

Fake clearance certificate: Is the transaction still valid?

Section 118 of the *Local Government: Municipal Systems Act, 32 of 2000* stipulates that a registrar of deeds may not register the transfer of property except on production to that registrar of a certificate, issued by the municipality, which certifies that all amounts that became due in connection with a property during the two years preceding the date of application for the certificate have been fully paid. In practice, this is referred to as a '*clearance certificate*'.

Section 92 of the *Deeds Registries Act, 47 of 1937*, also provides that transfer of land shall not be registered unless accompanied by a certificate of a competent public revenue officer that the taxes, duties and fees payable to the Government or any provincial administration on the property, has been paid.

Translation: *No clearance certificate, no transfer.*

These two sections are arguably the cause of most delays, and frustration, when it comes to property transactions. So much so, that it appears that there are some who have turned to fraudulent and illegal measures to obtain clearance certificates.

This raised a question which was answered in the case of *Baladakis N.O and Others v Jenzen and Another*; Is a transaction registered on the basis of a fraudulent clearance certificate valid?

In the *Baladakis-case*, the purchaser bought a property from the seller, whereafter the property was duly transferred to the purchaser in the relevant Deeds Office. When the purchaser attended the municipality to open a new municipal account on its name, the purchaser was informed that there was still an amount due to the municipality in respect of the property. The purchaser then provided the clearance certificate, as proof that the municipal account was paid up. The municipality, however, informed the purchaser that the clearance certificate was invalid as it was signed by a person who left the municipality's employment 2 years prior to the date of issuing the certificate, and that an amount was still due to them.

Naturally, the purchaser addressed a letter to the conveyancer and the seller in this regard. The conveyancer indicated that the clearance certificate was provided to them by the seller, and that they had no part in the alleged fraud. The seller, on the other hand, stated that he did not owe any money to the municipality and that the municipality's billing was incorrect. The Seller further alleged that he made calls to the municipality to explain that there are credits due on his account which had to be adjusted. After this, so the seller alleged, the clearance certificate was issued.

The purchaser, desperate to obtain full enjoyment of its property, applied to court for relief against the municipality to force the municipality to open a new account in the name of the purchaser. The municipality, in return, lodged a counterclaim, seeking an order to set the clearance certificate aside, effectively nullifying the transaction.

The court held that it was not in a position to declare the clearance certificate valid or invalid, and that further evidence was required in this regard. The court did, however, chastise the municipality for failing to take any further steps after discovering the fraudulent clearance certificate. Instead, the municipality tried to recover the debt due from the seller by holding the purchaser 'ransom' by way of refusing to open a new municipal account for the purchaser. This, the court held, was contrary to the decision of *Jordaan and Others v Tswane Metropolitan Municipality and Others*, where the Constitutional Court decided that new owners cannot be held liable for the municipal accounts of previous owners as this boils down to arbitrary deprivation of property.

In the current matter, the court held that the purchaser was the innocent party and, relying on the case of *Du Plessis v Proffitius and Another*, held that ownership can pass even in instances of fraud.

Consequently, the municipality was ordered to reflect the purchaser as the new owner of the property and to open a municipal account in the name of the purchaser. The issue in respect of the arrear municipal account was to be dealt with by the municipality and the seller, without affecting the purchaser.

It should, however, be noted that this judgement was handed down by the Gauteng Division of the High Court in Johannesburg, which may still be taken on appeal to the Supreme Court of Appeal and/or the Constitutional Court. We are

also of the view that, should the purchaser have played a part in the fraudulent obtaining of the clearance certificate, the court's decision would have been very different.

Conveyancers were, however warned by the court in paragraph 42 of the judgement: "The Deed Registry Act 47 of 1937 assigns onerous responsibilities to conveyancers. It is imperative that conveyancers are meticulous and methodical in the collecting and studying of information and supporting documentation. The duty to obtain accurate facts and to process correctly a conveyancing transaction is assigned to the conveyancer by the Deeds Registry Act and Regulations especially Section 15, 15A and Regulation 43, 44 and 44A".

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