THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

***Van Wyk v The MEC: Department of Local Government and Housing of the Gauteng Provincial Department* (1026/2018) [2019] ZASCA 149 (21 November 2019)**

From: The Registrar, Supreme Court of Appeal

Date: 21 November 2019

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of Khumalo J sitting in the Gauteng Division of the High Court, Pretoria. The appeal was upheld with costs.

The matter concerned two properties, referred to as Erf 302 and Erf 537, Moreletapark, which the appellant had purchased in two separate transactions from the Gauteng Department of Development Planning and Local Government (the department). The first of these, involving Erf 302 (the first property), was concluded on 15 June 2000 when the property was knocked down at a public auction to the appellant for the sum of R570 000. At the conclusion of the auction the parties appended their signatures to the deed of sale and the appellant performed his obligations in terms thereof, including the payment of a deposit in the amount of R57 000 (10%) and securing the balance of the purchase price by way of a bank guarantee.

However, five years later the appellant had still not obtained registration and transfer of the first property. In a letter dated 17 January 2005 the department explained that it was having difficulty in effecting transfer because Erf 302 was notarially tied to Erf 537 (the second property). The department offered the appellant the second property for an amount of R30 000, which it had determined to be the market value, acceptance of which would ensure finalisation of the transaction. The appellant accepted the offer to pay an additional amount, at which point the parties entered into a second written agreement of sale in respect of the second property for the sum of R30 000.

Five months passed before the department addressed a further letter to the appellant in which it recorded that the transfer process will be delayed because the properties have not been vested with the Gauteng Provincial Government.

The department thereafter dispatched a memorandum to the Department of Land Affairs (what is now the Department of Rural Development and Land Reform) with a view to obtaining a signed certificate, in terms of Item 28(1) of Schedule 6 to the Constitution, confirming the vesting of Erf 302 in the name

of the Gauteng Provincial Government and to obtain the concurrence of the Minister for the disposal of the same. The recommendation was approved by the Department of Land Affairs on 10 October 2008 and the Item 28(1) certificate was issued. But this was of little moment: on 14 April 2010 the department addressed yet another letter to the appellant, this time alleging that the agreement of sale concluded pursuant to the auction, as well as any other agreement in relation to the two properties, is of no force and effect – apparently due to the fact that at the relevant time, the properties did not vest in the Gauteng Provincial Government but in the National Government, which only the President has authority to dispose of.

Aggrieved by the decade of delay, the appellant issued summons for an order directing the respondent to sign all documentation and perform all such acts as may be necessary to effect transfer of the first and second properties to himself. The high court dismissed this claim but awarded the appellant the alternative relief that he sought, namely repayment of the deposit of R57 000 plus interest and costs. The main claim was dismissed on the basis of a misunderstanding of the law on sale. The high court held that, for an agreement of sale to be valid, the seller needs to be the owner of the thing sold, or have been authorised to sell by the owner of the thing. The SCA disagreed with this finding and held that it is now well-established that a transfer of ownership in the thing sold is not an essential feature of the contract.

The high court also referred to issues such as the invalidity of the Item 28(1) certificate, that the properties were not vested in the Provincial Government at the time of sale, and that it was beyond the MEC's authority to dispose of the same. However, the SCA held that these issues were not properly triable in the case before the high court because they were never raised by the respondent on the pleadings. It further reiterated the importance of pleadings in the course of litigation for their role in defining the issues as well as the scope and ambit of the dispute between the parties.

The SCA nevertheless held that the Acting Director-General of the Department was acting within the powers delegated to him in issuing the Item 28(1) certificate. In any event, the certificate could not simply be disregarded as if it had never existed, for unless and until set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot simply be overlooked. By relying on the invalidity of the Item 28(1) certificate, the high court had in effect upheld a collateral challenge which the respondent had not and could not raise in the proceedings.

In the result, the appeal was upheld with costs.
