

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO:7081/2012

In the matter between:

ETHEKWINI MUNICIPALITY

Applicant

and

SINDISWE B PHYLLIS AND 24 OTHERS

Respondents

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JUDGMENT

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Delivered : 12 November 2012

M PILLEMER, AJ:

[1] The Applicant, the Ethekwini Municipality, seeks an order against a number of individual respondents for the cancellation of the registration of residential sites in their names in the Township of Luganda coupled with an order that the registrar of deeds is authorised "to act accordingly". The Applicant in addition prays for a declaration that it is entitled to re-allocate the sites to other persons as it deems meet.

[2] The papers reveal that each of the respondents is the registered owner of an erf in the township and that a title deed has been issued to reflect such ownership; registration having occurred in terms of s9 of the Less Formal Township Establishment Act, 113 of 1991.

[3] In terms of s9(7) of the Act "Ownership of the erf shall be deemed to have been transferred on the date of registration by the registrar of a deed of transfer".

[4] What is sought therefore is an order cancelling the title deeds and depriving the respondents of ownership of their land and conferring on the applicant the right to allocate what was the respondent's property to others.

[5] The Registrar of Deeds has not been cited as a respondent and the registrar has not been given the requisite seven days notice required by s 97 of the Deeds Registries Act, 1937. I was informed from the bar that it was only after I had asked a few days ago to see the report from the Registrar of Deeds that the papers were served on him and that a report is not yet available.

[6] The properties in Luganda Township were transferred at various dates in 1995. Some of the persons who received transfer

have not collected their title deeds. The respondents were alleged to fall into this category.

[7] The deponent to the founding affidavit is the Manager: Conveyancing at the municipality. He has annexed copies of the title deeds of the respondents that reflect their ownership, has explained that these were issued by the then Town Council of the Borough of Pinetown, which had developed the township of Luganda in terms the Less Formal Township Establishment Act and goes on to explain that it took a while for the title deeds to become available for collection and that some of the owners did not come to collect them. The Borough of Pinetown was incorporated into the Durban Metropolitan Council in 1995 and persons who would have had to report to the Pinetown offices now had to report to the Durban offices to collect their certificates. He testifies that the respondents failed to collect their certificates and failed to put up structures on the sites as was expected of them when the sites were allocated. He then explains the attempts made to contact the respondents, which largely involved publication in newspapers in Durban. Enquiries were also made at the sites themselves from occupants in the area initially to no avail in relation to all of the respondents. There were some who have been located since the application was launched and so no relief is being sought against them. There is some holding cost to the municipality for grass cutting and the like and there are

people on the waiting list for housing who could take up the sites. The deponent then asked for the relief "in the interest of everybody".

[8] An affidavit is also put up of a Mr Mhlongo, who is described as a Principal Professional Officer employed by the municipality. He confirms the contents of the main affidavit as it refers to him. There is no reference to him whatsoever in the main affidavit so his affidavit is completely pointless and takes the matter no further.

[9] For a reason that is not apparent on the file the court was persuaded to issue a *rule nisi*, which was then served by publication in two newspapers. Considerable costs have been incurred to date and while the social need to have the land developed and for the owners to make meaningful use of their property is obvious, the applicant had to have a cause of action before it could come to court to deprive the respondents of their ownership of the land that had been transferred to them.

[10] The fundamental difficulty the applicant faces is that in terms of s25 of the Constitution no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Mr Mkhize, who appeared for the applicant, furnished detailed written argument and in his

oral address attempted to persuade me that there is a law of general application that applies and entitles the applicant to the relief. He placed reliance on regulation 11 in Chapter IV of the Township Establishment and Land Use Regulations, 1986 promulgated under the Black Community Act of 1984 which make provision for an agreement to contain terms and conditions relating to a breach and that such agreement must deal *inter alia* with the failure to erect improvements within a given period which will then be regarded as a breach of the terms on which the land was made available and the land may be withdrawn.

[8] I have misgivings as to whether the regulations apply. But even if they do the regulations are of no assistance to the applicant without it first proving the terms of the agreement in terms of which the land was allocated and the breach giving rise to the right to withdraw the land. Applicant fails to do this, making no mention of the contracts in the papers and I was informed from the bar that it is having difficulty locating the agreements that were signed at the time. In the absence of an enforceable contractual term that would confer such a right, short of expropriation there is no immediately apparent basis in law to cancel the respondents' ownership and give their land to someone else.

[5] Mr Mkhize, in the alternative when it was apparent that he was unlikely to persuade me that he was entitled to relief on the papers, asked for the application to be adjourned to enable the applicant to attempt to locate the contracts and to supplement the papers. There does not appear to me to be any point in doing this. If a cause of action can be sustained when and if the contracts are located then proceedings relying upon that cause of action can be brought. The papers in the present application do not make a cause of action and there is no reason for an application that is fatally defective to remain in limbo.

[6] The application is dismissed.

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M PILLEMER, AJ

Counsel for the Applicant:

M I Mkhize

Applicant's Attorneys:

Mbele Dube and Partners

Date of hearing : 9 November 2012

Date of Judgment : 12 November 2012