

SOUTH AFRICA / JUDGMENT

Varachia v MEC Department of Local Government & Housing Gauteng (64978/14) [2017] ZAGPPHC 223 (26 May 2017)

[2017] ZAGPPHC 223

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mali

CASE / FILE NUMBER

64978/14

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 64978/14

Reportable:

No

Of

interest to other judges: No

26/5/2017

In

the matter between:

MOHAMED

RASHID AHMED

VARACHIA Applicant

and

THE

MEC DEPARTMENT OF

LOCAL Respondent

GOVERNMENT

& HOUSING GAUTENG

JUDGMENT

MALI J

INTRODUCTION

[1] This matter concerns an application for condonation in terms of Section 3(4)(a) and (b) of the Institution of Legal Proceedings

against Certain Organs of State Act 40 of 2002 ("the Act").

[2] The applicant is an adult male resident of Lenasia Extension 1, Johannesburg.

[3] The respondent is the member of the Executive Council responsible for Department of Local Government and Housing, an organ of state.

FACTS

[4] On 8 July 2010 the parties entered into an agreement of sale for the vacant land being Erf 11283, Lenasia, Extension 13, Johannesburg,

Gauteng. The relevant clause of the agreement, for purposes of this application, can be found in clause 9 of the sale agreement which reads as follows:

"9. The conveyance (sic) attorney which is nominated by the SELLER will pass transfer of the property to the PURCHASER and transfer costs as well as transfer duty shall be paid by the PURCHASER'

[5] On 7 September 2010 the applicant paid the purchase amount of R28 416.00. Subsequent thereto the applicant erected a structure in the building for the amount of R470 000.00.

[6] On 9 November 2012, on the instructions of the respondent, the structure built by the applicant was demolished. According to the respondent the structure was demolished on the basis of a court order.

[7] On 4 November 2013 the applicant issued a notice to institute proceedings against the organ of state. On 29 August 2014 the

applicant issued summons for damages in the amount of R1 300 000.00 against the respondent. The applicant being the plaintiff and the respondent cited as the defendant.

ISSUE

[8] The issue to be determined is whether the action of the applicant/plaintiff in the main matter needs to be condoned as he did

not serve a notice in terms of subsection 2(a) Act 40 of 2002 within the prescribed period.

LAW

[9] The Act states:

"3 Notice of intended legal proceedings to be given to organ of state

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

...

(4)

(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure ..."

[10] Alienation of Land Act No 68 of 1981. Section 2 of the Act provides;

"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. "

- [11] In *MADINDA v MINISTER OF SAFETY AND SECURITY*[1] the court held that the appellant's prospect of success inter alia was a factor which sought to be taken into account in determining a good cause. Held further, that given that the appellant had satisfied the requirements of section 3(4) (b) of the Act the trial court ought to have exercised its discretion in favour of granting condonation.
- [12] In *MARUMO v MINISTER OF POLICE*[2] it was held that the established principle in South African law that the phrase 'if the court is satisfied that' does not require proof on a balance of probabilities but rather requires an overall impression made on a court which brings a fair mind to the facts setup by the parties.
- [13] See *MINISTER OF SAFETY AND SECURITY v DE WIT*[3].

ARGUMENTS

- [14] It is submitted on behalf of the applicant that the delay in filing the notice was caused by the respondent's failure to effect transfer and registration of the property. It is apparent that the property has not been transferred until the hearing of this matter. The only document before court is the order instructing the respondent to appoint a conveyancer.
- [15] In paragraph 11 above the law is trite that the cause of action can only be found on ownership of the land. Regrettably, the applicant's counsel failed to address the court on the reason the applicant erected a structure before the transfer of the property into his name.
- [16] The applicant applied for an order compelling/ordering the respondent to appoint an attorney for purposes of registration of the property. The order was granted on 29 January 2013. It is apparent that the order was granted after the demolition of the property. In simple terms the applicant's claim is for the property that does not belong to him. The applicant chose to follow the correct route, that of interdicting the respondent to transfer the property, however after the fact. I take into consideration that the applicant made payment for the property but not all legal requirements are satisfied. I reiterate the immovable property is not registered in the applicant's name, a key requirement.
- [17] The overall impression made by the applicant is that of someone eager to flout the law and thereafter seek sympathy from the courts. As the saying goes "two wrongs do not make right" the respondent's failure to appoint an attorney to attend to the transfer and registration of the property into the applicant's name did not give right to the applicant to erect a structure in the property he did not own.
- [18] Having regard to the above I find that there are no prospects of success in the main action. To grant condonation just for the mere asking will prejudice the respondent. The respondent will be expected to engage in unnecessary litigation.
- [19] In the result I make the following order;
- 19.1. The application is dismissed with costs.

N P MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv. D Theodorellis

Instructed by:

Walter Niedinger & Associates

Counsel for the Respondents: Adv. L Mfazi

Instructed by:

State Attorneys, Pretoria

Date of Hearing:

3 May 2017

Date of Judgment:

26 May 2017

[1]

[2008] ZASCA 34; 2008 (4) SA 312 SCA page 312 D-J

[2] (37401/2011)2014 ZAGPPHC 640

[3] (588/2007) [2008] ZASCA 103; 2009 (1) SA 457 (SCA)

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