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

Case Number: 29560/21

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE: 10/02/2023

SIGNATURE:

In the matter between:

MAILULA ALBERT ATTE OBED

Applicant

And

**NATIONAL HOUSING FINANCE
CORPORATION (PTY) LTD**

1st Respondent

NU-WAY HOUSING DEVELOPMENTS (PTY) LTD

2nd Respondent

**PREVIOUSLY KNOWN AS KHAYALETU
HOME LOANS (PTY) LTD**

3rd Respondent

PIERE ANDRE BRUYNS

4th Respondent

SONJA BRUYNS

5th Respondent

SIPHO NOAH MTHETHWAS

6th Respondent

SIZIWE SYLVIA MTHETHWA

7th Respondent

REGISTRAR OF DEEDS

8th Respondent

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

9th Respondent

**THE DEPARTMENT OF HUMAN
SETTLEMENTS**

10th Respondent

JUDGEMENT

MNYOVU AJ:

[1] The applicant seeks a declaratory order that the sale of Erf/ Stand number 2[...], Extension [...], M[...] Street, Mamelodi East, Gauteng Province (the property) and the disposal thereof between the 1st and 2nd respondents, and by 2nd respondent to the 4th and 5th respondents, and by the 4th and 5th respondents to the 6th and 7th respondents be declared invalid and unlawful and be set aside,

[2] The applicant further seeks order that:

- i) an order directing the Registrar of Deeds to take all steps necessary and to do all such endorsements as maybe required to register the property in the applicant's name;
- ii) compelling the 1st, 2nd, and 3rd respondents to furnish the applicant with a copy of mortgage bond, cancellation of a bond agreement and/or any other documents which maybe relevant to the applicant's cause;
- iii) compelling the 1st, 2nd, 3rd respondents to take all steps necessary and to do all such things and make such endorsements as maybe required to register the property in the applicant's name;

iv) an order compelling the 3rd respondent to attend to the cancellation of the mortgage as per their letter dated 27 May 2013;

v) an order requesting the 9th respondent to change the name on the municipality account to that of the applicant;

vi) the registrar of the Deeds (Pretoria) is ordered to cancel the title deed number T[...] in respect of Erf/ Stand number 2[...], Extension [...], M[...] Street, Mamelodi East, Gauteng Province (the property) and to cancel all the rights accorded to the 4th and 5th, 6th and 7th respondents by virtue of the deed,

vii) the Director- General for the Department of Housing, Gauteng Province, is directed to hold an inquiry in respect of Erf/ Stand number 2[...], Extension [...], M[...] Street, Mamelodi East, Gauteng Province (the property), in terms of section 2 of the Conversion of Certain Rights into Leasehold Ownership Act 81 of 1988, and to determine the true owner in respect of the property.

[3] The 1st, 2nd, 6th and 7th respondents are opposing the relief sought and the remaining respondents abide the decision of this court.

[4] In terms of the provision of Section 21(1)(c) of the Superior Courts Act, 10 of 2013, the High Court may grant a declaratory order without any consequential relief sought.

That subsection provides as follows:

“21(1) A Division has jurisdiction over all persons resident or being in, and in relation to all causes arising and all offence triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a)

(b)

(c) *in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*

(2)

(3)

[5] Under common law, the High Court did not have jurisdiction to grant declaratory relief¹. Such power was conferred upon the High Court by the provisions of s 102 of the General Law Amendment Act 46 of 1935. Currently it is governed by s 21 of the Superior Courts Act.

[6] It is trite that the requirements in respect of the granting of declaratory order are two-fold²:

(a) The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation, and

(b) once a court is so satisfied, it must be considered whether or not the order should be granted.

[7] When considering the grant of declaratory relief, the court will not grant such order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute³

[8] In this present case, the issues that require determination are:

¹ *Geldenhuys and Neethling v Beuthin* 1918 AD 426

² *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at 213 E-G

³ *Ex parte Noriskin* 1962 (1) SA 856 (D)

(a) whether the fraudulent transfer of the 1st to the 4th and 5th respondents is valid;

(b) whether the transfer by 4th and 5th respondents to the 6th and 7th respondents is valid, even though it presupposes a valid fraudulent transfer,

(c) whether the cancellation and reversal of the deed of transfer should be ordered to allow inquiry in terms of Section 2 of the Act 81 of 1988 to be held.

[9] When dealing with the above requirements, it is prudent to deal with issues in the reverse order in view of the content of the declaratory relief sought.

[10] It will be useful to provide some background, the applicant is an pensioner, residing at Stand number 2[...], Extension [...], M[...] Street, Mamelodi East, Gauteng Province (the property). The applicant purchased the said stand in 1991 and build a house for himself and his family, he has been in occupation of the property for the past 29 years. He acquired the stand through the conversion of certain rights into leasehold or ownership act 81 of 1988 (Conversion Act)

[11] On or about 04 November 2019, the applicant was evicted from the property by 6th and 7th respondents, with a valid Court Order. The applicant and his family did not vacate the property as he believed that he was the rightful owner of the property which he purchased the stand and built a house with his own monies. The applicant seeked for a leave to appeal the eviction, but it was unsuccessful, because he was not registered owner of the property, which made him to launch a petition at Supreme Court of Appeal, which is pending. It is this eviction which triggered these proceedings.

[12] The applicant in his founding affidavit admits that he is not the owner of the property but he is the registered co-owner of the property, same can be confirmed by the City of Tswane, Local Authority, who is the 9th respondent in this matter.

[13] The applicant contends that on the basis of relief of co-owner, he was beneficiary of low cost housing in historical black township (Government) in 1987 for shelter. The 9th respondent owned the land and it granted South African Housing Trust Limited a Certificate of Grant of Leasehold in Mamelodi Township, for a period 99 years, it entitled South African Housing Trust Limited to have a right of leasehold to the applicant's property, as the property was owned by 9th respondent, which is a Local Authority.

[14] Applicants further avers that on or about 1990 he then occupied the property through the permission of 9th respondent and South African Housing Trust Limited. The South African Housing Trust Limited was registered as the owner of the property and the applicant was registered as co-owner by the 9th respondent. It is evident on the municipality invoices and rates, reflecting the particulars of the applicant. After occupying the property in 1991 the applicant then requested permission from South African Housing Trust Limited and from the 9th respondent to build the house on the stand of the property, the South African Housing Trust Limited inspected the property and referred the applicant to 3rd respondent (formerly known as Khayaletu Home Loans) for mortgage bond loan.

[15] The 3rd respondent in her answering affidavit confirmed that the applicant applied for the home loan to acquire the undeveloped Property from South African Housing Trust Limited; and contracted with Lapalaka Developers CC to construct a dwelling for the applicant on the property. The loan was granted by Hlano loan, and financial arrangements between the applicant and the 3rd respondent were agreed on that the 3rd respondent will disburse R30 591.55 as follows:

- (a) R6 600.00 to acquire the undeveloped property from South African Housing Trust Limited;
- (b) R21 914.00 for the to Lapalaka Developers in terms of of their agreed construction agreement;
- (c) R507.05 for the initial insurance premium,

(d) R1 178.50 in respect of various changes

[16] The 3rd respondent further contends that the R30 591.55 was funded by the applicant, as follows:

(a) Payment by the applicant to the 3rd respondent in the amount of R2 246.00, and

(b) Provision of the Hlano loan in the sum of R28 345.55 to be secured with a mortgage bond over the property.

[17] It is evident on the papers that the monies were paid by the applicant to the 3rd respondent in good faith by the applicant for the sale of property from the South African Housing Trust Limited; it is clear that during the process of the sale, there was a sale of agreement between the applicant, 1st and the 3rd respondent. The 3rd respondent in her answering affidavit avers that she contacted the erstwhile attorneys of South African Housing Trust Limited, BVZ attorneys to confirm if there was any reason why mortgage could not be registered over the property in favour of 3rd respondent, on or about 29 July 1991, the attorneys confirmed that mortgage bond will be secured and they will attend to the registration of the property.

[18] The 3rd respondent contends that in terms of their records the applicant's house was constructed and after completion of the construction, the applicant took occupation on or about 13 December 1991, on or about 2002 the South African Housing Trust Limited was disestablished in which an agreement was reached between South African Housing Trust Limited and 1st respondent in terms of which the South African Housing Trust Limited is to transfer, for a nominal amount, its rights and assets to the 1st respondent. At all material times the applicant proceeded to pay Hlano loan which he settled it in full to the value of R112 167.05 on or about 02 July 2013. Therefore, there is no dispute of fact regarding the fact that the applicant has a legal right over the property as the co-owner, the monies were paid over to the South African Housing Trust Limited, 1st respondent had the knowledge about the sale of the property, 1st respondent should have transfer and registered the property to the applicant's name. This contention has a merit in this matter.

[19] The basis of the claim is that the property was sold to and transferred first to 4th and 5th respondents by the 1st and 2nd respondents and lastly sold to the 6th and 7th respondents by 4 and 5th respondents unlawfully. The applicant could not know the reason as to why 1st and 2nd respondents failed to transfer the property to him, except to state that it was an administration error that occurred. The applicant contends that he made enquires with 1st and 2nd respondents seeking clarification as to why the property was sold and never transferred to his name, and was informed by the 2nd respondent that it was within his right and responsibility to dispose of the property.

[20] In its opposition, the 1st respondent in his answering affidavit denies any records of payments received being purchase price from the applicant, denies any negotiations pertaining agreement entered into the 2nd respondent. The 1st respondent argued that he cannot be held liable for not effecting the transfer of the erstwhile South African Housing Trust properties into the name of the applicant, as 1st respondent was not in possession of the records pertaining to Deeds of sale and or proof of payment, thereon he was not privy to the terms of agreements that would have concluded between the 2nd respond and prospective home owners. The 1st respondent cannot even recall as there is so much substantial lapse of time, he denies consenting that the 2nd respondent should transfer any properties. In the premises, the applicant has failed to make a proper case.

[21] In its arguments, the 2nd respondent submitted that application by the applicant is premature as the court cannot find the applicant to be a lawful owner of the property in circumstances where the applicant has duly been evicted, the applicant could have brought the proceedings in an action procedure and not in the motion proceedings, the applicant should have known that when launching the application that dispute of facts which are incapable of to resolve on paper, will rise, 2nd respondent put it to the attention of the court that despite several requests for applicant to deliver in terms Rule 35(12) notice, applicant failed to do so. Further, there is no cause of action put to this court with regard to registration of transfer in the deeds office, no proof of sale of agreement between the parties as alleged by the applicant on his founding affidavit. applicant's cause of action was premised on an

administrative error. Lastly, the Section 2(2) inquiry will have no effect in this application, there is an eviction order which bears the evidence that the applicant is not the owner of the said property. The 2nd respondent also argues on the unreasonable delay of time as it was a fundamental issue when the applicant brought the application. The applicant has no proper case, this application must be dismissed.

[22] In its opposition, the 6th and 7th respondent's contention was that the applicant's application is unreasonable as the matter took place many years ago, before it was brought in June 2021 as they now have also fallen the victims of being deprived their property which they have real right of ownership by virtue of valid title deed. The counsel argued further that the 6th and 7th respondent's contention was that the applicant's application is unreasonable as the matter took place many years ago, before it was brought in June 2021 as they now have also fallen the victims of being deprived their property which they have real right of ownership by virtue of valid title deed. The counsel argued further that the 6th and 7th respondent instituted eviction proceedings in which the applicant was evicted and lost the appeal as such there is a pending petition by Supreme Court Appeal relating to the judgement of eviction granted in November 2019. The 6th and 7th respondent contend that the applicant possesses the personal claim or right against some other respondents, the counsel also submitted that the on the unreasonable delay by the applicant to launch this application, has caused the prejudice to the 6th and 7th respondents, applicant's claim must be dismissed with costs.

[23] I will now deal with the unreasonable delay of the launch of this application. The respondents argued in their papers that there is no reasonable and/or valid explanation tendered by the applicant as to why he has decided to launch the present proceedings after such a substantial lapse of time. In the applicant's founding and supplementary affidavit there was no explanation to unreasonably delay, however, in the hearing of the application, the applicant raised the reasons for delay, was that after eviction order, he applied for leave to appeal the eviction order which was dismissed, because the applicant did not make an application to court to set aside sale of property as invalid and unlawful, the applicant further argued that there is a pending petition to Supreme Court of Appeal, which is the reason he seeks

urgency of this application. From the arguments above and having read the papers it was not necessary for this court to dismiss the application on the basis of unreasonably delay, the application has merit and prospect of success

[24] The correct approach to Section 21(1)(c) of the Superior Courts Act, 10 of 2013, the wording of which is similar to the erstwhile power conferred upon under section 19(1) (a) (iii) of the now repealed Supreme Court Act 59 of 1959 was summed up Corbett CJ in *Shoba v OC, Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1 (A) at 14F-I as follows

“an existing or concrete dispute between the persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case. But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding. (see Ex Parle Nell 1963(1) SA 754 (A) at 759 H-760B)

[25] A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. There must be a legal basis upon which the declaratory order in favour of the applicant can be made, it would not ordinarily be appropriate where one is dealing with events which occurred in the past, such events, if they give rise to a cause of action, would entitle the litigant to an appropriate remedy. The interest that the applicant should have, is at least akin to the interest that a party has to intervene in the proceedings in the High Court, i.e., have a direct and substantial interest in the subject matter⁴.

[26] The question whether or not a declaratory order should be made under s 102 of the General Law Amendment Act 46 of 1935, has to be examined in two stages. First, the Court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation⁵, and then, if satisfied on that point,

⁴ *Milani et al v SA Medical and Dental Council et al* 1990 (1) SA 899 (T) at 902G

⁵ *Family Benefit Friendly Society v Commissioner for Inland Revenue et al* 1995 (4) SA 120 (T) at 125B.

the Court must decide whether the case is proper for the exercise of the discretion conferred on it.

[27] Applying the principles in respect of declaratory, and considering the requirements the following is relevant,

(a) It is common cause that the applicant is the occupier of the Stand number 2[...], Extension [...], M[...] Street, Mamelodi East, Gauteng Province (the property); the applicant occupied the property with through the permission of the Local Authority, the rates clearance certificate from the City of Tswane used to transfer the property listed the applicant as a registered co-owner with the 1st respondent's predecessor. The applicant purchased the stand from the South African Housing Trust and build a house.

(b) the applicant submits on his supplementary affidavit that, since he launched the application, new information is not hearsay evidence, as it was made under oath as part of the proceedings to assist the court to reach its decision whether to grant the order or not.

(c) It is in these circumstances that the applicant submits to this court that the said property was fraudulently transferred to the respondents. The applicant further contends that in its supplementary affidavit, that at all material times he was not in possession of the power of attorney. The 1st respondent has never contacted him with regard to his property despite that he had the knowledge about the sale of the property by him.

(d) the applicant further acquired knowledge that the 2nd respondent at all times he was in possession of his records with regard to the property, the 2nd respondent gave the mandate to the Mr Serfontein to sell the property and instructed his conveyancers Prinsloo Bekker Attorneys who used the applicant's rates clearance certificate to transfer the property to the respondents. By doing so, the Conveyers totally disregarded the applicant's interest in the subject matter and transfer the property without the applicant's knowledge. not at any given time the applicant was contacted. The 2nd

respondent and its representative, Mr Serfontein whom they gave him Special Power of Attorney to transfer the properties belonging from the erstwhile South African Housing Trust had no right to sell and transfer the property. The lack of authority was also confirmed by the 1st respondent, it is for this reason stated that the transfer was fraudulent, now risking the applicant to lose his property.

(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 3rd, 9th and 10th respondents have to intervene in the High Court proceedings. The existing dispute was not required in respect of the interest, their decision is binding in this matter. The applicant has proved that necessary conditions exist for him to be granted a declaratory relief by this court. The applicant has a direct and substantial interest in the subject matter. The issues that were raised to this court for determination were not hypothetical, abstract and academic or legal position is clearly defined by the statute.

[28] On these basis, it is proper for the Court to exercise its discretion as follows:

[29] I grant the following order:

29.1 The application for declaratory order is granted as per relief sought.

29.2 No order to costs.

B.F MNYOVU
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant:

N E Ramapuputla

Instructed by:

Ramapuputla Attorneys

Counsel on behalf of 1st Respondent: Adv J D B Themane

Instructed by: Stegmanns Inc.

Counsel on behalf of 2nd Respondent: Adv A R Coetsee

Instructed by: Prinsloo
Bekker Attorneys

**Counsel on behalf of 6th and
7th Respondents:** Adv D.T. Skosana SC

Instructed by: S NGOMANE INC.

Date heard: 10 October 2022

Date of Judgement: 10 February 2023