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

Reportable:	**NO**
Of interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **1227/2023**

In the matter between:

SETSOTO LOCAL MUNICIPALITY	Applicant
and	
NKOPANE MICHAEL MOELETSANE	1st Respondent
NTHUSENG MOHOSHO	2nd Respondent
DEPARTMENT OF HUMAN SETTLEMENTS (FREE STATE PROVINCE)	3rd Respondent
THE REGISTRAR OF DEEDS	4th Respondent

Coram: JP DAFFUE J

Heard: 28 NOVEMBER 2024

Order granted: 28 NOVEMBER 2024

Reasons handed down: 29 NOVEMBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 29 NOVEMBER 2024.

Summary: A municipality brought an application for the cancellation of a deed of transfer in terms whereof it transferred immovable property to the first respondent more than two decades ago. The applicant's municipal manager deposed to the founding and replying affidavits. She relied mostly on inadmissible hearsay evidence and did not provide any proof that the applicant's municipal council had resolved to institute the proceedings. An application to postpone was dismissed and the main application was also dismissed with costs.

REASONS

DAFFUE J

[1] On 28 November 2024 the following order was granted:

'1. The application for postponement is dismissed.

2. The main application is dismissed with costs.

3. Reasons shall follow in due course and shall be sent electronically to the parties.'

[2] These are my reasons. When Adv Z Nyezi started to present her oral argument, I pointed out the following aspects and requested her to make appropriate submissions and/or provide me with authority:

a. the applicant's deponent, Me FN Malatjie, is the current municipal manager of the Setsoto Local Municipality, the applicant herein, who relied for her authority to act based on her appointment as municipal manager together with a delegation of powers attached as annexure FM2 to the replying affidavit;

b. certain signing powers were granted to her as municipal manager and nothing more;

c. no resolution was filed in terms whereof the applicant's municipal council resolved to launch application proceedings in order to declare the transfer of the immovable property to the first respondent invalid and for the cancellation of deed of transfer number T19263/2021 in terms whereof the first respondent is the registered owner of the property;

d. the deponent was appointed as municipal manager in 2022 and although she submitted that the contents of her affidavit fell within her personal knowledge, it is clear that she was relying on hearsay evidence in respect of about each and every allegation contained in her affidavits;

e. the aforesaid deed of transfer does not contain a single condition in favour of the applicant or any other entity, either as referred to by her, or at all;

f. the *causa* for the transfer is apparent from the deed of transfer, to wit that the property was sold on 26 March 2001 to the first respondent at a purchase price of R540.81;

g. the so-called Rapid Release Program relied upon by the deponent pertaining to conditions imposed upon persons to whom erven are granted, was not in existence in 2001, it being a new program which was developed in Gauteng during 2021 only, as stated by the first respondent and there was no reason not to accept his version.

[3] Upon pointing out the problems to Ms Nyezi, she requested an adjournment in order to obtain instructions. After about half an hour I was called back to the court. It appeared that there was no responsible municipal employee in court and that the applicant's attorney unsuccessfully tried to contact someone telephonically. No responsible person could be located to provide instructions. Therefore, Ms Nyezi requested a postponement in order to obtain instructions which, according to her, might possibly entail withdrawing the application.

[4] Mr Geyer on behalf of the first respondent, instructed by Legal Aid South Africa, opposed the application vehemently. He pointed out that the notice of motion was served on the first respondent in the beginning of 2023. In terms thereof the applicant intended to approach the court on 20 April 2023 for relief. The first respondent's answering affidavit was filed timeously on 11 May 2023, but no replying affidavit was forthcoming from the applicant for some time. In order to obtain finalisation, the first respondent even filed a notice in terms of rule 30, read with rule 30A. This caused the applicant to apply for condonation for the late filing of the replying affidavit. This interlocutory application was eventually granted on 15 August 2024, applicant to pay the costs thereof. The problems facing the applicant was to some extent set out in the answering affidavit and again in the first respondent's heads of argument. Consequently, the applicant could not be heard to say that it was taken by surprise.

[5] Postponements are not there for the taking. Applications for postponement shall be made timeously and it is expected of the applicant for postponement to explain their predicament fully and satisfactorily. The Constitutional Court held as follows in *Lekolwane and Another v Minister of Justice (Lekolwane)*:[1]

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public

[1] [2006] ZACC 19; 2007 (3) BCLR 280 (CC) para 17.

interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.'

[6] In *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as amici curiae)*[2] the Constitutional Court referred to *Lekolwane* with approval in the following words:

'In *Lekolwane and Another v Minister of Justice and Constitutional Development* this Court added the following factors to be considered in granting a postponement: (1) the broader public interest; and (2) the prospects of success on the merits. The following factors could non-exhaustively be added to the above: the reason for the lateness of the application if not timeously made; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that ultimately must be decided. In balancing these factors it is of vital importance to keep in mind that -

'(w)hat is in the interests of justice will . . . be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay.' (footnotes omitted)

[7] Ms Nyezi tried to save the day by handing up from the bar a judgment of the North West Division, Mahikeng which most definitely did not support her at all.[3] No doubt the deponent to an affidavit in motion proceedings does not need to be authorised by the party concerned to depose to the affidavit. However, the institution of the proceedings and the prosecution thereof must be authorised. It would be preposterous to accept that any municipal manager may apply to a court, not authorised by a resolution from the municipal council, to set aside transactions lawfully entered into years earlier, this being a classic example, in seeking the cancellation of a deed of transfer which was registered in the Deeds Registry in 2001, *ie* 23 years ago.

[8] When I dismissed the application for postponement, I invited Ms Nyezi to make any further submissions in respect of the main application, but she declined my invitation. When Mr Geyer started to address me, I informed him that it was not

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[2] 2007 (5) SA 620 para 11.

[3] Unreported judgment, *Ditsobotla Local Municipality v Carewell Holdings 5 (Pty) Ltd and Another* (1396/22) [2023] ZANWHC 153 (1 September 2023).

necessary as I was satisfied that there was absolutely no merit in the application. Consequently, the above order was made.

[9] It is necessary to say something more about the merits of the application. I mentioned earlier that about no allegation contained in the founding and replying affidavits falls within the personal knowledge of the deponent. In fact, she could not even say that documents relating to the transactions between the applicant and the first respondent were kept under her control and that she relied on the contents thereof. Apparently, a fire broke out at the municipal offices during 2011 and most of the municipality's documents were destroyed in the process. No application has been made for the hearsay evidence to be allowed in accordance with the provisions of s 3 of the Law of Evidence Amendment Act 45 of 1988. Therefore, all allegations by the deponent pertaining to the relationship between the applicant and the first respondent as well as the transactions allegedly concluded between them are inadmissible and disregarded.

[10] The applicant sought cancellation of the first respondent's deed of transfer. Section 6(1) of the Deeds Registries Act 47 of 1937 is applicable. It reads as follows: '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.'

[11] *In casu,* no onus was placed on the first respondent to prove his ownership of the immovable property, to wit erf 6645, situated in the town Meqheleng (extension 7), district Ficksburg, Free State Province, measuring 328 m^2 and held by deed of transfer T019263/2001, attached as annexure NMM01 to the answering affidavit. The objective evidence could not be disregarded.

[12] Although, registration on its own is not sufficient to transfer a real right to immovable property, it is apparent from the deed of transfer that the necessary mental element was also present insofar as it is confirmed therein that the property was sold by the applicant to the first respondent at a purchase price of R540.81. No doubt, *ex facie* the document the applicant as transferor intended to transfer the property to the first respondent as transferee who accepted the acquired right whereupon the

registration took place. In our law the abstract theory of transfer applies. The Supreme Court of Appeal dealt with the principle as follows:[4]

'In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property, is effected by registration of transfer in the Deeds Office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement.' (authorities referred to omitted)

The applicant could not point out any defects in the real agreement between the transferor and transferee.

[13] A municipal manager is the head of administration of a municipality and the responsible and accountable officer thereof. Their functions are set out in s 55 of the Local Government: Municipal Systems Act 32 of 2000. None of the powers set out in s 55 divest a municipality's municipal council of its executive powers. Nugent JA made this clear in *Manana v King Sabata Dalindyebo Municipality*.[5] I quote:

'In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority – which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power.'

[14] We would become a chaotic society if newly appointed municipal managers may as they wish *inter alia* seek cancellation of deeds of transfer registered in the name of transferees. The relief sought in the notice of motion shall be referred to the municipal council who will have to debate the issue after having been informed of all relevant issues, whereupon it may or may not resolve to take action for cancellation of the deed of transfer *in casu*.

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[4] *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) para 22.
[5] [2011] 3 All SA 140 (SCA) para 17.

[15] I referred to the allegation that conditions were imposed upon the first respondent. Again, this is pure hearsay, but most importantly, the deed of transfer does not contain any conditions whatsoever. There is also no proof that the particular property has been reallocated to another person and even if so, how this was legally done.

[16] The deponent failed, obviously because she is totally unaware of the history of the matter, to explain why it took the applicant more than two decades to seek the relief that was now sought. The only objective reason for taking action belatedly is the first respondent's application in the magistrates' court in Ficksburg, claiming eviction of the people occupying the RDP house which was built on his property. The eviction application was instituted as far back as 2021 under Ficksburg case number 43/2021. That application was postponed several times. The applicant is apparent opposing the relief sought. No doubt this High Court application was instituted in order to prevent the eviction application to be granted.

[17] In conclusion, the first respondent's point *in limine* pertaining to the absence of a resolution by the applicant's municipal council to institute action for the relief sought is valid and was upheld. Although unnecessary to consider the other aspects mentioned above, it is reiterated that the applicant's deponent relied on inadmissible hearsay evidence which carried no weight at all and had to be ignored. The applicant made out no case in light of the objective facts and the first respondent's version.

[redacted]

JP DAFFUE J

Appearances

For appellant:	Adv Z Nyezi
Instructed by:	Mhlokonya Attorneys
	Bloemfontein
For first respondent:	Mr W Geyer
Instructed by:	Legal Aid South Africa
	Bloemfontein