

SOUTH AFRICA / JUDGMENT

McLaren v Freimac (Pty) Ltd and Others (08/9285) [2010] ZAGPJHC 33 (28 April 2010) [2010] ZAGPJHC 33

COURT

South Gauteng High Court, Johannesburg

BEFORE

C.G. Lamont

CASE / FILE NUMBER

08/9285

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/9285

In the matter between:

McLAREN, LOUISE Applicant

and

FREIMAC (PTY) LTD First Respondent

PARKVIEW GOLF CLUB Second Respondent

THE REGISTRAR OF DEEDS, PRETORIA Third Respondent

CITY OF JOHANNESBURG Fourth Respondent

J U D G M E N T

LAMONT, J:

[1] This is an application for a declarator that there has been no subdivision separating certain immovable property from certain other immovable

property and a direction that the registration of the subdivided property be cancelled. The applicant is the owner of certain residential property which prior to subdivision was adjacent to the property owned and subdivided by the second respondent.

- [2] The second respondent was the owner of certain property known as the Farm Parkview Golf Course, No. 312 IR. A portion of the farm which subsequently became known as Portion 1 of the Farm Parkview Golf Course, No. 312 Registration Division IR (hereafter referred to as the property) was identified in a diagram S.G. No. 8010/2001. The property was sold by the second respondent to the first respondent. The property was registered in the name of the first respondent on 9 March 2005, pursuant to a contract of sale between first and second respondents dated 30 March 2004.
- [3] Some time prior to that contract being concluded second respondent and a company controlled by the applicant's husband concluded a contract in principle pursuant to which the applicant's husband's company would in principle take transfer of the property to develop it. Pursuant to this contract a diagram identifying the property was prepared for the subdivision. The
- opening of a township register was granted. At that time the applicant must have been aware of the steps taken in relation to the
- property. She at the time took no steps to prevent the subdivision of proposed development.
- [4] The sale to the applicant's husband's company was not proceeded with and subsequently the first and second respondents concluded the contract referred to above.
- [5] The approval of the local authority for the subdivision and establishment of a township which had been obtained at the instance of the company controlled by the applicants husband lapsed.
- [6] It was accordingly necessary for the first respondent to obtain the permission of the local authority for the subdivision of the property from the farm owned by the second respondent if the first respondent wished to implement its rights under the contract of sale with the second respondent,
- [7] Section 4 of the Transvaal Ordinance No. 20 of 1986 provides that there shall be no division of land unless the subdivision has been consented to by the local authority. Section 5 of the same Ordinance provides that:

"5.1 The Surveyor-General shall not approve a general plan or diagram relating to the division of land and the Registrar shall not register the transfer or lease of any portion of land which has been divided unless the Administrator or authorised local authority as the case may be has consented to the division in terms of section 4."

There having been no approval by the local authority the land could not be subdivided; a Surveyor-General was not entitled to approve the diagram and the Registrar was not permitted to register the transfer of the portion of land divided namely the property.

- [8] On 16 March 2005, one week after transfer to the first respondent, application was made, by the first respondent to establish a township on the property. This application was made in terms of the Gauteng Town Planning and Townships Ordinance No. 15 of 1986 (the Town Planning Ordinance).
- [9] On 11 October 2006 the township application was considered by the fourth respondent's Development Planning and Urban Management Planning Committee and was approved subject to certain conditions. The applicant appeared at the hearing as an objector. She raised the issue of whether or not the subdivision and subsequent registration had taken place lawfully. The point raised by the applicant was dismissed. (The applicant raised this point pursuant to her discovery in September 2006 of the existence of a title deed in the name of the first respondent. This appears to be the first time the applicant saw a document reflecting the owner of the property as the first respondent. She apparently was informed at some stage during August 2005 that the first respondent had taken transfer of the land. This was a rumour the truth of which she did not accept.
- [10] The fourth respondent's Committee approved the application to establish a township. The applicant and her husband appealed against the decision. The result of the appeal was that the finding of the Committee was confirmed with some amendments which are irrelevant to the present proceedings.
- [11] Third respondent's act in registering the property in the name of the first respondent was unlawful. The continued registration is unlawful. The third respondent in terms of section 3 of the Deeds Registries Act No. 47 of 1937 is enjoined:

"3(1) The Registrar shall, subject to the provisions of this Act –

take charge of and except as provided in subsection (2) or (3) preserve or caused to be preserved all records which were prior to the commencement of the Act, or may become after such commencement records of any deeds, registry in respect of which he has been appointed: Provided that the Registrar may destroy or otherwise dispose of any record as prescribed which has been cancelled in terms of this subsection or any record in connection with a caveat that has expired ...

examine all deeds or other documents submitted to him for execution or registration, and after examination reject any such deed or other document the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exists; provided that such deed or document need not be examined in its entirety before being rejected;

attest or execute and register deeds of transfer of land, and execute and register certificates of title to land ..."

- [12] The third respondent in registering the subdivision and in issuing the title deed acted unlawfully and in breach of the obligations

provided for in section 3 of the Deeds Registries Act. The Registrar's decision is reviewable.

“Whenever a public body has a duty imposed upon it by statute and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty this Court may be asked to review the proceeding complained of and set aside or correct them. There is no special machinery created by the Legislature, it is a right inherent in the court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the court. And it will when necessary summarily correct or set aside proceedings which come under the above category.”

See: Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 T.S. 111 at 115.

[13] The exercise of public power is only legitimate when lawfully exercised.

See: Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council [1998] ZACC 17; 1999

(1) SA 374 at para [56];

Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the RSA

[2000] ZACC 1; 2000

(2) SA 674 (CC) at para [20].

[14] The applicant submits that it is entitled to relief by reason of the illegality and that such relief can be afforded in terms of section 6 of the Deeds Registries Act. Section 6 provides:

“6.

Save as is otherwise provided in this Act or in 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.

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 subsection (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.”

[15] It is common cause between the parties that the effect of the subdivision and issue of title of ownership in the name of the first respondent is void and constitutes a nullity by reason of the illegality. In consequence the property and the farm must be treated as if it were never subdivided and as if the owner thereof remains the second respondent. As a further consequence the first respondent never become the owner of the property and was not entitled to make the application to establish a township on the land.

[16] As the act of the Registrar in deciding to register, its implementation by the registration and the continued state of affairs (the registration) are all unlawful, they fall to be dealt with in a manner that removes the illegality. If the Registrar is aware of the illegality he is duty bound to set it aside

See: Qaukeni Municipality v FV Trading 2010 (1) SA 356 (SCA) at para 23 and 26 G-H.

See also on the principle of legality: Oudekraal Estates (Pty) Ltd v City of Cape Town 2010 (1) SA 333 at para 81.

[17] On this basis the applicant is entitled to relief.

[18] The parties argued the matter on the basis that the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) and/or the

Constitution

(S172(1)) applied. The submissions made were that I was to consider delay and whether or not justice and equity required the administrative action to be set aside. Time was to be considered so it was submitted on the basis that either 180 days constituted a time bar if PAJA applied or that the rights became unenforceable if the delay was unreasonable.

[19] It was common cause between the parties that in deciding the issues before me, the questions of undue delay and whether or not an order is just and equitable were to be decided. I was referred to *inter alia* *Gqwetha v Transkei Development Corporation Ltd and Others* 2009 (2) SA 603 (SCA). The *Camps Bay Ratepayers' and Residents' Association and Another v Gerda Yvonne Ada Harrison and Another* [2010] ZASA 3 para [50].

[20] The respondents submitted that it was irrelevant whether or not the delay exceeded 180 days from the date of the decision to register the property (assuming the Promotion of Administrative Justice Act (PAJA) to be applicable as Section 172 of the Constitution also applied and that accordingly there was no 180 day time bar even if PAJA applied. The matter could so it was submitted be decided under Section 172 of the Constitution which provides for considerations of legality.

See: *Qaukeni Municipality v FV Trading* 2010 (1) SA 356 (SCA) at para 14.

[21] Assuming this is a constitutional matter in terms of section 172 of the Constitution of the Republic of South Africa, 1996, this Court is empowered to make any order that is just and equitable subject to the conditions in the section being met. Section 172 provides:-

172. Powers of courts in constitutional matters.—

(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional

invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief

to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court

to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

The Camps Bay Ratepayers' and Residents' Association and Another v Gerda Yvonne Ada Harrison and Another [2010] ZASA 3 para [50].

[22] As the matter was argued on the basis of delay and justice and equity I shall deal with those issues. Although it seems to me that the true issue is illegality. If that is the true issue then the consequence of the reviewable act namely the registration falls to be set aside as being unlawful independently of PAJA and Section 172 of the Constitution.

[23] The delay in my view is not unreasonable. To the extent it exceeds 180 days the delay is explained. The unreasonable delay must itself cause prejudice. It did not in the circumstances.

See: Harnaker v Minister of the Interior 1965 (1) SA 372, Oudekraal Estates (Pty) Ltd v City of Cape Town 2010 (1) SA 333 (SCA) at 346.

- [24] The first and second respondents were aware of the risks and the applicant's attitude. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004
- (6) SA 222 (SCA) at 249 G holds that respondents conduct over the period is relevant and I take that into account. The application to establish a township was prosecuted by a person who was never entitled to prosecute it and who should have known that. The applicant in my view is not to be penalised for having failed to approach this Court at an earlier stage when she was patently seeking a remedy consistent with the remedy she currently seeks but in another forum. In my view the delay creates no prejudice on the part of the respondents which could not have been anticipated at the time the issue was first raised.
- [25] The period of time between when the applicant heard a rumour which she did not believe and the time when she discovered as a fact that transfer had been effected to the first respondent is not to be taken into account in computing the delay. The rumour did not provide her with proper and true knowledge of the transfer. She doubted the truth of the rumour as steps which she had expected to come to her knowledge in the process of a subdivision had not come to her knowledge. Her consent had not been sought and there had been no publication of the proposed subdivision as would have been expected to be the case had there been a subdivision with consent. It appears to me that she did not act unreasonably in accepting on the face of it that the third respondent would not transfer without consent and hence that the rumour was false.
- [26] In my view delay must be assessed on the basis that the applicant had knowledge from approximately September 2006. Steps which the applicant took after September 2006 included appearing at the township application on 11 October 2006 and raising the point, appealing against the decision of the committee, prosecuting that appeal on the basis of the same point until the final conclusion of the matter which occurred on 24 March

2010. In the course

of that prosecution the applicant was involved in an initial hearing, the appeal, an application to have the approval of the member of the Executive Council of the Gauteng Provincial Government set aside under Case No 2009/41125 which was granted on 17 November 2009 and in the present matter by way of the institution of these proceedings during February/March 2008.

- [27] During the course of the applicant's opposition to the proceedings she made known the nature and extent of the objection to the first, second and fourth respondents.
- [28] The applicant throughout has made it known that she regards the conduct of the third respondent in registering the subdivision as unlawful as well as the reason for that submission. The respondents are not taken by surprise and well knew of the respondents' attitude from an early stage. The first and second respondents must have well known whether the facts which the applicant asserted to be true, were true and they also were able to determine that the transfer by the third respondent was illegal as also that the application to establish a township had not been made (as is required) by the order.

LEGAL EFFECT OF DELAY

[29] In my view the illegality continues for each day that the property is unlawfully registered in the name of a party who is not the owner. On this approach there has been no delay. There is an ongoing wrong giving rise to an ongoing cause of action.

See: *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 331 F-G.

The registration which continuously reflects an unlawful state of affairs is to be distinguished from its cause. The decision in *Radebe v Government of The Republic of South Africa and others* 1995 (3) SA 787 at 803 (D) is distinguishable in my view as the cause was dependent on the single act of expropriation.

[30] By reason of my approach to the delay issue it is my view not necessary to decide whether or not the Registrar's illegal act is administrative action in terms of PAJA - a complex question. See: *Minister of Health and another v New Clicks SA (Pty) Ltd and others* 2006 (1) BCLR (CC) para 718 and following. This absolves me from deciding whether or not if the 180 day period was exceeded condonation should be given, even although none was formally sought by the applicant. See: *Minister of Health and another v New Clicks SA (Pty) Ltd and others* 2006 (1) BCLR (CC) para 718 and following.

[31] I consider now justice and equity. The factors militating in favour of the granting of relief include:-

the true owner is not the registered owner,

unlawful action occurred which resulted in a registration which is void and which should not be sanctioned,

the current registered owner cannot pass title to a purchaser,

persons who provide loan money to the registered owner on the basis of the security of the property are at risk,

the application to establish a township may well have been wrongly granted as the application was brought by a person who is not the owner and who had no right to bring it,

the first, second and fourth respondent have continuously been aware of the claimed defect.

processes which should have been undertaken in the course of obtaining the consent of the local authority and which were not undertaken can be undertaken. This would enable affected persons to place their perspectives before the local authority for consideration.

See: *Knysna Hotel CC v Coetzee N.O.*

[1997] ZASCA 114; 1998 (2) SA 743 (SCA) at 753 B-C.

[32] The factor militating against granting of relief include:-

if the transfer falls to be set aside and in consequence the second respondent pending transfer must repay the purchase price it may be unable to readily do so,

the application to establish a township may well be set aside as having been brought by the wrong owner and as having been brought in respect of an as yet not subdivided piece of land,

monies expended in the pursuit of the development may be wasted,

until the unlawful act is set aside the first and second respondents were entitled to deal in their property and have done so. (The delay argument in a different guise)

In my view justice and equity dictate that the unlawful act be set aside. The first and second respondents were aware from an early stage of the risk they undertook in proceeding on the basis the registration was lawful. Their potential losses and difficulties were knowingly undertaken. I must balance those injustices against the injustice the continuation of the unlawful state of affairs of the third respondent created. There will be uncertainty concerning the property which affects future potential owners and other third parties. The Deeds Register will inaccurately reflect a state of affairs which it should not be allowed to continue to reflect. As a matter of good order alone the Deeds Register should be accurate. If an inaccurate register is permitted to remain it is inevitable that people will lose faith in it as a register which impeccably presents data; data on which people rely and which they are entitled to assume are reliable.

[33] In my view the following relief should be granted to the applicant.

It is declared that there has been no subdivision separating the area of land highlighted on the diagram attached to this order marked “X” from the farm Parkview Golf Course No 312 Registration Division IR.

The registration of the subdivision of Portion 1 of the farm Parkview Golf Course No. 312 Registration Division IR Province of Gauteng under deed of transfer number T28474/2005 is cancelled.

First and second respondents are to jointly and severally pay the applicants costs.

C.G. LAMONT

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant : Adv. A.J. Lamplough

Instructed by: ; Howard Salmon Attorney

For the First Respondents : Adv. S.J. Grobler SC

Adv. C.F. v.d. Merwe

For the Second Respondent : Adv. L.M. du Plessis

Instructed by : Strauss Scher Inc

Date of hearing : 25 March 2010

Date of Judgment : 28 April 2010

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