

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 36307/2018**

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED.  
DATE: 14 December 2021

In the matter between: -

**NDLOVU, TOZANE GLADYS**

**obo LATE ZIYONI GEDEON NDLOVU**

**NDLOVU, TOZANE GLADYS**

First applicant

Second applicant

and

**MONAMA, CONSTANCE**

**MASTER OF THE HIGH COURT**

**REGISTRAR OF DEEDS, JOHANNESBURG**

First respondent

Second respondent

Third respondent

**J U D G M E N T**

**DELIVERED:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 14 December 2021.

## **INTRODUCTION**

[1] The applicant<sup>1</sup>, the widow of the late Ziyoni Gedeon Ndlovu (*“the deceased”*) who died on 24 July 2015, and the executrix of the estate of the deceased, seeks various forms of relief in respect of an immovable property described as Erf [...], Jabulani, Soweto, with physical address [...] Fihla Street, Jabulani, Soweto (*“the property”*).

[2] Firstly, the applicant seeks an order declaring the deed of sale dated 2 November 1988 as valid and the deed of sale concluded by the deceased, the first respondent and Mandhla Patrick Mota (the previous owner of the property) (*“Mota”*) invalid. Then the applicant seeks an order removing the first respondent, who alleges to be the customary wife of the deceased and who resides at the property, as co-owner of the property.

[3] Both the applicant and the first respondent lay claim to the property.

## **THE APPLICANT’S CASE**

[4] To her founding papers, the applicant attached copies of letters of authority issued by the second respondent (the Master) in support of her appointment as executrix of the estate of the deceased. The applicant’s *locus standi* as executrix is not disputed. The fact that the deceased died intestate is similarly not disputed.

[5] The applicant in support of the allegation that she is the surviving spouse of the deceased, attached a copy of an abridged marriage certificate to the founding papers.<sup>2</sup> The marriage certificate bears a date stamp of the 15<sup>th</sup> of February 1991 and a handwritten note which states *“community of property excluded”*. According to this document the applicant married the deceased on the 9<sup>th</sup> of July 1974. The applicant and the deceased married in accordance with the prevailing law at the time, which was the Black Administration Act, 38 of 1927 (*“the BAA”*). The

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<sup>1</sup> A reference to the “applicant” is an interchangeable reference to the first and second application where relevant.

<sup>2</sup> Founding affidavit, annexure “TGN4”, p 001-20.

applicant's marital status vis-à-vis the deceased is not disputed either<sup>3</sup>, although the first respondent avers that the deceased and the applicant were estranged from one another at the time of his passing.

[6] Three adult children were born of the marriage relationship between the applicant and the deceased.

[7] The applicant avers that she holds a 50 % share in the property in that she contributed financially to the acquisition of the property which was during a time when she was employed at Adcock Ingram (Pty) Ltd and retired in 2006.

[8] The applicant explains that during her marriage to the deceased they firstly acquired an immovable property situated at 696 Lehabe Street, Diepkloof, Soweto and thereafter acquired the property in question for the purpose of storing the minibus taxis used for their minibus taxi business.

[9] On the 2<sup>nd</sup> of November 1988 the applicant and the deceased purchased the property from Mota. At paragraph 9.5 of the founding papers the applicant states that Mota is unable to attest to an affidavit confirming these facts. She however attached a document purporting to be a deed of sale.<sup>4</sup> Annexure "TGN5" is a handwritten document dated 2 November 1988 and reads as follows: -

*"The total amount of the house is thirty five thousand: R35,000.00.*

*Mr Gedion Ndlovu Paid the sum of eighteen thousand three hundred rand: R18,300.00 to Mr Patrick Mota ID number [...] as Depot of House number [...] Jabulani on the 2-11-88. The balance is sixteen thousand seven hundred: R16,700.00. 1 Patrick Mota; 2 Gedion Ndlovu."*

[10] The documents therefore bears the date of the 2<sup>nd</sup> of November 1988, describes the property, identifies the seller (Mota) and purchaser (the deceased), stipulates the purchase price of R35 000.00 and records that a deposit of R

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<sup>3</sup> Answering affidavit, paragraph 22, p 003-10.

<sup>4</sup> Founding affidavit, annexure "TGN5"; p. 001-21

18 300.00 had been paid. Both the names of Mota and Ndlovu appears again towards the end of the document, where one would ordinarily expect to find the signatories to a deed of sale.

[11] Regarding payment of the outstanding balance, the applicant states at paragraph 9.8 of the founding affidavit that the balance of R16,700.00 *“was later paid on the date of which I cannot remember but it was in the year 1989 after which we then moved into the property and occupied it. My deceased husband and I then forgot to have ownership of the property transferred to us”*.<sup>5</sup>

[12] The applicant states that the deceased vacated the common home in Diepkloof in 2008 and stayed at the property with the children in order to guard the taxis. He would visit the Diepkloof house *“now and then or alternate between the two houses”*.<sup>6</sup>

[13] The applicant tells the Court that she was informed that in 2011 the first respondent moved in with the deceased at the property. During 2013 the deceased fell ill and he was in and out of hospital until his death in 2015. After his passing, the applicant went through his personal document file and found a title deed dated 23 March 2015 reflecting the deceased and the first respondent as the owners of the property.<sup>7</sup>

[14] The applicant thereupon attended at the office of the Registrar of Deeds and obtained copies of a deed search reflecting all the previous transactions over the property, transfer duty receipt issued by the South African Revenue Service reflecting both the deceased and the first respondent as unmarried, and a power of attorney to pass transfer signed by Patrick Mota reflecting the date of purchase as April 2014.

[15] The applicant states that the first respondent was married to another man, Mohlahle Solomon Monama (*“Monama”*) in accordance with the civil law on the 5<sup>th</sup> of July 1993 and avers that she is still so married. The applicant attached a copy of an

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<sup>5</sup> Founding affidavit, paragraph 9.8, p 001-11.

<sup>6</sup> Founding affidavit, paragraph 9.9, p 001-12.

<sup>7</sup> Founding affidavit, annexure “TGN6”, p 001-22 to 001-23.

abridged marriage certificate of the first respondent and Monama. The first respondent and her husband have their own house according to the applicant. Neither her marriage to Monama nor the allegation that she owns a house with him, is disputed<sup>8</sup> by the first respondent.

[16] The applicant asserts that since the first respondent is still married to another man in terms of the Marriage Act, 25 of 1961, there can be no valid customary marriage “*when one of the parties is a partner in an existing civil marriage*”.<sup>9</sup>

[17] The applicant alleges that the transfer of the property was fraudulent in that the power of attorney indicates that the property was sold in April 2014 whilst the title deed reflects the purchase date as the 22<sup>nd</sup> of May 2014. Moreover, the applicant disagrees with both these dates as it is her case that the property was bought by her and the deceased on 2 November 1988.

[18] The further fraudulent act that was perpetrated, according to the applicant, is the fact that both the deceased and the first respondent failed to disclose their true marital status to the prejudice not only of the applicant, but also to Monama.

[19] Ultimately, the applicant concludes that the first respondent has no legal right over the property, that she has her own house and has not contributed in any form to the acquisition and maintenance of the property.

## **THE FIRST RESPONDENT’S CASE**

[20] The first respondent avers that she and the deceased moved in together in 1999 and entered into a customary marriage on the 7<sup>th</sup> of July 2000. On the 7<sup>th</sup> of July 2000 the deceased, according to the first respondent, sent a delegation who paid labola to her family in the amount of R2,500.00. She further states that on the same day she was handed over to the deceased’s family and a celebration followed. She attached several affidavits deposed to by the delegates to her papers who confirm the conclusions of the customary marriage

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<sup>8</sup> Answering affidavit, paragraph 33, p 003-13.

<sup>9</sup> Replying affidavit, paragraph 6.5, p 004-6.

[21] At paragraph 9 of her answering affidavit the first respondent states as follows: -

*“We have therefore been customarily married since 2002 and our marriage was ended by his death. I am in [sic] a verge of registering our customary marriage.”<sup>10</sup>*

[22] When her and the deceased moved into the property, the first respondent was advised by the deceased that the property belonged to him, but that he was still paying the purchase amount of R35,000.00 to Mota. At the time she moved in, the remaining amount was R5,000.00 to complete the transaction of R35,000.00. The first respondent avers that when she and the deceased paid the remaining R5,000.00, Mr Mota refused to transfer the property to the deceased's name and claimed that the amount of R35,000.00 was too little. He then demanded an additional R40,000.00 to make up the full purchase price of R75,000.00.

[23] The first respondent alleges that she paid the remaining R40,000.00 by way of a lump sum of R10,000.00 and monthly instalments of R5,000.00 until the R40,000.00 was paid in full in May 2014. She obtained the money from her society and from a loan that she took from African Bank.

[24] The first respondent attached an affidavit deposed to by Mota on the 13<sup>th</sup> of February 2019 at Protea Glen police station to her answering affidavit where Mota stated as follows: -

*“I, the undersigned, Mandhla Patrick Mota, ID [...] residing at 2310 Mzobe state under oath that on the 22<sup>nd</sup> May 2014 I sold the house stand number [...] Fihla Drive, Jabulani to the following people:*

*Ziyoni Gedeon Ndlovu ([...]) and Constance Monama (ID number [...]).*

*The 350 m<sup>2</sup> was worth R35,000.00 but later on my family demanded R40,000.00 because they think R35,000.00 is not enough. That R4,000.00*

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<sup>10</sup> Answering affidavit, paragraph 9, p 003-8.

*(sic) was paid by Constance Monama after the late Z G Ndlovu.”*

[25] The first respondent states that one adult child was born from her relationship with the deceased.

[26] The first respondent explains that the reason why she and the deceased declared their marital status as unmarried in the title deed is because their customary marriage was not yet registered at Home Affairs at the time and there was hence no marriage certificate available.

[27] To the allegation that a Deed of Sale was concluded with Mota and the deceased in 1988, the first respondent boldly responds: *“I note the attached Annexures, and deny the correctness of the contents of the sale agreement dated 1988”*.<sup>11</sup>

[28] In the first respondents heads of argument it is alleged that the deed of sale date 2 November 1988 is not valid as it does not comply with the requirements of section 2 of the Alienation of Land Act, 68 of 1981. No support or motivation for this averment is provided. In addition, it is the first respondent’s case that all that is required of her to prove her entitlement to a share in the property is the mere production of the title deed.

## **APPLICANT’S REPLY**

[29] The applicant pointed out that all the affidavits deposed to by the delegates at the customary marriage ceremony are verbatim the same and that no proof of payment of labola is attached.

[30] The applicant stated that Mota is in no position to depose to affidavits as he is a very sick man and on every occasion the children went to him prior to the institution of the present proceedings he was not even able to recognise them.<sup>12</sup> Accordingly, the applicant disputes Mota’s capacity to depose to an affidavit.

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<sup>11</sup> Answering affidavit, paragraph 21, p 003-10.

<sup>12</sup> Replying affidavit, paragraphs 7.6.1 to 7.6.3, p 004-9.

[31] The applicant also pointed out that the first respondent failed to attach any proof of the payment that she made in respect of the additional R40,000.00. Moreover, she points out that the affidavit by Mota indicates that she only paid R4,000.00 as opposed to R40,000.00 as alleged.<sup>13</sup>

[32] It is pertinent also to point out that the applicant states that the purchase price was reflected as R35,000.00 in the Title Deed and not R75,000.00 as alleged by the first respondent.<sup>14</sup>

[33] Lastly, the applicant disputes that the deceased and the first respondent had a child together and insists on a paternity test.<sup>15</sup>

## **APPLICABLE LEGAL PRINCIPLES**

### **The Applicant's marriage to the deceased**

[34] Before 1988, all marriages between Black South Africans were automatically deemed to be out of community of property.<sup>16</sup> The applicant and the deceased was therefore initially married out of community of property as the marriage certificate attached to the founding papers correctly reflects.

[35] Subsequently, section 22(6) of the BAA was repealed by the Marriage and Matrimonial Property Law Amendment Act, 3 of 1988. Marriages entered into after the commencement of the 1988 Act provided limited relief until recently when all black marriages entered into in terms of the BAA and in terms of which an automatic out of community rule applied, were declared to be marriages in community of property by the Constitutional Court in *Sithole and Another v Sithole and Another*<sup>17</sup>, a judgment handed down on the 14<sup>th</sup> of April 2021.

[36] In *Sithole* the Constitutional Court declared the provisions of section 21(2)(a) of the Matrimonial Property Act, 88 of 1984 unconstitutional and invalid to the extent

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<sup>13</sup> Replying affidavit, paragraph 7.12, p 004-9.

<sup>14</sup> Replying affidavit, paragraph 8.3, p 004-10.

<sup>15</sup> Replying affidavit, paragraph 7.14, p 004-10.

<sup>16</sup> Section 22 of the Black Administration Act, 38 of 1927.

<sup>17</sup> 2021 (5) SA 34 (CC).



that they maintain and perpetuate the discrimination created by section 22(6) of the BAA thereby maintain the default position of marriages of black couples, entered into under the BAA before the 1988 amendment, that such marriages are automatically out of community of property. The Court declared further that all marriages of black persons that are out of community of property and that were concluded under section 22(6) of the BAA before the 1988 amendment are, save for those couples who opt for a marriage out of community of property, declared to be marriages in community of property. It was also declared that chapter 3 of the Matrimonial Property Act from date of the order would apply in respect of all marriages that have been converted to marriages in community of property.

[37] In its judgment the Constitutional Court did provide for an opting out of the default marital property regime where parties would be entitled to notify the Director-General of the Department of Home Affairs in writing that they have opted for a marriage out of community of property.

[38] Although the deceased died in 2015, prior to the *Sithole* judgment, the principles of unconstitutionality would still apply to their marriage and they were accordingly married in community of property. This implies that both the applicant and the deceased would have by implication held an undivided half share in the property by virtue of their marital property regime.

### **The invalidity of the customary marriage**

[39] I am not persuaded that the first respondent and the deceased entered into a valid customary marriage.

[40] In terms of section 3(2) of the Recognition of Customary Marriages Act, 120 of 1998 (“RCA”), save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 during the subsistence of such customary marriage.

[41] Section 10(1) of the RCA provides further that a man and a woman between whom a customary marriage subsists are competent to contract a marriage with

each other under the Marriage Act, 1961, if neither of them is a spouse in a subsisting customary marriage with any other person. Furthermore, section 10(4) states that despite subsection (1), no spouse of a marriage entered into under the Marriages Act, 1961, is during the subsistence of such marriage, competent to enter into any other marriage.

[42] Section 10(4) of the RCA provides further that: -

*“Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.”<sup>18</sup>*

[43] The RRA and particular sections came into effect on the 15<sup>th</sup> of November 2000, which precedes the date of the alleged customary marriage between the first respondent and the deceased.

[44] Since both the deceased and the first respondent were already civilly married to different parties at the time their customary marriage was allegedly concluded, it was not possible or legally competent for either of them to conclude a customary marriage.<sup>19</sup>

[45] It would therefore appear that the true reason why the first respondent has until now not made any effort to register her customary marriage with the deceased, is because she was acutely aware that her marriage to Monama and the deceased's marriage to the applicant would exclude such registration.

## **VALIDITY OF THE DEED OF SALE DATED 2 NOVEMBER 1988**

[46] Section 2(1) of the Alienation of Land Act, 68 of 1981 (“LAA”) reads as follows: -

*“No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained*

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<sup>18</sup> Section 10(4) of the Recognition of Customary Marriages Act, 120 of 1998.  
<sup>19</sup> *K v P* (09/41473) 2010 ZAGPJHC 93.

*in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”*

[47] As was stated in *Just Names Properties 11 CC and Another v Fourie and Others*:<sup>20</sup> -

*“The requirement that the alienation of land must be contained in a deed of alienation signed by the parties thereto would prevent litigation and remove the general temptation of being motivated by greed.”*<sup>21</sup>

[48] The object of the section in the LAA is to leave no doubt as to what the parties have agreed upon.<sup>22</sup> It has also been held that section 2 of the LAA requires that the essential elements of the transaction, i.e. the identity of the parties, the subject matter of the transaction and where the alienation is the sale of land, the price to be paid for it, be reflected in writing.<sup>23</sup> In addition, the parties must be defined with sufficient precision to enable them to be identified.<sup>24</sup>

[49] Applying the legal principles to the deed of sale dated 2 November 1988 I am satisfied that all of the formal requirements have been met and that the deed of sale is valid.

## **WEAKNESSES IN THE FIRST RESPONDENT’S CASE**

[50] The first respondent failed to proffer any explanation for the discrepancies found to exist in the purchase price reflected on the Title Deed, the transfer duty receipt, the power of attorney, the affidavit by Mota as well as in her own affidavit is not explained. The first respondent’s version that the purchase price was increased by Mota to R75 000.00 is not supported by any of the facts either. This amount

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<sup>20</sup> 2007 (3) SA 1 (W).

<sup>21</sup> *Wilken v Kohler* 1913 AD 135; *Clements v Simpson* 1971 (3) SA 1 (A) at 7; *Wendywood Development (Pty) Ltd v Rieger and Another* 1971 (3) SA 28 (A) at 38 to 39. Although these cases were determined prior to the promulgation of the Alienation of Land Act, the principles enunciated therein still apply.

<sup>22</sup> *Johnston v Leal* 1980 (3) SA 927 (A).

<sup>23</sup> *Raven Estates v Miller* 1984 (1) SA 251 (W) at 254.

<sup>24</sup> *Johnston v Leal* 1980 (3) SA 927 (A) at 946H; *Stalwoo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) paragraph [7] at 658D. See also *Fraser v Viljoen* 1980 2008 (4) SA 106 (SCA) and *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 344A - E.

features nowhere else but in the first respondent's answering affidavit.

[51] When scrutinising all the documents relating to the transfer of the property into the name of the first respondent and the deceased, the following of discrepancies are glaring at a mere cursory glance:

(i) The date of sale of the property is reflected as 22 May 2014 in the title deed, whereas it is recorded as April 2014 in the Power of Attorney. It is noteworthy that the exact day upon which the sale purportedly took place in April 2014, is blank in the Power of Attorney.

(ii) The marital status of the first respondent and deceased was incorrectly reflected on the title deed, the SARS Transfer Duty Declaration and on the Power of Attorney.

[52] In *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*<sup>25</sup> the Supreme Court of Appeal referred to its judgment in *Legator McKenna Inc and Another v Shea and Others*<sup>26</sup> where it was confirmed that the abstract theory of transfer applies to movable as well as immovable property. According to that theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction. However, the passing of ownership only takes place when there has been delivery effected by registration of transfer coupled with what Brand JA, writing for the court in *Legator McKenna*, referred to as a '*real agreement*'. The learned judge explained that '*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*'.<sup>27</sup>

[53] The SCA went on to explain in *Quartermark* that although a valid underlying agreement to pass ownership, such as in this instance a contract of sale, is not required, where such underlying transaction is tainted by fraud, ownership will not pass, despite registration of transfer.

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<sup>25</sup> 2014 (3) SA 96 (SCA)

<sup>26</sup> 2010 (1) SA 35 (SCA)

<sup>27</sup> Para 12.

[54] Moreover, registration does not prove ownership as suggested by the first respondent. Here, the following two passages from *Meintjes NO v Coetzer and Others*<sup>28</sup> are instructive:

*“[9] As we know, real rights may be acquired by various modes that are not reflected in the deeds office, for example, by prescription, expropriation, etc. In such circumstances the owner can trump a bona fide possessor who had acquired the property from the person registered as owner in the deeds registry. Under the negative system of registration, which was adopted in South Africa from Roman-Dutch law, the registrar of deeds plays a rather passive role. Although he examines every deed carefully before registering it, mistakes do happen. For example, where the signature of the transferor is forged, as is the case in the matter before us, the court will order rectification of the deeds registry in favour of the original owner. This will be so, even against the bona fide acquirer. In the present case, a fortiori, the first and second defendants are not bona fide acquirers, as they admittedly forged the deceased's signature. (See also *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 496.) Mr Bergenthuin SC, for the plaintiff, referred to *Kristal v Rowell* 1904 TH 66 at 71, where the power of attorney under which the mortgage was executed was forged and it was held that the mortgage therefore conferred no right or title of any sort upon the acquirer, and that the original owner was entitled to have it cancelled.*

*[16] The first and second defendants bore the onus throughout to prove waiver or abandonment. The mere fact that the property is registered in the name of a person does not translate into ownership. Ownership may be acquired by prescription or by abandonment, even if the property is not registered in one's name.”*

[55] Turning to the facts, Mota despite the fact that he was aware that a valid sales

transaction had been concluded between him and the deceased in 1988 (this is apparent from his affidavit), shifted the proverbial goal posts and demanded more money after the purchase price of R 35 000.00 had already been settled in full. He was also prepared to enter into another sales transaction (despite the valid conclusion of the first one) with another party (the first respondent) in order to be paid more money for the property. The underlying transaction which led to the transfer of the property into the name of the first respondent and the deceased is therefore tainted in my view which directly impacts on the validity of the registration of transfer.

[56] It is also telling that the first respondent has failed to produce a copy of the deed of sale purportedly concluded on the 22<sup>nd</sup> of May 2014. When the Court asked the first respondent's counsel why this was not disclosed, it was argued that the applicant ought to have done so. I am not persuaded by this argument. The applicant has produced the deed of sale that she relies on. It was incumbent upon the first respondent to produce the deed of sale upon which her case is founded. Her failure to do so, leads the Court to only one reasonable logical conclusion and that is that there was no valid deed of sale to begin with.

[57] To the extent that the applicant was required to produce the second deed of sale, it is clear that she has taken all reasonable steps to place all relevant documentation before the Court. All of the documents that she obtained from the deeds office were attached to the founding papers. The documents as is conveyancing practice, would ordinarily not include a copy of the deed of sale. Such document would be kept in the protocol of the conveyancer who attended to the transfer of the property. Moreover, being a party to the deed of sale itself, it is not unreasonable to expect the first respondent to have retained a copy upon signature or to have at least explained to the Court why she did not have one and could not obtain one.

[58] The first respondent takes issue with the fact that the applicant cannot tell the Court with certainty whether the balance of the purchase price was paid pursuant to the 1988 deed of sale, and hence, so the first respondent argues, no valid deed of sale has come into being. This argument carries no weight. On the first respondent's

own version, when she moved in with the deceased he had informed her that the property belonged to him and that only an amount of R 5 000.00 was outstanding, which presupposes a prior sale of the property. Also, she stated that the remaining R 5 000.00 was paid, but that Mota wanted more. Therefore, on either parties' version a validly concluded 1988 deed of sale existed.

[59] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact<sup>29</sup>, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.<sup>30</sup>

[60] The first respondent's affidavit is riddled with bold and unsubstantiated allegations. The answering affidavit shirked critical issues raised by the founding papers as already pointed out.

[61] The *Plascon-Evans* rule is not affected by the fact that the onus relating to the disputed facts is on the first respondent. On the facts, the first respondent has failed to discharge this onus.

## THE REGISTRAR OF DEEDS

[62] During the hearing I questioned Mr Mashaba for the applicant on the necessity for a report from the Registrar of Deeds. Mr Mashaba submitted that it was

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<sup>29</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 - 635; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) paras 8 - 10.

<sup>30</sup> *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26

not necessary and that the Registrar was given notice of the application and therefore could have done so if it wished.

[63] Section 97 of the Deeds Registries Act, 47 of 1937 provides as follows:

*“Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days’ notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make.”* (emphasis added)

[64] Section 97(1) is cast in peremptory language. Before any application is made to the court for authority or an order involving the performance of any act in the Deeds Registry, the applicant shall give notice to the registrar who may report on the issue if he/she deems it desirable.

[65] The purpose of the section is to ensure that whenever there has to be an interference by the Court in any matter relating to the property registered in the Deeds office, the Registrar of Deeds should be advised of the intended order.<sup>31</sup> Non-compliance with the seven-day notice provision of section 97 (1) can even been condoned by the Court. This interpretation accords with the purpose of the provision, namely to allow Registrars of Deeds an opportunity to submit a report expressing their views on applications where relief is sought envisaging *“the alteration of registered documents”*<sup>32</sup>

[66] The importance of this section should also be seen against the backdrop of a comment made by the Supreme Court of Appeal in the case of *Chief Registrar of Deeds v Hamil-Ton Brown*<sup>33</sup>, where he referred to *‘the mysterious procedures, known only to conveyancers and officers in the Deeds Office, which are involved in transferring titles to land’*.

[67] However, the section makes it clear that it is the registrar who may elect to file

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<sup>31</sup> See *Ex Parte Sanders Et Uxor* 2002 (5) SA 387 (C) at 390J-391A.

<sup>32</sup> *Haviland Estates (Pty) Ltd and Another vs Mc Master* 1969 (2) SA 312 (A) at 319 (H).

<sup>33</sup> 1969(2) SA 543(A).



a report. Hence, the filing of a report is not peremptory or a prerequisite to the Court granting an order.

[68] Although notice was given to the registrar of the application on 4 October 2018, no report was filed. Accordingly, I find that insofar as there was a duty on the applicant to comply with section 97 of the Deeds Registries Act, she has done so.

## **ORDER**

In the circumstances I grant the following order: -

[1] The deed of sale dated 2 November 1988 and entered between Mandhla Patrick Mota (ID [....]) and Ziyoni Gedeon Ndlovu (ID [....]) is declared valid.

[2] The deed of sale, insofar as it exists, dated 22 May 2014 and entered into between Mandhla Patrick Mota (ID [....]), Ziyoni Gedeon Ndlovu (ID [....]) and Constance Monama is declared invalid.

[3] The third respondent is ordered to rectify the title deed number: T10007/2015 in respect of Erf [....], Jabulani, Soweto, Gauteng Province with physical address [....] Fihla Street, Jabulani, Soweto (*“the property”*), by cancelling the transfer and registration of the 50% share in the property in the name of the first respondent, Constance Monama, and re-transferring and registering such 50% share in the property into the name of the deceased estate of Ziyoni Gedeon Ndlovu (ID [....]).

[4] The first respondent is ordered to pay the costs of the application.

**F BEZUIDENHOUT**  
**ACTING JUDGE OF**  
**THE HIGH COURT**

**DATE OF HEARING:** 23 August 2021  
**DATE OF JUDGMENT:** 14 December 2021

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