH MTHETHWA</b>                                                                             | Sixth Respondent   |
| <b>SYLVIA SIZIZWE MTHETHWA</b>                                                                         | Seventh Respondent |
| <b>REGISTRAR OF DEEDS</b>                                                                              | Eighth Respondent  |
| <b>CITY OF TSHWANE METROPOLITAN MUNICIPALITY</b>                                                       | Ninth Respondent   |
| <b>THE MINISTER OF HUMAN SETTLEMENT<br/>(GAUTENG PROVINCE)</b>                                         | Tenth Respondent   |

*This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 4<sup>th</sup> December 2025.*

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**JUDGMENT**

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## **RETIEF J (Leso AJ and Terblanche AJ concurring)**

### **INTRODUCTION**

[1] This judgment has been one of the hardest judgments to pen. The reason for this, will become apparent to the reader in due course. However, what should ring true, when you do read it, is that hard cases make bad law.

[2] To commence then, on the 10 February 2023, Mnyovu AJ [the Court *a quo*] in this Division granted declaratory relief [the order], ostensibly in favour of Mr Mailula, the respondent in this appeal [the respondent], concerning his interest in a property known as erf number 2[...], extension 4, Mamelodi Township J.R., Gauteng Province [the property]. The property was part of several erven earmarked for a low cost housing scheme which, at the material time, was held under leasehold in favour of the South African Housing Trust Ltd [SAHT].

[3] In 2015, Mr and Mrs Mthethwa, the appellants in this appeal [the appellants], and unbeknown to the respondent, bought the property from private sellers, Mr and Mrs Bruyns [the Bruyns]. The appellants, now the registered title holders of the property by virtue of title deed T22469/2015 successfully obtained an eviction order in this Division in 2019 to evict the respondent from the property he lived in for almost 30(thirty) years. The eviction order is presently the subject matter of an appeal serving before the Constitutional Court [CC].

[4] The respondent to secure his right of tenure and to protect his rights in terms of the section 26 of the Constitution in respect of the property, brought the successful application [main application] which served before the Court *a quo*, the subject matter of this appeal.

[5] The appellants and the National Housing Finance Corporation (Pty) Ltd [NHFC], the first respondent in the main application before the Court *a quo*, applied for leave to appeal to the Full Court of this Division alternatively, to the Supreme Court of Appeal [SCA]. Leave was refused.

[6] The appellants then petitioned the SCA for leave and, on the 8 October 2024 the SCA granted them leave appeal to the Full Court of this Division. With leave, this Court is therefore cloaked with the necessary jurisdiction to hear the appeal on the grounds brought by the appellants.

[7] The same cannot be said for NHFC who, without petitioning the SCA simply served a notice of appeal after the fact in November 2024. The NHFC assumed that they could take this procedural step, as of right, without leave. In this way, NHFC was hoping to simply come in through the back door when the front door was open to them all the time, they simply had to follow due procedure.<sup>1</sup> In consequence, the NHFC was not formally joined as appellants in this appeal. Both the appellants and the respondent, at the date of hearing, objected to this procedural attempt taken by NHFC. This Court upheld their objections and the appeal which served before this Court remained that of the appellants.

[8] However, it was not only NHFC who sought to take procedural advantage without leave, but the respondent too. The respondent without leave and without filing a cross-appeal, attempt to widen the ambit of the issues on appeal by seeking a variation of the order granted handed down by the Court *a quo*.

### **VARIATION OF THE COURT A QUO'S ORDER, ABSENT LODGING A CROSS-APPEAL**

[9] The respondent without leave and lodging a cross-appeal<sup>2</sup> now seeks to vary the Court *a quo*'s order contending that an appeal Court is entitled and empowered to exercise a discretion by virtue of subsection 19(d)<sup>3</sup> of the Superior

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<sup>1</sup> **Nabolisa v S** [2013] ZACC 17; 2013 (8) BCLR 964 (CC), paras 67, 74 and 76.

<sup>2</sup> **Minister of Police v Nontsele** (547/2022) [2024] ZASCA 137 (11 October 2024); **Monyepao v Ledwaba** 2020 JDR 0875 (SCA) at par [6] the SCA held:

*".....whatever the subject-matter of the proposed cross-appeal, leave to cross-appeal is necessary because the rules relating to appeals apply mutatis mutandis to cross-appeals."*

<sup>3</sup> Section 19 of the Superior Courts Act states that:

*"19. The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-*

*(a)-(c) ....*

Courts Act, 10 of 2013 [Superior Act] to do so. The respondent's Counsel argued that although the Court *a quo* granted the order in his clients favour, from the wording of the order it was ineffective. The respondent's Counsel advanced that the variation sought was simply to give effect to what already had been ordered by the Court *a quo* and was therefore not a substantive variation. In consequence, the argument was that the common law rule prohibition of *reformatio in peius*, that a judgment or order cannot be varied on appeal to the appellant's prejudice, absent a cross appeal, would not be disturbed as the judgment against the appellant granted by the Court *a quo* would not substantively be altered just, made clear.<sup>4</sup>

[10] In support of this proposition the respondent's Counsel invited this Court to consider the Full Court judgment in the *Octagon*<sup>5</sup> matter and, furthermore in developing his argument he, in written argument, made reference to the premise upon which the unsuccessful respondents in the Full Court in the *B-Sure* matter relied.<sup>6</sup> The Full Court in *B-Sure* stated that the principle in the *Octagon*<sup>7</sup> matter was no authority for the proposition that an appeal Court has jurisdiction to grant a respondent substantive relief to vary an order absent a valid cross-appeal. In coming to this finding the Court in the *B-Sure* matter, *inter alia*, reasoned at paragraph [31] that:<sup>8</sup>

“31.1 *Octagon did not concern the jurisdictional requirements for an appeal or cross-appeal. The Full Court did not deal with sections 16 or 17 of the Act or even consider the authorities in relation thereto, namely Goodridge v Botha (1954 (2) SA 540 (AD) at 544 and Gentiruco 1972 (1) SA 589 - own emphasis);*

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(d) *confirm, amend or set aside the decision, which is the subject of the appeal and, render any decision which the circumstances may require.”*

<sup>4</sup> **Von Steinaecker v Kniesl** (1898) 19 NLR 153.

<sup>5</sup> **Octagon Chartered Accountants v Additional Magistrate, Johannesburg, and Others** (2018) 940 SA 498 (GJ).

<sup>6</sup> **B-Sure Africa Insurance Brokers (Pty) Ltd and Others v Dotsure Insurance Company Limited and Another** (A2023/041879) [2024] ZAGPJHC 958 (24 September 2024).

<sup>7</sup> See footnote 5.

<sup>8</sup> *Ibid*, par 31.

31.2 *Octagon was about the power of an appeal court to vary a procedural order where a failure to do so would give rise to impractical and untenable results. In this regard, there can be no doubt that the High Court has such power to regulate its procedures in the interests of the proper administration of justice; and*

31.3 *The question in the present appeal before this Court is whether this Court can grant a substantive order where a cross-appeal for such relief was not made. The erstwhile Appellate Division and the SCA have, since Goodrich and Gentiruco<sup>9</sup>, consistently found this to be impossible on the basis that the jurisdictional requirements relating to appeals also apply to cross-appeals.”<sup>10</sup>*

[11] The relevance of the *B-Sure* matter is unclear as the respondent’s Counsel did not contend that the variation sought was procedural of nature but, rather that absent variation the order itself could not effectively be enforced. In other words a recognised exception to the general prohibition against *reformatio in peius*.<sup>11</sup> To determine whether this Court is jurisdictionally cloaked to entertain the variation on the basis of an exception, both the order and the variation sought by the respondent requires consideration.

[12] The order of the Court *a quo* simply reads:

“[29] *I grant the following order:*

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<sup>9</sup> **Gentiruco AG v Firestone SA (Pty) Ltd** 1972 (1) SA 589 (AD) at 607G.608G; **Goodrich v Botha** 1954 (2) SA 540 (AD) at 544.

<sup>10</sup> Own emphasis – “**Setsedi v Mamelodi Town Council and Others** [1991] ZASCA 148; 1992 (1) SA 483 (AD) at 494A; **National Union of Metalworkers of South Africa (NUMSA) and Others v Henred Fruehauf Trailers (Pty) Ltd** [1994] ZASCA 153; 1995 (4) SA 456 (AD) at 475F-G; **Langa CJ and Others v Hlope** 2009 (4) SA 382 (SCA) at paragraph [30].”

<sup>11</sup> See footnote 5 at para 24-28 and the authorities referenced therein and as set out in footnote 9.

29.1     *The application for declaratory order is granted as per relief sought (own emphasis).*

29.2     *No order to costs.”*

[the order]

[13]     It is common cause that the respondent did not amend his notice of motion. In his notice of motion the respondent sought no less than 11(eleven) prayers excluding costs. That nature of the prayers were final. Less than half of the prayers sought, 5(five) of them in fact, dealt with declaratory relief. The respondent sought to declare the sale and disposal of the property to various parties invalid, he sought to declare that his Constitutional rights in terms of section 26 had been infringed and, he sought to declare the decision by certain government agencies, who allowed the transfer of the property and other even earmarked for low cost housing, as unjust administrative actions. With the remaining 6(six) prayers the respondent sought compelling orders to give effect to the declaratory relief where applicable. The respondent's ultimate goal was to ensure that the property was registered in his name.

[14]     The respondent's relief was poorly crafted and whatever difficulty arises from that, was further compounded by the Court *a quo* who saw fit to capture the relief without precision. In paragraph [1] of the judgment the Court *a quo* identified the following declaratory relief:

“[1]     *The applicant seeks a declaratory order that the sale of erf/stand 2[...], extension 4, M[...] Street, Mamelodi East, Gauteng Province (“the property”) and the disposal thereof between the first and the second respondents, and the second respondent to the fourth and fifth respondents, and by the fourth and the fifth respondents to the sixth and seventh respondents be declared invalid and unlawful and set aside.”*

[15] Paragraph [1] simply paraphrases prayers 1 to 3 of the notice of motion. This was done without consideration of the remaining prayers dealing with declaratory relief. This is probably why the Court *a quo* failed to engage with this relief. Then, in paragraph [2] of the judgment the Court *a quo*, lists the compelling relief. The compelling relief is introduced by stating: “ [2] *The applicant (the respondent- own emphasis) further seeks (own emphasis) orders that:-*” and, in sub-paragraphs i)-vii) the further relief is listed.

[16] In this way the Court *a quo* made a distinction between the declaratory relief described in paragraph [1] on the one hand and the remaining further compelling relief sought in paragraph [2] on the other hand. This much is clear from the construction and content of the paragraphs.

[17] In dealing with the paraphrased declaratory relief in paragraph [1] the Court *a quo* applied section 21(1)(c) of the Superior Act [section 21] and in applying the first test of the two stage section 21 enquiry it found in paragraph [27] of the judgment that:

“27[e] *Based on the evidence before this court I am satisfied that the applicant has a legally recognised interest in an existing, future and contingent right, an interest akin to the interest that the third, ninth and tenth respondents (Hlano Housing solutions (Pty) Ltd, City of Tshwane and Department of Human Settlement (Gauteng Province)-own emphasis) have to intervene in the High Court proceedings.”*

and,

“*The applicant has a direct and substantial interest in the subject matter.*”

[18] Without commenting on this finding, but considering the judgment as a whole, this finding was confined to the declaratory relief paraphrased in paragraph [1] of the judgment. The Court *a quo* thereafter failed to engage with the remaining

prayers, prayers 5 and 7 and all the prayers dealing with the compelling relief as set in in paragraph [2].

[19] Notwithstanding, what remains apparent is that the respondent failed in his prayers to specifically seek to be declared the owner of the property and the Court *a quo* found that he had an interest in a right to the subject matter. Yet, the variation sought by the respondent reads as follows:

- “1. The sale of agreement dated the 14 November 2012 in respect of Erf / Stand 2[...], Extension 4, M[...] Street, Mamelodi East, Gauteng Province (“the property”) and the disposal thereof between the first respondent and the fourth and fifth respondents is declared invalid and unlawful and is set aside.*
- 2. The sale agreement dated the 13 October 2014 in respect of Erf / Stand 2[...], Extension 4, M[...] Street, Mamelodi East, Gauteng Province and the disposal thereof between the fourth and fifth respondents and the sixth and seventh respondents is declared invalid and unlawful and set aside.*
- 3. The applicant (the respondent – own emphasis) is declared the lawful owner of Erf / Stand 2[...], Extension 4, M[...] Street, Mamelodi East, Gauteng Province.*
- 4. The Deed of Transfer with number T000022469/2015 dated 1 April 2015 in respect of Erf / Stand 2[...], Extension 4, M[...] Street, Mamelodi East, Gauteng Province is hereby cancelled.*
- 5. The Registrar of Deeds is directed to take all steps necessary and to do all such things and make such endorsements as may be required to give effect to paragraph 3 hereof.*

6. *That the first, second, fourth, fifth, sixth and seventh respondents be ordered to pay the costs of the application jointly and severally on attorney and own client scale.”*

[variation order]

[20] It is clear from the variation order that the respondent does not simply seek to make the order, as granted clear but, to introduce substantive changes without a cross-appeal. It is also important to point out that the variation order also includes a punitive cost order in circumstances when the Court *a quo* failed to grant costs. The variation order does not constitute an exception to the common law rule.

[21] This Court will not entertain the respondents variation order as argued for want of jurisdiction on appeal.

[22] Now to the matter at hand. This matter cries out for a semblance of clarity. Furthermore, due to the fact that the relevant background facts commenced as far back as 1991 and that the Court *a quo* failed to deal with all the evidence and discuss the all the issues, this Court will consider it before dealing the appellants' grounds of appeal. In that way too the appellants grounds will be clearer.

### **BACKGROUND FACTS AND DISCUSSION**

[23] The background facts are complex, they involve the interplay between many parties who were directly involved in low cost housing schemes since 1991 and effect the security of rights to housing in terms of section 26 of the Constitution of vulnerable people, both the appellants and the respondent.

[24] During 1986, the government and the private sector agreed that South Africa was faced, amongst others with two key crises that needed to be addressed urgently, namely the lack of affordable housing with ownership for the lower income earning segment of the market and, unemployment.

[25] It was therefore decided that a joint venture vehicle should be created between government and the private sector in terms of which employment opportunities would be created through the facilitation and funding of housing directed at the lower income earning segment of the market. In 1986 SAHT, the joint venture vehicle was established. Its mission was to: *"Promote and facilitate the provision of affordable shelter and security of tenure (own emphasis) to the lower income earning communities of South Africa in a way which will maximise job creation."* SAHT itself was the finance vehicle through which government and the private sector funding was raised. SAHT was not a wholly State owned enterprise in 1988.

[26] In 1988, Khayaletu Home Loans, was incorporated as a wholly owned subsidiary of SAHT which provided retail home loan finance to low income communities. Khayaletu Home Loans is now known and cited as Hlano Housing Solutions (Pty) Ltd, the third respondent in the main application [Hlano]. Nu-Way Housing Development (Pty) Ltd, the second respondent in the main application [Nu-Way] was incorporated in 1994 and facilitated and managed property development.

[27] On the 10<sup>th</sup> of January 1991 SAHT acquired rights to certain pockets of undeveloped erven owned by the Mamelodi Council by virtue of the registration of a grant of leasehold for a period of 99 years in terms of section (2)(1)(a)(i) in terms of the Black Communities Development Act 4 of 1984. The leasehold in favour of SAHTS was registered through a certificate of grant of leasehold held under TL1849/1991 [mother title deed]. The property formed part of the pocket of leasehold erven and is described in the mother title deed.

[28] On the 23 June 1991 the respondent concluded an agreement with Lapalaka CC, a construction company and the developer agent. In terms of the agreement Lapalaka CC undertook to build a house for the respondent on the property. The agreed construction cost was R 22 116.00. The respondent approached Khayaletu for finance.

[29] According to the written loan application form provided by Hlano in their papers, the respondent and a Ms Diana Nhlape's jointly applied for finance on the 28 June 1991. The application for finance included a request for the loan amount to purchase of the property, a vacant stand at the time and, for the costs associated with the construction of the house. Hlano alleges that the application for finance was done on the strength of, *inter alia*, a sale agreement which was concluded between the respondent and SAHT. A copy of the agreement was not attached to Hlano's papers however, the fact that a written sale agreement was concluded was confirmed by their attorneys in writing in a letter dated 10 May 2021, who, with reference to the property stated, that:

- “ 3. *Our client (Hlano-own emphasis) provided financing for this transaction (acquisition of the property and construction of a house by the respondent-own emphasis) and factually paid the purchase price to SAHT (own-emphasis).*
4. *For reasons which we cannot explain, SAHT never transferred the property to your client and in fact, some years later sold the property to Nu Way Housing Development (Pty) Ltd (Nu Way).*
4. *SAHT was disestablished on 1 September 2002 with Act 16, 2002 and all assets of SAHT was taken over by the National Housing Finance Corporation (“NHFC”) from that date*
5. *The property remained registered in the name of SAHT and was sold again in 2015 by Nu Way with the assistance of the NHFC.”*

[30] Shortly thereafter the Upgrading Tenure Act 112 of 1991<sup>12</sup> [Tenure Act] came into operation on the 5<sup>th</sup> of July 1991. The Tenure Act was part of a scheme of legislation that was enacted to redress the injustices caused by the colonial and apartheid regimes. It was to provide for the conversion into full ownership of the

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<sup>12</sup> The Upgrade and Tenure Amendment Act of 2021, upgrades the 1991 Act to bring in line with the Constitutional Court's ruling in **Radebe v Radebe** [2018] ZACC 42.

more tenuous land rights which had been granted during the apartheid era to South Africans. Land reform was one of the key focus areas of the scheme, because the schematic deprivation of the South African majority's right in land and property was a main feature of the apartheid system.<sup>13</sup> When the Tenure Rights Act was promulgated, it meant that all registered leaseholds were in terms of section 2(1) automatically, by the operation of law, converted into ownership. In other words, no formal transfer had to be affected by deed, but the Registrar of Deeds could endorse a leasehold title deed, converting leasehold into freehold (ownership).

[31] After its promulgation and on the 22 July 1991, Hlano approved the loan application and duly informed the respondent on the 29 July 1991 by way of a letter of confirmation of grant of loan. In the confirmation letter, Khayaletu confirmed that: *"We have the pleasure in confirming that a loan for the amount of R 28,638.50 secured by a first mortgage bond over stand No. 2[...] MAMAELODI, has been granted to you (the respondent-own emphasis) for the purchase of the stand and house."*

[32] The terms of the loan were set out in the letter of confirmation, and it was clear that the respondent, over the bond period of 20 years, would pay Khayaletu 240 monthly instalments. The total loan was referred to as *'the bonded amount'*. The bonded amount included the purchase price of the property for R 6,600.00 in favour of SAHT and all legal and administrative costs to the register the property into the respondent's name, to register a first mortgage bond over the property, leasehold and deed of sale charges. The deed of sale and bond administrative costs according to the approved loan application was raised for 'BVZ'. BVZ according to Hlano's papers were their attorneys of record at the time. On the admitted facts, the respondent was a Khayaletu client.

[33] Flowing from this letter the respondent in his founding papers alleges that he, on the 29<sup>th</sup> of July 1991 entered into an agreement of sale with the NHFC, Nu-

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<sup>13</sup> **Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v North West Provincial Government** [2000] ZACC 2: 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) DVB Behuising at par 8.

Way and Hlano (previously Khayaletu) and that it was an implied term that contracting with any one of them is an agreement with all of them. This allegation is not understood in that, at the material time, Nu-Way had not been incorporated and NHFC had not acquired any rights to the property from SAHT yet.

[34] However, the fact that the respondent entered into a written agreement of sale involving the property with SAHT which he paid for on the strength of which a loan was granted, is supported on the facts by Hlano. At the material time, Khayaletu charged the respondent for the drafting of the agreement and granted the respondent a loan on the strength of an agreed purchase price. SAHT, Hlano and the respondent are the only parties, unlike NHFC or Nu-way who were not party to the negotiation in 1991. Therefore the relevant party, Hlano, with knowledge, does not refute the existence of an agreement and the *essentialia* of the underlying agreement between SAHT and the respondent nor and intention to transfer the property it held in the name of the respondent.

[35] Returning to the loan confirmation, Hlano stated that on the 30<sup>th</sup> July 1991 BVZ stated *“I confirm registrability of the documentation provided for the above client and stand number. The documentation received is in order and enables us to prepare the necessary documentation for submission to the Deeds Office for registration of a bond in accordance with the instruction.”*

[36] It is common cause that the property, for some unexplained reason, was not registered into the respondent's name nor was a first mortgage bond registered over the property to secure Khayaletu's financial interest. The NHFC was not involved in 1991 and Hlano confirms that it paid SAHT the purchase price. Be that as it may. it is common cause that the respondent paid the full loan amount to Hlano by the 28 May 2013.

[37] Almost a decade later and in July 1999, the government acquired all the ordinary shares in SAHT previously held by the private sector as a means to streamline the disposal process of its statutory disestablishment. In an information memorandum dated in August 1999 by SAHTs it, *inter alia*, set out its disposal

asset plan. The memorandum was tendered into evidence by Hlano. In paragraph 2.3.2 thereof it was recorded that SAHT sold a number of stands to Khayaletu clients in respect of which Khayaletu provided home loans and that such properties need to be transferred to such clients by Khayaletu. SAHT undertook to pay the arrear rates and taxes associated with such properties to facilitate the transfers. No list identifying the clients nor which stands which formed part of the properties SAHT sold to Khayaletu clients as per the memorandum.

[38] On the 26 November 1999 before SAHT's disestablishment, Nu-Way and SAHT entered into a sale of business agreement in which, *inter alia*, provision was made for Nu-Way to dispose of erven direct from SAHT to purchasers, until SAHT became disestablished. At this time and on the facts the property was not just a vacant erf but a house funded by Hlano and paid for by the respondent.

[39] On the 1<sup>st</sup> of September 2002 SAHT was statutorily disestablished and ceased to exist and, all rights and assets of the SAHT and the administrative and financial records vested with the NHFC now in terms of section 3(6)(b) of the Housing Act 107 of 1977. The State took over the liabilities.

[40] On the 12 May 2003 the Chief Executive of NHFC, Mr SS Moraba appointed Mr LC Serfontein to enable SAHT/NHFC to transfer any fixed property registered in the name of SAHT to NHFC or to Nu-Way and/or to transfer fixed properties directly to buyers to whom properties were sold in terms of a deed of sale entered into at that date, May 2003. No power of attorney was extended to Mr LC Serfontein on the papers to authorise the transfer from SAHT or NHFC to purchasers, other than those as at 12 May 2003.

[41] The property was not transferred to the respondent as a result of this resolution. Instead, a decade later, and on the 14 January 2013, and argued by the respondent without authority, Mr L C Serfontein, acting on behalf of the NHFC signed a power of attorney authorising Anton Bekker and/or Jacque Pretorius and/or Phillipus Carel Prinsloo to pass transfer of the property to Pierre and Sonja Bruyns [the Bruyns] on the strength of an underlying deed of sale dated 14 November 2012 for a purchase price of R 30 000.00. The transfer of the property,

*de facto*, only took place some years later in April 2015 whilst the property, as described in the deed, was still held in the mother title held under leasehold.

[42] That is why, the description of the property transfer to the Bruyns in T22470/2015 read: “*FIRST REGISTERED AND STILL HELD (own emphasis) BY CERTIFICATE OF REGISTERED GRANT OF RIGHT OF LEASEHOLD TL1849/91 WITH GENERAL PLAN SG NUMBER L723/1990 RELATING THERETO*”. From the evidence then, the property remained held under leasehold TL 1849/91, albeit in April 2015.

[43] In July 2014, Mahlanga attorneys acting for the respondent, contacted Hlano. The exact request is unclear, but it related to the property and the respondent’s ownership thereof. On the 15 September 2014, Hlano trying to obtain clarification to be in a position to meaningfully respond to Mahlanga attorneys, requested a meeting with Michael Cullen, from Nu-Way. The request was not met favourably. Michael Cullen responded that a meeting would serve no purpose and speaking for Nu-Way, stated that “*-that in terms of their purchase agreement with SAHT they have the right to sell all such erven that they have sold, are currently selling or will be selling into the future unless proven otherwise by way of contrary agreements or deed searches implying otherwise.*” Nu-Way did not file papers in the main application.

[44] On the 13 October 2014, before the Bruyns took transfer they resold the property to the appellants for R 290 000.00, making a R 260 000.00 profit over 2 (two) years on an erf which was earmarked for low cost housing and which was described as vacant. At the time of the conclusion of the sale agreement the Bruyns were not in a position to give undisturbed possession as they still needed to acquire the possession of the property *via* transfer from NHFC. The Bruyns did not file papers in the main application.

[45] Meanwhile on the 29 October 2014, in a memorandum authored by Indrani Naidoo of Hlano, in preparation for a meeting with NHFC, she recorded the

following history relating to the property in respect of the respondent's claim and raised queries:

*"Scenario 2 (a): AA Mailula*

- *KHL active account. Account paid up. Hlano provided paid up letter. MB (mortgage bond-own emphasis) not registered as transfer to customer did not take place. Deeds print out reflects Title holder as NHFC (was SAHT). We cannot effect transfer of this property. Cost implication (own emphasis).*
  - *Note: Title held by SAHT which should have been transferred to KHL in order for KHL to effect transfer to customer. Customer wants his title deed. Bond was not registered. No fault of customer. NOT ONSOLD. (own emphasis)"*

[46] It appears that Hlano accepted that it should have affected the transfer, the basis for this was not fully explained by Hlano. Yet, this obligation was raised in the August 1999<sup>14</sup> memorandum by SAHT, was referred to. Notwithstanding whose obligation it was, transfer to the respondent did not occur and Hlano thought it too costly to do so.

[47] On the 6 November 2014, the Bruyns signed a power of attorney to Nakkie Du Toit and Nathan Jared Len authorising them to transfer the property to the appellants. The reference to the registered deed from which the transfer was to be effected was stated as *"HELD BY DEED OF TRANSFER NUMBER ABOUT TO BE REGISTERED."* This appears to suggest that the property was not to be transferred directly from the mother title deed.

[48] From the papers, a back to back registration process was envisaged to ensure that the Bruyns acquired a right of ownership to the property before the transfer to the appellants took place. All of this was to happen on the 1 April 2015.

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<sup>14</sup> See par [37].

[49] On the 1 April 2015, and from the documentary evidence forming part of the record, the chronological registration sequence chain did not occur as intended. According to the unique numbers assigned to each deed during the registration process deed T22469/2015 by its numbered reference was registered before T22470/2015. In other words, at the moment of transfer from the Bruyns to the appellants, the Bruyns appear not to have acquired ownership of the property. The legal principle of *nemo dat quod non habet* comes to mind, namely that no one can give what they do not have. The numbered sequence does not follow the sequence of the relative causes as provided for in section 14 of the Deeds Registry Act 47 of 1937.<sup>15</sup>

[50] Furthermore, in sequence then, at the time the appellants took registration, the property was described in T22469/2015 as:

*“FIRST REGISTERED BY CERTIFICATE OF REGISTERED GRANT OF LEASEHOLD NUMBER TL 1849/1991 WITH GENERAL PLAN SG NUMBER L723/1990 RELATING THERETO AND HELD BY DEED OF TRANSFER T.....”.*

[51] “T.....”, is reference to the registered title the Bruyns’ were supposed to acquire as foreshadowed in the 6 November 2014 power of attorney setting out the manner in which attorney Nakkie Du Toit and Nathan Jared Len were empowered to pass transfer. *Ex facie* the description of T22469/2015 provided in the record, it does not appear as if the property was registered out of the mother title deed before transfer was passed as, the space referencing the new title deed was left blank.

[52] The consequences of an incorrect registration sequence or the possibility of a missing link in the transfer chain from the Bruyns to the appellants was not a

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<sup>15</sup> Section 14 of the Deeds Registry Act 47 of 1937 provides the practices and procedures for registration of deeds, including providing that registration of transfers of land must follow the sequence of their relative cause.

point raised nor argued before the Court *a quo* nor, raised by this Court at the hearing of the appeal.

[53] It was however identified by this Court when it had to consider the veracity of the trigger event which the respondent alleged constituted a purported fraud consequent upon an allegation of lack of authority by Mr LC Serfontein to sign the power to pass transfer the property to the Bruyns. The nub of the argument, that Mr LC Serfontein, at the material time, was not provided the necessary authority in that the reach of the by NHFC did not cater for transfer after 13 May 2003.

[54] Furthermore, the evidence suggested that NHFC according to their letter dated 10 May 2021 did not consent to any transfer of the property to “*any person*”. This would include the appellants and the Bruyns. This letter too appears to be confirmed by Ms McLeod of NHFC on the 13 May 2021 when she reaffirmed that NHFC did not consent to the transfer of the property, this included the transfers in 2015. It is common cause that the property in 2015 was still registered in the name of NHFC notwithstanding the fact that that the property may have formed part of the purchase agreement between SAHT and Nu-Way. The Court *a quo* accepted the undisputed evidence of lack of authority point raised by the respondent on the papers when it exercised its section 21 discretion granting the declaratory order per relief. This is clear from its reasoning set out in the judgment.

[55] Flowing from all of this, this Court considered the sequence of events leading up to the registration of the property in the name of the appellants. The appellants too bemoaned the Court *a quo*'s consideration of the weight of their personal rights to the property. Faced with the evidence and lack of argument on the point, the parties were notified of the further points this Court required submissions on and, both parties were afforded an opportunity to make yet further submissions, including submissions dealing with this Court's wide discretion in terms of section 19(d) of the Superior Act when dealing with the appeal before it. Section 19(d) as dealt with in Occupiers of Saratoga Avenue,<sup>16</sup> and as applied by

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<sup>16</sup> Footnote 5 para [33] with reference to **Toubie v S** [2012] ZASCA 133 (SCA 655/11; 27 September 2012) para 10. See also Erasmus Superior Court Practice vol 1 2 ed at pA2-75: 'The power conferred upon a court of appeal by the provisions of this paragraph are not

the CC in the Vodacom Makate matter came to mind when the Court stated that: “*In a successful appeal, ‘the appellate court may make the order that the court of first instance should have made.’*” In this way a fair hearing was considered in terms of section 34 of the Constitution. Both parties in their further submissions agreed that the title deeds were registered out of sequence although their submissions relating to the consequences thereof differed.

[56] Of further interest, and as raised by the respondent, the property description in both T22469/2015 and T22470/2015 is also incorrect. None of the parties, for the exception of the respondent and Hlano, were, at the material time, aware that the property was not a vacant stand to be sold but an erf with a dwelling. This too is supported by the appellants’ evidence who thought they were buying a piece of vacant land with their pension, for investment purposes. This is why their attorney of record, Len Attorneys, who on their instruction, authored an eviction notice in May 2015 described the property as vacant erf 2[...] Mamelodi Extension 4, perpetuating the error.

[57] The appellants never dealt with how they met the Bruyns and if they ever viewed the property nor, how the fundamental error *ex facie* the description of the property T22469/2015 occurred. The appellants thought they were buying vacant land for investment purposes. This is completely contrary to the purpose, intent and basis relied on by the respondent who according to Hlano purchased it as part of a low cost housing scheme intended to afford shelter and security of tenure to the lower income earning communities of South Africa. The property was sold to the appellants a decade ago as a vacant erf for a purchase price of R 290 000.00, an amount which surely does not represent shelter and security of tenure in favour of lower income earning communities, as intended. SAHT’s mission to promote and facilitate the provision of affordable shelter and security of tenure to the lower income earning communities of South Africa.

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limited to matters arising directly from the appeal itself: a court of appeal has a wide powers to render a decision which the circumstances of a particular case might require’ and **Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another** [2012] ZACC 9; 2012 (9) BCLR 951 (CC), par 7. See also *Vodacom (Pty) Ltd v Makate and Another* (CCT51/24)[2025] ZACC 13; 2025 (10) BCLR 1174 (CC).

[58] The Registrar of deeds prepared a report for the Court *a quo* but failed to deal with these pertinent issues. This could have been because due to the enquiry posed to the Registrar of deeds. However the Court *a quo*'s attention was drawn to section 6 of the Deeds Registries Act 47 of 1937:

“6(1) *Save as is otherwise provided in this Act or any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.*

(2) *Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in sub-section (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.”*

[59] Lastly, the respondent's Counsel in argument, for the first time, referred to the respondent's 50% share in the property. No evidence appears from the founding papers to support the contention. It has always been the respondent's case that he is the owner. The Court was not referred to the evidence by any co-owner in support of such contention. No such new evidence served before the Court by way of application or otherwise.

[60] Against this backdrop and discussion the appellants grounds of appeal are considered.

### **GROUND OF APPEAL**

[61] The appellants in written argument raised summarised the grounds in four categories. This was helpful as the grounds as raised in the notice were not concise and did not comply fully with uniform rule 49 as such, were cumbersome. The nub of the grounds traversed the complaints that the Court *a quo* granted relief which was not supported on the papers, that the order is self-contradictory and/or vague in certain material respects, that the Court *a quo* disregarded the eviction order stemming from the appellants' registered title to the property held under T2269/2015 and that the Court *a quo* simply accepted the respondent's explanation from the bar for his delay in bringing his application.

[62] This Court deals with each category.

*Did the Court a quo grant relief which was not on the papers?*

[63] The nub of argument centres around the meaning of prayer 1 "*declaratory order granted as per relief sought.*", The appellants argue that if the order is understood in context it means that both the relief per sub-paragraphs [1] and [2] listed in the judgment were all granted. In developing this argument, the appellants argue that relief sought in sub-paragraphs [2] vi and vii, which prayed for the cancellation of T22469/2015 and, to direct the Director-General for the Department of Housing to hold an enquiry in terms of section 2 of the Conversion of Certain Rights into Leasehold Ownership Act 81 of 1988 [Leasehold Act] in order to determine the true owner of the property, if read in context, was granted by the Court *a quo* by incorporation. In consequence the appellants argue that such relief was not sought by the respondent in his unamended notice of motion.

[64] This is an assumption and must therefore be considered in context. In context the appellants are correct that the listed relief did not form part of the prayers sought by the respondent. Notwithstanding, it does not automatically flow that these prayers were granted by the Court *a quo*. This is so as previously reasoned.<sup>17</sup> If sub-paragraphs [2] vi and vii formed part of the compel relief listed in paragraph [2], which they do by their very nature, no matter how listed, then,

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<sup>17</sup> Paras [14-18].

absent the Court a *quo* engaging with the compelling relief, it cannot simply be assumed nor is it logic to assume that compelling prayers are declaratory relief by incorporation. Therefore, any misdirection complained of by possible incorporation cannot stand.

[65] As far as the appellants argument is expanded to bolster a misdirection that sub-paragraph [2] vi, if incorporated, did not form part of the respondent's pleadings in that it directs the Registrar to cancel T22469/2015 and to cancel all the rights of the Bruyns and the appellants by virtue of such aforesaid deed, this too requires amplification.

[66] Although, the compel relief as discussed could not form part of the declaratory relief as reasoned, the respondent in prayers 1- 3 of his unamended notice of motion, which by its nature is declaratory, does pray for the setting aside of the sale (the underlying agreements) and the disposal of (the delivery by registered transfer) of the property to the appellants and, *inter alia*, the Bruyns.

[67] Delivery to the appellants of the property took place by the registration of transfer of the property the appellants names by virtue of the registration of T22469/2015. The declaratory relief was duly granted by the Court a *quo* and logically, cancellation of the title deeds would give effect to the order.

[68] Furthermore the relief in prayers 1 to 3 are supported in the pleadings and form part of the evidence in the founding papers in that the respondent relies on the non-registration of the property into his name and the transfer to others as an administrative error, a mistake, perpetrated by government agencies, SAHT, NHFC and Nu-Way. In other words, SAHT, NHFC and Nu-Way lost sight of his rights in the proverbial wash over time. Flowing from this error/mistake he seeks in paragraphs 51 to 53 that both the sale and the transfer of the property to the Bruyns and the appellants be declared invalid and cancelled. The appellants do not attack the veracity of the cause of action merely that it was not pleaded.

[69] Thereafter, the respondent then having received further information which accompanied Hlano's answering affidavit he filed a supplementary affidavit. The supplementary affidavit formed part of the record and Hlano's evidence was not challenged. Based on the undisputed lack of authority point to pass transfer to the Bruyns and the consequences, the respondent based his cause of action in the pleadings on a perpetrated fraud being committed. NHFC simply denied any error, did not deal with the correspondence of the 10-13 May 2021 and simply reaffirmed the respondent's understanding of the May 2003 power of attorney. In other words no explained denial of fraud, an acceptance of lack of consent.

[70] From the judgment it is clear that the Court *a quo* considered the fraudulent cause of action, pronounced on it and applied it to tip the scale in the respondent's favour. No misdirection of fact is raised by the appellant upon which such discretion was exercised.

[71] This ground as raised must fail.

*Was the order self-contradictory and vague?*

[72] Both parties agree that the order is vague and the mere fact that it requires interpretation to give it context is testament to its vagueness. One is not expected to try and interpret an order. It must be clear and concise. The order is not. The doctrine of effectiveness applies as this ensures that orders are not confusing and in consequence, can be obeyed. This is not the case.

[73] However, the vagueness is confined to its reach namely whether it incorporates the compel relief or not. On a proper reading of the judgment and as reasoned the reach is confined to the relief as listed in paragraph 1. The appellants however, do not seek to give context to what the order should be. In fact, their grounds move from the premise that it can be enforced and but should not as certain prayers did not form part of the pleadings. The appellants simply move for the order to be set aside and to replace the order in the main application as dismissal on the merits.

[74] The argument raised relating to certain reasoning of the Court *a quo* in the judgment as being mutually destructive and self-contradictory does not take the matter any further as one appeals the order and not the reasons. The reach of the order is not mutually destructive as reasoned.

[75] The appellants partially succeed in that the order is vague and requires interference to ensure its effectiveness.

*Did the Court a quo disregard the eviction order which mainly stemmed from the validity of the appellants' registered title to the property held under T2269/2015?*

[76] The Court *a quo* did not deal with the eviction judgment in its judgment. It too is unclear what the Court dealing with the eviction fully considered. However, this Court accepts at the very least that absent reference to a counter application brought by the respondent in the eviction application and having due regard to the substance of the respondent's case, the validity of T2269/2015 was not an issue which served before the Court, at that time, when it dealt with the eviction application. This is the very reason why the appellant launched the main application, to place all the facts before the Court to ensure, *inter alia*, that the eviction from his home in terms of section 26(3) of the Constitution which was granted is reconsidered to ensure that it was not granted arbitrarily by this Division. *Res judicata* was not raised by the appellants.

[77] In the application before the Court *a quo*, admittedly the papers were confusing and poorly drafted, however, the respondent's case which emerged was one of a vulnerable person seeking desperately to assert and protect his right of tenure afforded to him, and as initially realised by SAHT *via* the low-cost housing scheme. Therefore, as a precaution in light of an eviction order which was obtained by the appellants in November 2019 the main application was launched.

[78] In the eviction application he was found to be an illegal occupier of the property in circumstances when, on the common cause facts he fully paid for the

property, he has improved the property and paid for such improvements, he as with written consent occupied the property for almost 3 (three) decades.<sup>18</sup>

[79] The order will interfere with the weight of the appellants' reliance on the title deed as their real right to it will be disturbed. The order too will disturb any rights they acquired from the underlying agreement of sale. The argument that the order seeks to reverse the eviction order is misplaced. The eviction order stands.

[80] The appellants on this ground as argued fails.

*Should the respondent have been barred from moving his application because of a delay?*

[81] The unreasonable delay relied on by the appellants in their answering affidavit relates to the respondent's claim based on the Promotion of Administrative Justice Act 3 of 2000 [PAJA] claim which the respondent refers to as against the City, Hlano and DHS. In this regard, reference is made in paragraph 7 of the answer to the unreasonable delay vis-à-vis in respect of PAJA being the 180 days from the date on which the person concerned was informed or became aware of the action. The time relied on by the appellants in their papers is the date of dispute regarding the property, being the 25 May 2015 ("the notice of eviction"). The appellants contend they waited 5 years before instituting the present proceedings. The application was launched on the 14 June 2021.

[82] The appellants reliance must be seen as against the respondent's case. In paragraph 29.3 of his founding papers the respondent stated that his intention was ultimately to set aside any alleged administrative action purportedly taken by the City of Tshwane [City], the Department of Human Settlement Gauteng Province [DHS], the NHFC and Hlano Housing Solutions (Pty) [Hlano]. However, he was still waiting for the written reasons he requested and "*as soon as those reasons are provided the Honourable Court will be requested to allow that I supplement my affidavit to accommodate whatever the response is from the respondents.*" In short

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<sup>18</sup> **Cusa v Tao Ying Metal Industries and Other**, 2009 (2) SA 204 (CC) at 225H.

he was relying on section 26 of the Constitution to assert his rights and how they were realised in an attempt to ward off an eviction order foreshadowed in section 26(3) of the Constitution. Furthermore it was his intention to, in time, to vindicate his constitutional rights to fair administrative action in terms of section 33 of the Constitution as against the decisions the City, DHS, NHFC and Hlano took when they transferred the property.

[83] Whether the Court *a quo* was cloaked with the requisite jurisdiction as a result of the delay in respect of PAJA relief, such argument must too be considered as against paragraph 29.3 when the respondent states that he still waits for the reasons that he has requested for such administrative decisions. In terms of section 7(1)(b) of PAJA, the 180 days is considered as against the time the person was informed of the administrative action, become aware of the action and the reasons for it or might reasonably have expected to have become aware of the action. The appellant does not consider section 7 of PAJA but only on section 6.

[84] Furthermore the relief sought by the respondent as against the appellants is not based on PAJA.

[85] The ground of delay as raised must fail.

[86] In consideration the appellants partially succeed on the basis that the order is vague, a point raised by the respondent too.

## **CONCLUSION**

[87] To satisfy the appellants by setting aside the Court *a quo*'s order as requested by both the parties and simply to replace it with a dismissal will not be in the interest of justice. This is so as it will not bring finality to the dispute between the parties nor will it be a proper reflection of what the Court *a quo* should have done if it had engaged and considered all the evidence and prayers correctly. It too will not give weight to the State's failure to ensure it Constitutional imperative

of 'other means' to achieve the realisation of adequate housing referred to section 26(2) of the Constitution. In short, and as the words of the CC in the Vodacom v Makate matter which is relevant, the hearing before the Court *a quo* was an 'abortive hearing'.<sup>19</sup>

[88] The importance of this matter to both the parties including the importance of the subject matter demands that it be dealt with and, dealt with properly.

[89] A Court sitting as an appeal Court in terms of section 19 of the Superior Act has a wide discretion. However, when exercising such discretion it should do so judicially. In considering all the relevant facts including those which elicited further submissions it became clear that without a proper ventilation of all the material facts, absent a cross appeal, it was not inclined to grant an order which may prejudice the applicants. It was for this reason that further submission having regard to section 19(d) of the Superior Act too was requested from both parties.

[90] Section 19(c) of the Superior Act however empowers a Court of appeal to remit the main application back, *inter alia*, to the Court of first instance or to the Court *a quo*, with or without further instructions to ensure that a proper consideration of the case brought before it is conducted. This is considered just in the circumstances.

## **COSTS**

[91] Costs normally follow the result. However in this case, and as a result of the appellants' partial success on a complaint raised by the respondent too, this Court holds the view that in exercising its discretion each party should pay their own costs. It was common cause that the order by the Court *a quo* could not stand.

[92] I then propose the following order:

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<sup>19</sup> **Vodacom (Pty) Ltd v Makata and Another** (CCT51/24)[2025] ZACC 13; 2025 (10) BCLR 1174 (CC).

1. The appeal is upheld.
2. The order dated the 10 February 2023 granted by Mnyovu AJ is set aside.
3. The application is remitted back to a single Judge of this Division, but not back to the Acting Judge who heard the matter in the Court *a quo*.
4. The Appellants or the Respondent may approach the Deputy Judge President of this Division to request a preferential Court date to set the application down for rehearing.
5. All the parties in the main application are to receive notice of the new date of set down.
6. The Appellants and the Respondent are entitled to supplement their papers.
7. Each party bears their own costs.

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**L.A. RETIEF**

Judge of the High Court

Gauteng Division

I agree,

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**LESO AJ**

Acting Judge of the High Court

Gauteng Division

I agree,

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**TERBLANCHE AJ**

Acting Judge of the High Court

Gauteng Division

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Ref: Ramapotula/CVL505

Date of hearing:

23<sup>rd</sup> July 2025

Date of further heads of argument:

5<sup>th</sup> November 2025

Date of Judgment

4<sup>th</sup> December 2025