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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2596/2017

In the matter between:

LEKHETHO JACOB MOSHODI
MAMOKETE RUTH MOSHODI

1st Applicant
2nd Applicant

and

STEPHEN TEFO SEBOTSA
JUDITH MOLEBOHENG SEBOTSA
MANGAUNG METROPOLITAN MUNICIPALITY
THE REGISTRAR OF DEEDS BLOEMFONTEIN
THE MEMBER OF THE EXECUTIVE COUNCIL
FOR COOPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS AND HUMAN SETTLEMENT, FREE STATE
PROVINCE

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent

HEARD ON: 28 JUNE 2018

JUDGMENT BY: LEFENYA, AJ

DELIVERED ON: 14 AUGUST 2018

INTRODUCTION

[1] This is an application arising from a dispute over ownership of land described as Erf [...] Ratau, Thaba Nchu district, Free State Province (the Property). The 1st and 2nd applicants are married to each other in community of property. The applicants asked for relief in the following terms;

1. The First and Second Respondents are ordered to take all steps necessary to cancel the title deed under title deed reference **T20084/2011** which has been mistakenly transferred and registered in the names of the First and Second Respondents on 28 November 2011 and which is held under the care of the fourth respondent for the property described as;

ERF [...] (RATAU). DISTRICT THABA NCHU, PROVINCE FREE STATE IN EXTENT, 1083 (ONE ZERO EIGHT THREE) SQUARE METRES HELD BY DIAGRAM DEED: T20084/2011 (hereinafter referred as “the property”);

2. In the alternative to paragraph 1 *supra*, the First and Second Respondents are ordered to take all the necessary steps to deregister the transfer and/ or registration of the property under the title deed number T20084/2011 which has been mistakenly transferred and registered in the names of the First and Second Respondents on the 28 November 2011 and which is held under the care of the Fourth Respondent;

3. The Registrar of The Honourable Court is authorized and/or ordered, in the event that the First and Second Respondents refuse / fail to give effect to paragraph 2 *supra*, to sign all documents necessary on behalf of the First and Second Respondents to give effect to paragraph 1 *supra*;
4. The Fourth Respondent is authorized and/ or ordered to cancel the title deed registered and held in the names of the First and Second Respondents under the deed reference number T20084/2011 for the property, alternatively to deregister the transfer and/or registration of the property under title deed reference number T20084/2011 which has mistakenly been transferred and registered in the names of the First and Second Respondents on 28 November 2011, and to transfer and/or register the property in the names of the First and Second Applicants, alternatively to transfer and or register the property back to its original owner, namely the Provincial Government of the Free State.
5. The First and Second Respondents to be ordered to pay the costs of this application;
6. The Third, Fourth and Fifth Respondents to be ordered to pay the costs of this application if opposed by the Third, Fourth and Fifth Respondents;
7. Further and/ or alternative relief.

[2] The Third, Fourth and Fifth Respondents are joined in as they may have an interest in the matter and no cost order is sought against them unless if they oppose the application. Naturally the Third, Fourth and Fifth Respondents did not oppose this application.

FACTS

- [3] In their affidavits, the first and second applicants stated that together with their children, they have stayed in the property since 1982. According to the applicants they are therefore the owners of this property and have since built a house which is the family home.
- [4] The first applicant avers that the property was initially allocated to a certain Ms. Violet Lamoen. Thereafter the same property was subdivided into 4 pieces of land, whereby one fourth was allocated to him by Violet Lamoen and the Barolong Boo Seleka Traditional Council.
- [5] The applicants' arguments is that the allocation of the property to them has provided them with explicit permission to occupy the property which in turn created a right of ownership over the property and subsequent right to lease, sell and or transfer the right over the property to the third person. It is in this permission to occupy the land that the applicants claim reasonable expectation to register the property in their names.
- [6] Several annexures in support of the above have been attached to the applicants' affidavits, amongst these receipts of payment of levies as proof of residing in the property.

- [7] The 1st and 2nd respondents are also married to each other in community of property and argued that they are the lawful owners of the property. According to the first and second respondents, they were granted permission to occupy the property in question in 2005 by the Barolong Local Authority. In support of this the first and second respondents submitted a title deed with number **T20084/2011** in which the property has been registered and transferred in their names on the 28 November 2011. They have further submitted a permission to occupy the land.
- [8] It is common cause that the first and second respondents reside at number 2504 Unit 1 Thaba Nchu. They have never at any stage occupied the property in question.
- [9] The applicants' submission is therefore that the property has been mistakenly transferred and registered in the first and second respondents' names and that this transfer and registration therefore interfere with their rights to use and enjoy the property. It is therefore on this premise that the applicants asked for relief sought in their notice of motion.

ISSUES

- [10] In his affidavit, the 1st applicant stated that he was informed by Kgosi M Setlogelo, who is the chairperson of the Barolong boo Seleka Traditional Council, that the property was mistakenly transferred and registered into the names of the 1st and 2nd respondents. The respondents however disputed this and claim that they have rightfully obtained the title deed and further

disputed that the plaintiffs have been in an uninterrupted occupation of the land. The applicants therefore allege possession and enjoyment of the property whilst the first and second respondents claim transfer and registration through the title deed.

[11] It is common cause that on 2 occasions, the first and second respondents had applied to the Magistrate Court in Thaba Nchu for the eviction order against the applicants from the property.

[12] I do not think that it will assist us in any way to get to the full details surrounding the eviction orders as there are allegations and counter allegations and withdrawals of some applications at some stage.

[13] The issue therefore to be determined is whether the applicants are rightfully occupying or residing in the property, and if so, if it was therefore wrongly registered and transferred into the first and second respondents' names and therefore the title deed mistakenly issued in the names of the 1st and 2nd respondents.

THE LEGAL PRINCIPLES

[14] The rights to property and housing are enshrined in sections 25 and 26 of the Constitution of the Republic of South Africa, Act 108 of 1996 respectively.

- [15] The registration and transfer of rights in land and other immovable property, on the other hand is regulated by the Deeds Registries Act 47 of 1937.
- [16] It is trite that the most important and effective way of proving ownership of property is the production of the authentic documents of title over the land. See **Dlamini v Lipholo [2010] ZAFSHC** 54 27 May 2010.
- [17] A person can therefore also successfully claim ownership by proof of long possession and enjoyment of the property. This may be by way of evidence whether oral or documentary.

APPLICATION OF THE LAW TO THE FACTS

- [18] It is trite that in most instances the production of authentic documentation of title over land override the occupation or possession and enjoyment of the property. This is so because the occupation and enjoyment could have been illegal and mostly the evidence in this regard will be hearsay. Equally courts should not just easily accept the proof by way of production of title deed.
- [19] Counsel for the applicant's submission in this regard is that mere production of title deed is not sufficient and further argued that there is a possibility that the property was mistakenly registered in the names of the first and second respondents.

- [20] The first respondent, on the other hand, to contended that the production of receipts of payment of levies is not proof of titled ownership. I agree. This however in my opinion cannot be ignored as it is one way of proving occupation of land which in ownership dispute has to be taken into consideration. The allegations by the applicants, therefore, that they occupied the land since 1982 and documents in support thereof must be taken into account.
- [21] There is also a serious allegation by the applicants that the respondents at some stage offered to sell the property back to the applicants. According to the applicants they then refused to buy their “own” property back. There is no clear explanation from the respondents’ affidavits why the first application for eviction in the Magistrate Court was withdrawn. These allegations in my opinion are serious and deserve to be taken into consideration. Another aspect that raised concern is failure by the respondents to submit documents that were sought in terms Prevention of Illegal Eviction Act 19 of 1998 after the Court granted them an opportunity to do so.
- [22] The first respondent, further, alleged that the property was physically pointed out to him. This, according to him, was done before the Barolong Local Authority issued him with the permission to occupy. He further alleges that, at that stage of pointing out, the property was vacant.
- [23] The Barolong Local Authority, as the first respondent alluded to, is the current Barolong Boo Seleka Traditional Council. This is the

very body that in an affidavit by Kgosi Setlogelo supported the applicants' occupation of the property. It is the very body in Kgosi Setlogelo's affidavit, that claimed that the issuing of the deed of transfer to the first and second respondents was wrong. Therefore if indeed it is the Barolong Local Authority that granted the first and second respondents the permission to occupy the property, and if it is its member that pointed out the vacant land to the first respondent, I cannot see any difficulty by the respondents to obtain affidavit to that effect. Just as the applicants managed to obtain the affidavit from their member, Kgosi Setlogelo, the first and second respondents could have also done the same. It was therefore, in my opinion, imperative of the respondents, having alleged this, to obtain the necessary affidavits from such persons to confirm issuing of the permission to occupy and to state when was the land pointed out to the first respondent and prove indeed if it was vacant at the time.

- [24] The first respondent's allegation that the applicants never occupied the property in question is therefore in my opinion bare and without any merit. He alleged that the applicants have not been in occupation of the land as they allege, but failed to submit any affidavit stating where the plaintiffs stayed since 1982 or at any stage thereafter.

FINDING

- [25] I am therefore satisfied that the applicants have established on the balance of probabilities that they have been staying in the property for a considerable long period of time prior to the

property being registered and transferred into the first and second respondents' names. I found no evidence to the contrary as the first and second respondents failed to dispute this. The applicants clearly cannot understand how the property was registered and transferred into the names of the first and second respondent as they have occupied the land since 1982. If one reads between the lines, it is evident that the applicants suspect that there has been foul play or at least some flaws in the registration and the granting of the said title deed to the first and second respondents. These circumstances need to be taken into account.

- [26] Therefore, in the absence of affidavits in support of the legitimate granting of the title deed to the first and second respondent, or proof of authenticity thereof, I cannot say I am persuaded that the respondents have effectively challenged the applicant's claim. As stated in **Dlamini v Lipholo** *supra*, "***Mere production of a Deed of Transfer in circumstances such as in this matter does not justify the finding that the respondents are true owners of this property...***"
- [27] Had the respondents provided the necessary affidavits from the relevant authorities in support of their claims as stated above, I might be persuaded to make a different finding. It is therefore a difficult task, just on face value, and taking the applicants' submissions into account, to accept the authenticity of the title deed no T20084/2011. Having said that, still, the applicants' allegations are also not sufficient to reject the authenticity of the title deed that was produced by the first and second respondents.

[28] In the circumstances I cannot say that I am satisfied that any of the parties successfully established any legal right which grants them any authority to exercise ownership over the property. I am therefore of the opinion that this warrants proper and further investigations and determination by the relevant authorities as to who are the rightful persons to possess or reside in the property or who are the rightful owners thereof.

[29] Therefore prayer 4 of the plaintiff is in my opinion a fair and equitable solution. As correctly submitted by Counsel for the applicants, there will be no prejudice to any of the parties should prayer number 4 be granted.

[30] **ORDER**

Accordingly the following order is made;

1. The Fourth Respondent is authorized and/or ordered to cancel the title deed registered and held in the names of the First and Second Respondents under title deed reference number T20084/2011 for the property, alternatively to deregister the transfer and or registration of the property under title deed reference number T20084/2011 which has been mistakenly transferred and registered in the names of the First and Second Respondents on 28 November 2011 and to transfer and or register the property in the names of the first and Second Applicants, alternatively to transfer and or register the

property back to its original owner, namely the Provincial Government of the Free State.

2. No order is made as to costs.

B. LEFENYA, AJ

On behalf of the applicant: Adv. O.O. Molateli
Instructed by:
Matlho Attorneys
Bloemfontein

On behalf of the respondents: Adv. R.J. Nkhahle
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