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**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**Case no: D9296/2024**

In the matter between:

**THE MEC FOR HUMAN SETTLEMENTS KZN**

**APPLICANT**

and

**MOHAMMED YASEEN HOOSEN**

**FIRST**

**RESPONDENT**

**MOHAMMED ALLI HOOSEN**

**SECOND**

**RESPONDENT**

**MADUPHA'S BUSINESS ENTERPRISE CC**

**THIRD**

**RESPONDENT**

**ETHEKWINI MUNICIPALITY**

**FOURTH**

**RESPONDENT**

**REGISTRAR OF DEEDS, PIETERMARITZBURG**

**FIFTH RESPONDENT**

**SHERIFF, INANDA AREA ONE**

**SIXTH**

**RESPONDENT**

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**ORDER**

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**The following order is made:**

1. The deed of sale entered into by the first respondent as a purchaser and the third respondent as a seller for the sale of the immovable property described as Lot 3[...] S[...], situated in the City of Durban, Administrative District of Natal, in extent 420 (four hundred and twenty) square meters, held under title deed number T5418/93 is set aside.
2. The deed of sale entered into by the second respondent as a purchaser and the third respondent as a seller for the sale of the immovable property described as Lot 9[...] S[...], situated in the City of Durban, Administrative District of Natal, in extent 508 (five hundred and eight) square meters, held under title deed number T13080/98 is set aside.
3. The fifth respondent is interdicted and restrained from passing transfer of the properties described in paragraphs 1-2 above, unless authorised to do so by the applicant.
4. The counter-application of the first and second respondents is dismissed.
5. The first and second respondents are directed to pay the costs of this application, such to be taxed on scale B.

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**JUDGMENT**

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**M S Hadebe AJ****Introduction**

[1] This is an application to set aside the deeds of sale entered into by the first, second and third respondents in respect of the sale of the immovable properties described as follows:

- (a) Lot 3[...] S[...], situated in the City of Durban, Administrative District of Natal, in extent 420 (four hundred and twenty) square meters, held under title deed number T5418/93 (Lot 3[...]).

(b) Lot 9[...] S[...], situated in the City of Durban, Administrative District of Natal, in extent 508 (five hundred and eight) square meters, held under title deed number T13080/98 (Lot 9[...]).

[2] The applicant is also seeking an order restraining and interdicting the fifth respondent from passing transfer of Lot 3[...] and Lot 9[...], unless authorised to do so by the applicant.

[3] The first and second respondents have filed a counter-claim wherein the following orders are sought:

‘1. That the applicant be and is hereby directed to sign all such documents and do all such things as may be necessary to give effect to the order of this Honourable court dated the 3<sup>rd</sup> December 2020 under case no: D5209/2020;

2. That in the event of the Applicant failing, within 3 months of the grant of this order, to comply with the order in paragraph 1 hereof, then in such event, the Sixth respondent be and is hereby directed to sign all such documents and do all such things may be necessary on behalf of the applicant so as to give effect to the provisions of the order of this Honourable Court dated the 3<sup>rd</sup> December 2020 under case no: D5290/2020.’

### **Background facts**

[4] This matter emanates from the sale agreements concluded between the first, second and third respondents for the sale of Lot 9[...] and Lot 3[...] on 8 August 2017 and 14 August 2017, respectively. The first and second respondents instituted an action against the third and fourth respondents seeking an order directing the third respondent to take all necessary steps to give effect to the transfer of Lot 3[...] and Lot 9[...] from the fourth respondent to the first and second respondents. A judgment by default was granted in favor of the first and second respondents on 3 December 2020 by Pillay J. It appears that the service of the court order to the applicant triggered this application.

### **Issues**

[5] The court is called upon to decide on the following issues:

#### ***Main application***

- (a) Whether the sale agreements concluded by first, second and third respondents for Lot 3[...] and Lot 9[...] are to be set aside.
- (b) Whether the fifth respondent is to be interdicted and restrained from passing transfer of the properties, unless authorised to do so by the applicant.

### ***Counter -application***

- (a) Whether the applicant is to be directed to sign all such documents and do all such things as may be necessary to give effect to the order of Pillay J.
- (b) Whether the sixth respondent is to be directed to sign all such documents and do all such things as may be necessary on behalf of the applicant to give effect to (a) above in the event of the applicant failing to comply with the order.

[6] The following issues are also in dispute:

- (a) the ownership of Lot 3[...] and Lot 9[...];
- (b) the validity and lawfulness of the sale agreements between the first, second and third respondents;
- (c) the points in limine of res judicata and estoppel;
- (d) the practical effect of the order sought by the applicant; and

### **Common cause**

[7] The following issues are common cause:

- (a) the first, second and third respondents entered into sale agreements for the sale of Lot 3[...] and Lot 9[...];
- (b) the first and second respondents obtained judgment by default against the third respondent directing the third respondent to do all things necessary to transfer the properties to the first and second respondents respectively;
- (c) the applicant was not a party in the action instituted by the first and second respondents under case no: D5290/2020; and
- (d) that the order granted dated 3 December 2020 is not binding on the applicant.

### **Application for condonation**

[8] The first, second and fourth respondents brought applications for condonation for the late filing of their heads of argument. The applications were unopposed. Consequently, the applications were granted.

**Matter under case no: D5209/2020**

[9] It became imperative to peruse the court file under case no: D5209/2020 wherein default judgment was granted. The following was noted in the file:

- (a) The action was instituted on 12 August 2020 by the first and second respondents against the third and fourth respondents. Summons was served on the third and fourth respondents on 14 August 2020 and 31 August 2020, respectively.
- (b) The third and fourth respondents did not defend the action. Hence, default judgment was granted.
- (c) The applicant instituted an application seeking an order for leave to intervene and join the proceedings as a third defendant in the main action. It also sought an order to set aside the default judgment .
- (d) On 5 February 2024, the application was adjourned to 16 February 2024 and the applicant was granted leave to supplement its papers. On 16 February 2024, the matter was removed from the roll.

**Submissions by the applicant**

[10] The applicant submitted that Lot 3[...] and Lot 9[...] are registered and owned by the KwaZulu-Natal Department of Housing (the Department). The properties were passed to the KwaZulu-Natal Provincial Housing Development Board on 28 May 1998 by virtue of s 14(2)(a) of the Housing Act 107 of 1997 (Housing Act). It was further submitted that the Department has not signed the sale agreements selling Lot 3[...] and Lot 9[...] and has no intention to do so. Relying on s 2(1) of the Alienation of Land Act 68 of 1981 (the Act) and the judgment of *Legator McKenna Inc and Another v Shea and Others*,<sup>1</sup> the applicant submitted that the sale agreements entered into between the first, second and third respondents in relation to the sale of Lot 3[...] and Lot 9[...] were unlawful and of no force and effect.

[11] In dealing with the points in limine of res judicata and estoppel raised by the first and second respondents, the applicant submitted that it was not a party in the action under case no: D5209/2020. It further submitted that the issues that were

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<sup>1</sup> *Legator McKenna Inc and Another v Shea and Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) para 22.

adjudicated upon in case no: D5290/2020 are not similar to this matter; and that the order granted in case no: D5290/2020 was for specific performance directing the third respondent to effect transfer of the properties.

[12] In relation to the practical effect of the order sought by the applicant, it was submitted that the Department remains the owner of Lot 3[...] and Lot 9[...]. It was argued that the orders sought in this matter will have a practical effect on the parties. The applicant further submitted that the relief sought in the counter-application has no legal foundation in the form of a deed of alienation between the Department and the first and second respondents.

### **Submissions by the fourth respondent**

[13] In supporting the applicant's application, the fourth respondent argued that the disputed transactions between the first, second and third respondents emanated from the fraudulent misrepresentation made by the third respondent. The fourth respondent submitted that the third respondent had no right to dispose of Lot 3[...] and Lot 9[...]. It further submitted that it does not own the properties but that the applicant owns them. Also, it was argued that the third respondent admitted in an affidavit that the sale agreements between the first, second and third respondents were concluded as a result of the third respondent's error.

### **Affidavit by the third respondent**

[14] The third respondent does not oppose the application and counter-application. Ms Madupha Lindiwe Beauty Ntombela, who is the Director of the third respondent filed an affidavit dated 17 October 2024. The following is recorded in her affidavit:<sup>2</sup>

'1.

It was an error for me to have entered into a sale agreement with the first and second respondents in respect of the "Lot 3[...] S[...]" and Lot 9[...] S[...]", however when I discovered that I made an error I notified Mohammed Yaseen Hoosen and Mohammed Alli Hoosen that I did not intend proceeding.

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<sup>2</sup> Pages 251-252 of the indexed papers.

However, Mohammed Yaseen Hoosen and Mohammed Alli Hoosen still went ahead in proceeding with the matter, which I was not made aware.'

### **Submissions by the first and second respondents**

[15] The first and second respondents submitted that the issue of the purchase and sale agreements has been finalised and there is a court order dated 3 December 2020 in place. They submitted that the said court order is binding until set aside. They disputed that the applicant is the owner of Lot 3[...] and Lot 9[...] as the applicant relies on the provisions of s 14(2)(a) of Housing Act. It was submitted that the applicant has no inherent right to retain the properties in question as a provincial department as the Housing Act clearly indicates that the said properties must be transferred to the Municipality in whose jurisdiction they are situated.

[16] It was further submitted that the applicant has failed to effect registration of transfer of the properties into the name of the fourth respondent despite the order of court requiring the transfer of the properties to the fourth respondent for onward transfer to the first and second respondents. The first and second respondents further submitted that the applicant has failed to set aside the order of court directing transfer of the properties which order must be given effect to.

### **Applicable legal principles**

#### ***Compliance with s 2(1) of the Act***

[17] The following words are defined in the Act:

“contract”-

(a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year;

(b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take;'

“owner”- in relation to land, means the person in whose name that land is registered in the deeds office concerned, and also any successor in title of such person;'

“seller”- means, in Chapter II, any person who alienates land in terms of a contract or any other person to whom the obligation of that person to give transfer of land in terms of a contract has passed;'

[18] Section 2(1) of the Act provides that:

‘No alienation of land after the commencement of this section shall, subject to the provisions of section 28, 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.*’ (My emphasis.)

Section 28 deals with the consequences of deeds of alienation which are void or are terminated. It provides that:

‘(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...

(b) the alienator may in addition recover from the alienee...

(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.’

[19] The main thrust of the applicant’s argument was that the deeds of sale between the first, second and third respondents were not in compliance with s 2(1) of the Act. In *Cooper and Another NNO v Curro Heights Properties (Pty) Ltd*,<sup>3</sup> the Supreme Court of Appeal (the SCA) held that:

‘The result of non-compliance with s 2(1), is “that the agreement concerned is of no force or effect. This means that it is *void ab initio* and cannot confer a right of action.” (Footnote omitted.)

### ***Points in limine of res judicata and estoppel***

[20] The first and second respondents argued that there is a court order directing that the properties in question be transferred to them. They also argued that the applicant is estopped from contending that they are not entitled to take transfer. The SCA in *Nestlé (South Africa) (Pty) Ltd v Mars Inc*<sup>4</sup> held that:

‘The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to

<sup>3</sup> *Cooper and Another NNO v Curro Heights Properties (Pty) Ltd* [2023] ZASCA 66; 2023 (5) SA 402 (SCA) para 15.

<sup>4</sup> *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16.

adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.’

[21] In *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd*,<sup>5</sup> the SCA held that:

‘[22] For *res judicata* to operate it must be shown that the earlier judgment relied upon was a final judgment, and that there must be identity of parties and of the subject-matter in the former and in the present litigation. This court in *Prinsloo NO & others v Goldex 15 (Pty) & another* [2012 ZASCA 28; 2014 (5) SA 297 (SCA)] described the *res judicata* and the issue estoppel as follows:

‘[10] The expression “*res iudicata*” literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem re et eadem causa petendi*) (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 159; 2001 (2) SA 232 (SCA) ([2001] 1 All SA 417) at 239F-H and the cases there cited). In time the requirements were, however, relaxed in situations which gave rise to what became known as issue estoppel. This is explained as follows by Scott JA in *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10:

‘Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res iudicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was essential element of the judgment on which reliance is placed. Where the plea of *res iudicata* is raised in the absence of a commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse*

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<sup>5</sup> *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* [2017] ZASCA 95.

*Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 667J-671B, this is not to be construed as implying an abandonment of the principles of the common-law in favour of those of English law; the defence remains one of *res iudicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse Inkomste v Absa* (supra) at 670E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others....”

### **Analysis**

[22] The action under case no: D5209/2020 was instituted against the third and fourth respondents. The applicant was not a party to the action and had no interest therein save for the involvement of the properties owned by it. The relief sought by the applicant in this application is not similar to the ones that were sought in the intervention application which was removed from the roll. Also, the order dated 3 December 2000 does not direct the applicant to do anything. The points in limine raised by the first and second respondents that the relief sought by the applicant would be of no practical effect if granted and that the issue has already been decided, are incorrect in my view. When default judgment was granted, the court was not privy to the fact that the applicant owned the properties in question. I have no doubt that Pillay J would not have granted default judgment had she been aware that the fourth respondent did not own the properties and that the third respondent did not have the authority to sell the properties. The points in limine raised by the first and second respondents cannot succeed.

[23] On the issue of ownership, I do not understand the first and second respondents' argument against the following background:

- (a) according to the deeds office, Lot 3[...] and Lot 9[...] are registered under the name of the applicant;
- (b) the third respondent confirmed that it erroneously sold the properties as the properties are owned by the applicant and this was brought to the attention of the first and second respondents; and
- (c) the fourth respondent supported the applicant's application and confirmed that it does not own the properties.

[24] It is apparent that the sale agreements between the first, second and third respondent in relation to the sale of Lot 3[...] and Lot 9[...] are not in accordance with the provisions of the Act, in particular s 2(1). The said agreements were not signed by the owner (applicant) or its agent. I agree with the applicant's submissions that the agreements are to be set aside. The applicant is also seeking an order interdicting and restraining the fifth respondent from passing transfer of Lot 3[...] and Lot 9[...] unless authorized to do so by the applicant. Considering the background of the matter, I am of the view that the relief sought is to be granted.

[25] In regard to the first and second respondents' counter-application, they are seeking an order directing the applicant to sign all such documents and do all such things as may be necessary to give effect to the order dated 3 December 2020. There is no legal basis for the relief sought by the first and second respondents. Consequently, the counter-application is to be dismissed.

### **Order**

[26] I accordingly make the following order:

1. The deed of sale entered into by the first respondent as a purchaser and the third respondent as a seller for the sale of the immovable property described as Lot 3[...] S[...], situated in the City of Durban, Administrative District of Natal, in extent 420 (four hundred and twenty) square meters, held under title deed number T5418/93 is set aside.
2. The deed of sale entered into by the second respondent as a purchaser and the third respondent as a seller for the sale of the immovable property described as Lot 9[...] S[...], situated in the City of Durban, Administrative District of Natal, in extent 508 (five hundred and eight) square meters, held under title deed number T13080/98 is set aside.
3. The fifth respondent is interdicted and restrained from passing transfer of the properties described in paragraphs 1-2 above, unless authorised to do so by the applicant.
4. The counter-application of the first and second respondents is dismissed.
5. The first and second respondents are directed to pay the costs of this application, such to be taxed on scale B.

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**M S HADEBE AJ**

**Appearances**

Matter heard on: 20 February 2026

Judgment delivered on: 09 June 2026

For the applicant: Ms G Z Gumede

Instructed by: The State Attorney, KwaZulu-Natal

For the 1<sup>st</sup> and 2<sup>nd</sup> respondents: Mr R Mohamed

Instructed by: G.H Ismail Incorporated

For the fourth respondent: Mr K.I Mshengu

Instructed by: Luthuli Sithole Attorneys