
SOUTH AFRICA / JUDGMENT

Mabuya v Buffalo City Municipality and Another (EL645/2013, ECD1545/2013) [2017] ZAECELLC 12 (15 May 2017) [2017] ZAECELLC 12

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

EL645/2013, ECD1545/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO: EL 645/2013

ECD 1545/2013

In the matter between

NOMBUYISELO MABUYA

Applicant

and

BUFFALO CITY MUNICIPALITY

First Respondent

MEC FOR THE DEPARTMENT OF

HOUSING, EASTERN CAPE

Second Respondent

JUDGMENT

HARTLE J

1. The applicant issued out an application in May 2013 in which she sought an order primarily reviewing and setting aside a decision of the first respondent to cancel the allocation of certain immovable property, being Erf [5...], N. T., Beacon Bay, to her in terms of a housing subsidy scheme.
2. The applicant seeks a further order declaring that she is the person to whom the property was allocated and a further order compelling the responsible respondent[1] to in effect register the transfer of property into her name.
3. No explanation was tendered why nothing further transpired in this matter after the applicant's replying affidavit was delivered in October 2013 until the day when the matter was argued before me. However it was not argued before me that the delay in prosecution was an issue, and I will not concern myself further with that reality.
4. In essence the applicant alleged that she qualified for the allocation of the property in line with the national policy of government to provide housing to indigent persons. She was informed of her success in this regard on 27 August 2004. Subsequent to the allocation a house was built on the site.
5. After the building had been completed however, she was informed (she does not say by whom) that she could not take occupation of the property as it was allocated to someone else. Her endeavors to establish the reason why this was the case did not avail any answers.
6. Evidently her review application is based on the premise that there had been a purported decision to allocate the property to someone else and that her procedural rights were not respected in that process.
7. Although she does not state so equivocally, she appears to suggest that she herself never took occupation of the property after it was allocated to her.
8. It should be noted that the applicant purported to attach to her founding affidavit a copy of a list of allocations from which she claims it would have appeared that the property had in fact been allocated to her, although the fact of the allocation itself is not at all in dispute. The annexure foreshadowed in the founding affidavit was to be distinguished by the mark "NM1", but was evidently filed without it and it does not appear that the first respondent took any issue with the omission at the time.
9. On 5 July 2013 the first respondent filed its answering affidavit. It confirmed that the applicant was allocated the property and had been given vacant possession during 2004.
10. According to the municipal manager who deposed to the answering affidavit on behalf of the first respondent, however, it was pointed out that after the allocation, the applicant had married one Mxolisi Heshu who is the registered owner of house number [5...] N. T., Beacon Bay, and that she had moved with him to this property. She thereupon allowed one

Wellington Koloto, Mr Heshu's brother, to live on the property, where he still resides to date. Apparently this information was gleaned from the applicant herself in consultation with two housing officers in the employ of the first respondent who claim that they were unaware that it was inappropriate to speak with her concerning these matters in view of the pending litigation.

11. In any event, and to put paid to any suggestion that the allocation of the property to the applicant had been cancelled, or that anyone else was in the running for the property for that matter, the first respondent produced a deed of sale in respect of the property which was ostensibly signed by the applicant on 5 April 2013, that is on a date which predates the issue of the present application.
12. The first respondent further averred that the municipality (was then) in the process of having the property registered in the applicant's name. They added that the relevant registration documents were at the time with the municipality's legal representatives who were attending to the transfer.
13. The first respondent pleaded further that the applicant should be non-suited for failing to exhaust the internal appeal remedy provided for in section 62 of the Local Government: Municipal Systems Act, No. 32 of 2000 ("the Systems Act") and for unduly delaying the launch of the application for review.
14. It was finally contended that the application amounted to an abuse of process, the real purpose behind it being to seek the eviction of the said Mr. Koloto to whom she had given occupation. The first respondent claims that on this basis the application should be dismissed and the applicant ordered to pay its costs on an attorney and client scale. If I may dispose of this aspect at the outset, I do not consider it at all relevant to scrutinize the applicant's motives by reason of the order I make herein.
15. Prior to the delivery of the first respondent's answering affidavit, the municipality addressed the applicant's legal representatives on the basis that since there was no "decision" to impugn and that the necessary processes were under way, they invited the applicant to withdraw the application with an appropriate tender of their costs. This offer was spurned by the applicant's legal representatives, who instead insisted that the first respondent should deliver its answering affidavit, which it of course did.
16. On 10 October 2013 the applicant delivered a replying affidavit. She firstly denied that the issue of the cancellation of the allocation had been rendered moot (or that, as the first respondent had contended, it was a spurious allegation) because matters had been overtaken as it were by the signing of the deed of sale in respect of the property allocated. She claimed that the information obtained by the housing officers, Messrs Mjanqeka and Mzamo, had been unlawfully unsolicited from her when they arrived at her home and informed her that she was required to attend a meeting in connection with the property, whereupon she was taken in a municipal vehicle to the chambers of Advocate Da Silva. She was thus interrogated and claims that she was prevailed upon to sign the deed of sale, which

the first respondent passed off as having been signed before the launch of the present application on the same day, under these circumstances.

17. The applicant now with hindsight also sought to amplify that the basis for the review application in the first place had been a letter which was written by the municipality to Attorney Fredericks who had inquired from it regarding the property. In the letter, Mr. Fredericks is informed by the municipality that “through interaction with the committee, we took a decision to allocate the house back to Mandlenkosi Halom”. The applicant now purported to file this letter as annexure “NM1”, which she had omitted to file together with her founding affidavit. She claimed that the letter constituted the proof of the impugned decision.
18. The applicant’s legal representative also sought to introduce a supplementary affidavit (which it is evident from the court file was not served on the first respondent’s attorneys) in which, after the horse had bolted so to speak, he purported to comply with the provisions of section 62 of the Systems Act by “appealing” the decision taken by the first respondent to allocate the same house to Mandlenkosi Halom.
19. It is trite law that all the necessary allegations upon which the applicant relies must appear in her founding affidavit, and that she will generally not be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit.[2]
20. The contents of annexure “NM1” and all reference thereto in the replying affidavit self-evidently amounts to new facts which the applicant purported to introduce after the delivery of the answering affidavit. The same applies to the supplementary affidavit deposed to by her legal representative on 29 September 2016. Even assuming that this affidavit was served on the first respondent’s attorneys, leave was sought by her to introduce the third affidavit or to explain its significance. I accordingly regard the new evidence and the contents of the supplementary affidavit as not properly before the court.
21. In her founding affidavit the applicant had vaguely asserted that a decision adverse to her had been taken, but this was rejected by the first respondent in its answering affidavit. She also vaguely dealt with the issue of her occupation of the property in her founding affidavit. On the basis of the accepted rule in motion court proceedings stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[3] I have to accept that occupation of the property is not an issue and that the applicant herself was in control of affording her brother in law the right to occupy the site which had been allocated to her. In any event even assuming that the applicant was never given occupation of the property, the first respondent has conceded her entitlement to take transfer of the property premised on the basis of a valid allocation to her.
22. The only question to my mind which exists then is whether the deed of sale was indeed signed before the launch of the present application as this goes to the question of whether the matter was in fact moot for this reason and what costs order I should make in consequence of such a finding. The first respondent does not deal at all with the circumstances under which the applicant came to sign the deed of sale. It is however

improbable in my view that if she had signed the agreement on the date suggested by the first respondent that she would just days later launch the review on an ostensibly tentative basis concerning a supposed decision, if she knew clearly in her mind that she was about to take registration of transfer. I accordingly reject the first respondent's version that there was no need at all for the applicant to have brought the application in the first instance, or its stance that she should have properly withdrawn the application upon receipt of their attorney's correspondence urging her to do so and to tender its costs.

23. But whilst the applicant's papers fail to make out a case for the relief sought in prayers 1 or 2 (in this regard I accept the first respondent's version that the allocation and occupation of the site could not have been in contention), the confusion and uncertainty regarding whether the property which she believed had been allocated to her was going to be confirmed by way of

registration certainly justified (and still justifies) the mandamus relief sought in prayer 3. Indeed I was informed from the bar that to this day registration of transfer has not yet been effected. This is a serious indictment of the first respondent to have responsibly acquitted itself of its obligation to provide the applicant with her title to the property allocated to her.

24. Notwithstanding that the applicant has not made out a proper case for the relief sought in prayers (a) and (b), these aspects are however but a tangent to the remedy sought by her to register transfer of the property into her name which remedy has proved to be a necessity under all the circumstances. She therefore succeeds substantially in the application, and is entitled to her costs save to the extent that I qualify the costs award in the order which I intend to make.
25. Regarding the submission that I should have non-suited the applicant, such argument holds no sway in the light of the mandamus relief sought in prayer 3 which it was necessary for her to pursue in any event. The first respondent's failure to have registered the property in the applicant's name constitutes administrative inaction, which failure is ongoing. It also amounts to a breach of its constitutional obligation to realise the applicant's right of access to the site allocated to her. Further, on the first respondent's own version, the impugned decision does not arise, and consequently it does not lie in its mouth to say that an appeal against such a decision ought to first have been pursued before she came to this court.
26. In the result I issue the following order:
1. The first respondent is directed to take the necessary steps to ensure that the title deed of the immovable property known as number [5...] N. T., Beacon Bay, is registered in the name of the applicant; and
 2. The first respondent is ordered to pay the costs of the application, provided that the applicant shall not be entitled to recover the costs of filing the supplementary affidavit dated 29 September 2016, or any costs associated with the introduction of annexure "NM1".

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 2 February 2017

DATE OF JUDGMENT: 15 May 2017 (published by email)

Appearances:

For the plaintiff: Mr. Nduli of B Nduli & Co, 18 Porter Street, East London, ref. Mr Nduli/sbp/11716.

For the first respondent: Ms. Da Silva instructed by MMV Attorneys, 14 Regus Office Park, Berea, East London, ref. UN Mkize/BCM/Mabuya.

[1] I was informed that the application had been withdrawn against the second respondent or that no relief is sought against it. In any event the first respondent confirms that the second respondent was solely concerned with the allocation of properties under the projects since, acting in terms of section 9 of the Housing Act, No. 107 of 1997, the municipality resolved to construct low cost houses in Nompumelelo Township in Beacon Bay.

[2] Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd 2016 (2) SA 586 SCA 591 C – F.

[3]

[1984] ZASCA 51; 1984 (3) SA 623.

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