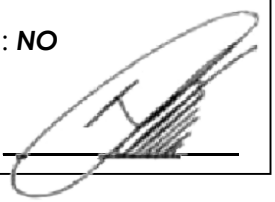
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***7th December 2020*** Signature: 

CASE NO: 8398/2020

DATE: 7TH DECEMBER 2020

In the matter between:

MKOKO, JOSEPHINA NONTOMBI Applicant

and

JOJA (previously SIBEKO), LINDIWE ESTHER First Respondent

REGISTRAR OF DEEDS, JOHANNESBURG Second Respondent

Coram: Adams J

Heard: 17 November 2020 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 7 December 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11h0 on 7 December 2020.

Summary: Opposed application – final mandatory interdictory relief – factual dispute to be decided on the basis of the *Plascon-Evans* rule – first

respondent's version cannot and should not be rejected on the papers – applicant's application refused –

ORDER

---

(1) The applicant's application against the first respondent is dismissed.

(2) There shall be no order as to costs.

JUDGMENT

Adams J:

[1]. This is an opposed application by the applicant for vindicatory relief in relation to her alleged undivided half share in immovable property in Tshongweni Township in Katlehong ('the property'). An unpleasant family feud between two sisters – the applicant and the first respondent – lies at the heart of the application. Over twenty years ago during 1999 the property was registered in the name of the first respondent. Her sister, the applicant, alleges – rather belatedly and some twenty years after the fact – that the transfer of the property into the name of the first respondent was done unlawfully. The registration of the transfer, so the applicant claims, was a fraud perpetrated on her and to her detriment by her sister, the first respondent.

[2]. The applicant therefore applies for the vindication of her undivided half share in the property. In her notice of motion the applicant requests that the title deed under which the property is held by the first respondent be cancelled and also for an order directing the Registrar of Deeds to re-register the property into both the names of the applicant and the first respondent.

[3]. The application is based on the provisions of section 6 of the Deeds Registries Act, Act 47 of 1937 ('the Act') for the cancellation of Deed of Transfer number T67070/99 in favour of the first respondent in respect of Erf 1938 Tshongweni Township ('the property'). In terms of the said Deed of Transfer,

the transfer of the property, which was directly from the Gauteng Provincial Government to the first respondent, was registered on the 15th of November 1999.

[4]. Section 6 of the Act provides as follows:

'6 **Registered deeds not to be cancelled except upon an order of court –**

(1) 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.

(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.'

[5]. The question to be decided in this application is whether the transfer of the property into the name of the first respondent was valid and based on a lawful and sustainable *causa*. That question should be decided against the backdrop of the relevant facts, some of which are common cause and some of which are disputed. Those facts will be dealt with in the paragraphs which follow. However, before traversing the relevant factual background, I interpose to make two observations. Firstly, a feature of this case which stands out like a sore thumb is the fact that important developments herein happened over two decades ago without the applicant seriously challenging or questioning those events. Secondly, the first respondent in these proceedings was unrepresented and she represented herself and appeared before court in person at the hearing of this application on the 17th of November 2020. She was nevertheless able to place before court those facts which, as will be seen, carried the day.

[6]. As already indicated, the applicant and the first respondent are sisters. They are the daughters of the late Nana Johanna Sibeko ('the deceased'), who up and until her death on the 3rd of January 1985 was 'the owner' of the

property. I say that the deceased was 'the owner' of the property, although this is not strictly speaking factually correct – the property was never registered in the name of the deceased. The deceased evidently was the holder of real rights in the property, including her right and that of her family to occupy and use the property in terms of a long-term leasehold. A permit or a certificate of occupation would have been issued in favour of the deceased in respect of the property by the government of the day, which, at the time was the East Rand Administration Board.

[7]. After the death of the deceased, the first respondent on the 26th of April 1985 at a family meeting held at the Alberton Magistrates Court at which matters pertaining to the deceased estate was discussed, received cession and assignment of all rights, title and interest in and to the property from the family, presumably referring to the heirs in the estate. On the basis of this cession and assignment the first respondent on the 10th of September 1985 was issued by the East Rand Administration Board with a 'Certificate of Occupancy' in relation to the property. It is the case of the first respondent that all of the aforegoing legal steps in the processes relating to the property were taken with the applicant's knowledge and with her full consent. The applicant, so the first respondent avers, was present at the 'family meeting' on the 26th of April 1985 and she signed the cession / assignment as one of the next of kin of the deceased. Similarly, on the 10th of September 1985, so the first respondent alleges, the applicant was present at the offices of the East Rand Administration Board and co-signed, as a witness, the certificate of occupancy in favour of the first respondent, thus giving her consent to the first respondent acquiring all the rights, title and interests in and to the property, notably the right to occupy same with her family.

[8]. With the advent of democracy during 1994 also came improvements in the lives of ordinary South Africans, including the acquisition of real rights in immovable property previously limited mainly to rights to occupy dwellings. The first respondent took advantage of the new developments. And on the strength of the certificate of occupancy issued in her favour on the 10th of September 1985 the first respondent, having applied for a conversion of her occupancy

right to full ownership rights, took transfer of the property. This transfer the applicant alleges was done fraudulently and underhandedly at the instance of the first respondent, as was the case with the preceding cession / assignment on the 26th of April 1985 and the Certificate of Occupancy dated the 10th of September 1985. In sum, the case of the applicant in this application amounts to a conspiracy of epic proportions implicating not just the first respondent but also the Magistrates Court in Alberton and the office of the East Rand Administration Board – the documentation generated by the Alberton Magistrates Court, the East Rand Administration Board and the Office of the Registrar of Deeds were all, according to the applicant, forgeries and fraudulent. The applicant alleges that the first respondent had through fraudulent means and by forging official documentation caused the property to be transferred into her name out of the estate.

[9]. In her founding affidavit the applicant makes out her case that their mother, the deceased, died intestate, which meant that she and the first respondent should have inherited as the only surviving descendants of the deceased equal undivided shares in the property. She also states that at no point did she cede, assign or donate her fifty percent ownership right in the property to the first respondent or to anyone else for that matter. This is in direct contradiction to the version of the first respondent in her answering affidavit.

[10]. The applicant states that she is entitled to one undivided half share of the property. The first respondent by stealth had taken transfer of the whole property and withheld from her, so the applicant alleged, this fact. However, all was to be revealed, according to the applicant, when there was a fall-out between them during 2011 when the first respondent demanded payment in respect of arrear rental and related charges from the applicant's daughter, who, at the time, was a tenant on the property. It was then that she discovered, so the applicant claims, this enormous fraud which the first respondent had perpetrated on her.

[11]. On the other hand, the first respondent claims that her actions were all regular and above board. She denies in the strongest possible terms that the

official documentation from the Magistrates Court and from the office of the *East Rand Administration Board* is a forgery. She remains adamant that the applicant, as one of the next of kin of the deceased present at the family meeting before the Alberton Magistrate on the 26th of April 1985, consented to and approved her acquisition from the deceased estate of the right, title and interest in and to the property.

[12]. In substantiation of her case, the first respondent alleges that at the time of her death their mother 'owned' two properties in the Katlehong area – those were (1) the property which is the subject of the litigation *in casu,* and (2) the property presently and since 1985 occupied by the applicant. The agreement between the two sisters, as per their mother's wishes, was to the effect that the division of the deceased estate would be on the basis that each one of them would acquire ownership of one of the properties previously owned by their mother. This agreement was embodied in the cession at the family meeting on the 26th of April 1985 and the certificate of occupancy dated the 10th of September 1985.

[13]. The applicant denies this version and alleges that she acquired her own property on her own and not from her mother. What is however peculiarly odd is the fact that the certificate of occupancy or the 'Site Permit', as it was called, in favour of the applicant in respect of her property was issued on the 13th of September 1985, whereas the 'Certificate of Occupancy' in favour of the first respondent was issued on the 10th of September 1985. This fact, in my view, lends substantial credence to the first respondent's story. It is not difficult to envision that these two certificates issued within days of each other were part and parcel of an arrangement in terms of which each of the two sisters would take one of the two properties given to them by their mother.

[14]. In this matter, there is clearly a factual dispute between the parties which goes to the heart of the matter. The dispute in a nutshell is whether the events culminating in the transfer of the property into the name of the first respondent happened pursuant to an agreement between the parties with its foundation as their mother's last wish.

[15]. In *Plascon-Evans v Van Riebeeck Paints* 1984 (3) 623 (AD), the principles relative to the assessment of factual issues in motion proceedings are set out as follows at pg 634:

'It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO*, 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd*, 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see e g *Rikhoto v East Rand Administration Board and Another*, 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries* case, supra at 924A).

[16]. So, I reiterate that it is clear that the main dispute between the parties is a factual one. The question is this: Which one of the two versions is to be accepted? In deciding that question, it should be borne in mind that this is an application and factual disputes are to be decided on the basis of the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited*, 1984 (3) SA 623 (A).

[17]. The general rule is that a court will only accept those facts alleged by the applicant which accord with the respondent's version of events. The exceptions

to this general rule are that the court may accept the applicant's version of the facts where the respondent's denial of the applicant's factual allegations does not raise a real, genuine, or *bona fide* dispute of fact. Secondly, the court will base its order on the facts alleged by the applicant when the respondent's version is so far-fetched or untenable as to be rejected on the papers.

[18]. In *Room Hire Co (Pty) Limited v Jeppe Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T0, it was held that:

'A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary investigation ... and to ascertain whether the denials are not fictitious and intended merely to delay the hearing.'

[19]. It is necessary to adopt a robust, common-sense approach to a dispute on motion. If not, the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. A Court should not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

[20]. The applicant submits that the version of the respondent should be rejected on the papers.

[21]. If regard is had to the evidence before me as a whole, it cannot be said that the version of the first respondent is so far-fetched that it can be rejected on the papers. In fact, in my view, the first respondent's story has a ring of truth to it. I have already alluded to the fact that it seems just too much of a coincidence that the applicant and the first respondents are issued with certificates of occupancy of their respective properties within days of each other. This common cause fact, to my mind, is a perfect fit for the first respondent's version – not so for the applicant's denial of the arrangement. Moreover, I find it hard to believe that for a period in excess of thirty years the applicant fails to raise the alarm on the perpetration of a massive fraud on her by none other than her very own sister. The point is that, in the context of the aforegoing, the first respondent's story may very well be true.

[22]. There is one other aspect which, in my view, seems to favour the first respondent's version. That relates to the fact that the property was transferred to the first respondent in terms of the provisions of s 5 of the Conversion of Certain Rights into Leasehold of Ownership Act 81 of 1988. This provision, as we know, involves the consultation with all interested parties in a property. Persons with an interest in the property would have been invited by the Provincial Government of Gauteng to stake their claim. The rhetorical question to be asked is why, during this process, the applicant did not alert the authorities to her supposed claim to one half undivided share in the property.

[23]. Howsoever I view this matter and if regard is had to the evidence, I cannot reconcile myself with a suggestion that the first respondent's version is far-fetched. I am therefore not prepared to reject same on the papers, which means that the applicant's application against the first respondent stands to be dismissed.

Costs

[24]. The general rule in matters of costs is that the successful party should be given her costs, and this rule should not be departed from except where there are good grounds for doing so.

[25]. *In casu*, the first respondent was unrepresented throughout these motion court proceedings. She would not have incurred legal costs and she is therefore not entitled to an award for costs.

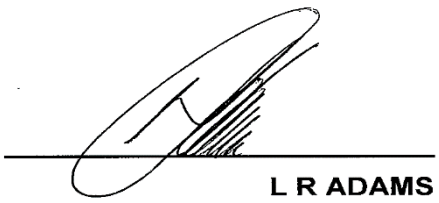
[26]. I therefore intend awarding no order as to costs.

Order

Accordingly, I make the following order:-

(1) The applicant's application against the first respondent is dismissed.

(2) There shall be no order as to costs.



L R ADAMS

Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	17th November 2020 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams* digital platform
JUDGMENT DATE:	7th December 2020 – judgment handed down electronically
FOR THE APPLICANT:	Advocate R M Mthembu Cell no: (076) 742-2542 Email: rmthembu@gmail.com
INSTRUCTED BY:	S E Dube Attorneys Incorporated Cell no: (079) 542-9518 Email: info@dubeattorneys.co.za
FOR THE FIRST RESPONDENT:	In person
INSTRUCTED BY:	In person
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance