

REPUBLIC OF SOUTH AFRICA

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

Case No: 20/37279

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED YES
25/032022

In the matter between:

MNGOMEZULU BOITUMELO NO.
ID NO [....]

First Applicant

MNGOMEZULU PHINDILE
ID NO: [....]

Second Applicant

and

MOKOENA TUMELO AUBREY
ID: [....]

First Respondent

MOFOKENG NONTUTUZELO SYLVIA
ID: [....]

Second Respondent

KRUGER & KRUGER ATTORNEYS

Third Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 25 March 2022

JUDGMENT

STRYDOM J

[1] This is an application in which the first applicant, in her capacity as the executrix in the estate of her late mother Merriam Mngomozulu ("the deceased") and the second applicant, the daughter of deceased seek orders against respondents for the following relief an order cancelling the title deed of House [...] Extension 12, Bophelong ("the property") presently registered in the name of first respondent, as well as cancellation of the bond in favour of First National Bank, the fifth respondent. Ancillary relief is sought including a costs order.

[2] Only the first, second and third respondents opposed this application and asked for the dismissal thereof with costs. Subsequently, the case against the third respondent was withdrawn.

[3] The applicant's case is premised on the following factual matrix: The second applicant currently resides at the property and has done so since the death of her mother; on 14 March 2000 the second applicant's mother bought the property for R2000 in terms of a written sale agreement; the full purchase price was paid by November 2000 but the property was not transferred to the deceased, primarily because of non-cooperation of the second respondent. Subsequently, an eviction application was brought by the first respondent who bought the property during about February 2020 from the second respondent for the amount of R198 000 in terms of a

written agreement of sale. The property was duly transferred into the name of the first respondent.

[4] The second applicant relies on the conclusion of the sale agreement in the year 2000 to enforce transfer of the property to her.

[5] The basis of the first applicant's defence is that he bought the property from second respondent, who was the legal owner of the property, and it was transferred into his name. He obtained a bond from fifth respondent to finance his purchase. The first respondent stated that he had no knowledge of the previous sale of the same property to the deceased.

[6] The second respondent denied that she entered into any written or other agreement with the deceased in terms of which she sold the property for R2000 to her. She denied that her signature appears on the handwritten agreement which purports to be a sale agreement.

[7] What the court is now faced with is a clear dispute of fact which cannot be decided on the papers filed. In the applicants' heads of argument and before court it was argued that the disputes of fact should be referred to hear oral evidence or to trial. On behalf of the respondents it was argued that this dispute of fact was foreseen and that the applicants should not have resorted to motion proceedings. It was argued that on this ground alone the application should be dismissed with costs. It should be noted that the applicant, probably realising that the matter was not capable of decision on the papers unilaterally removed the matter from the opposed roll but the removal was defective as it was done without the consent of respondents. On behalf of the first and second applicants the court was requested to hear the matter and to dismiss the application with costs.

[8] It was argued that despite the clear factual dispute the matter could in any event be dealt with on the common cause and undisputed facts as the second applicant lacks *locus standi* for the relief she is seeking. It was further argued that the applicants applied the so called doctrine of notice wrongly. Moreover, the claim which the applicants might have had has prescribed a long time ago.

[9] Dealing with the *locus standi* point first. The second applicant, the daughter of the deceased, who allegedly bought the property, claims for the transfer of the property into her name. She deposed to an affidavit in support of her claim that the property should be transferred to her. The first applicant only deposed to a confirmatory affidavit and does not state why the property should be transferred to the second applicant specifically. The applicants has failed to establish a basis for this claim that the property should be transferred to second applicant. Even if it is accepted that there was a previous sale agreement then allegations should have been made pertaining to the status of the estate and whether the deceased died with a will or intestate. The court cannot assume that there are no other potential beneficiaries in the estate of the deceased, without such allegation, and that the second applicant was entitled to inherit the house which was allegedly bought by the deceased.

[10] It was argued on behalf of the applicants that the first applicant, as executrix, supports the transfer of the property into the name of the second applicant. This in my view is however not sufficient. It was not indicated whether the deceased died with or without a will, thus intestate. No allegations were made indicating that the second applicant was to only heir of the deceased and on what possible basis she can lay claim to the property. In my view the second applicant has failed to show on the papers that she has the necessary *locus standi* for the relief she is seeking.

[11] The further obstacle for the applicants, even if it is accepted that the first sale agreement was entered into, followed by a second sale, lies in the wrong application of the legal doctrine of notice as alluded to on behalf of the applicants. In terms of this doctrine, a first buyer of property remains entitled to claim transfer of this property if a second buyer, with knowledge of a previous sale continued to buy the property and transfer same into his or her name. See in this regard *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) where it was found as follows at p 395 F-H:

"[11] The legal basis advanced by Vrededorp for its claim to the blue portion is again derived from the doctrine of notice. This time it relies on the application of the doctrine in the sphere of successive sales. The usual

operation of the doctrine in this instance, as explained in our case law, is essentially as follows: if a seller, A, sells a thing – be it movable or immovable – to B and subsequently sells the same thing to C, ownership is acquired, not by the earlier purchaser, but by the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his or her right is unassailable. If the second purchaser, C, is the first transferee, his or her right of ownership is equally unassailable if he or she had purchased without knowledge of the prior sale to B. But, if C had purchased with such prior knowledge, B is entitled to claim that the transfer to C be set aside so that ownership of the thing sold can be transferred to B.”

[12] In *Meridian Bay Restaurant v Mitchell* NO 2011 (4) SA 1 (SCA) it was found that the second purchaser does not need to have actual knowledge of the first purchaser's prior right. It would suffice that the second purchaser subjectively foresaw the possibility of the existence of the first purchaser's personal right to enforce a valid sale agreement but proceeded with the acquisition of his purchase regardless of the consequences it may have on the prior personal right of the first purchaser. The Court found as follows at paragraph 18:

“Thus C, the acquirer of the real right, does not need to have actual knowledge of B's prior right. It suffices that C subjectively foresaw the possibility of the existence of B's personal right but proceeded with the acquisition of his real right regardless of the consequences to B's prior personal right.”

[13] According to the applicants in this matter, the only knowledge which the first respondent obtained was that he became aware that the second applicant was in occupancy of the property. There is no allegation that he in fact knew that the property was previously sold to the deceased. In my view, the first respondent could not subjectively foresee the possibility of the existence of the deceased's personal right to enforce a sale agreement against the second respondent. On the probabilities one cannot imagine that the second respondent would have told the first respondent that she previously sold the property to the deceased. It is more probable that she would have told the first respondent that the second applicant was in

occupation of the property in her capacity as a tenant as is alleged by the second respondent. On this basis the applicants has failed to make out a case for the relief they sought.

[14] It was argued on behalf of the applicants that the first respondent should have engaged in a “*due diligence*” exercise to ascertain what the position was pertaining to the occupancy of the property. This in my view is not required from a potential buyer.

[15] Apart from anything else it was argued on behalf of the first and second respondents that even if the first sale agreement was concluded (which was denied), then the claim of the applicants prescribed. This, according to the respondents, could also been decided on the papers before Court.

[16] As stated, the alleged first sale agreement was concluded on 14 March 2000 and the final instalment was paid during November 2000. From that date onwards, the deceased became entitled to claim for the transfer of the property into her name.

[17] A claim to transfer an immovable property into the name of another is one for the delivery of goods and constitutes a “debt” for purposes of the Prescription Act 68 of 1969 (“Prescription Act”).

[18] In terms of section 11 of the Prescription Act, any claim which the deceased may have had in the transfer of the property prescribed three years after the alleged last instalment which was paid during November 2000.

[19] Axiomatically, the deceased’s claim to ownership of the property prescribed in November 2003. In *eThekweni Municipality v Mounthaven (Pty) Ltd* 2019 (4) SA 394 (CC), it was found as follows in the Constitutional Court:

“8. In terms of the dictionary meaning of ‘debt’ accepted in Makate, an obligation to pay money, deliver goods or render services is included under the definition and would prescribe within three years under the Prescription Act. Material or corporeal goods consist of property, movable or immovable.

Ownership of immovable corporeal property is transferred to another by delivery, actual or deemed, of the goods. That is practically impossible in the case of immovable property like land. Hence it is an accepted principle of venerable ancestry in our law that the equivalent of the delivery of movables is in a case of immovable property, registration of transfer in the Deeds Office. A claim to transfer immovable property in the name of another is thus a claim to perform an obligation to deliver goods in the form of immovable property. It is a 'debt' in the dictionary sense accepted in Makate. It really is as simple and straight forward as that."

[20] Consequently, the deceased's right to obtain transfer of the property has become prescribed.

[21] The applicants before this Court has not made out a case, even on the acceptance of the applicants' allegations, that the second applicant can now claim for the cancellation of the second sale agreement, the cancellation of the transfer into the name of the first respondent and for the property to be transferred into the name of the second applicant.

[22] It should be noted that the Court's decision in this judgment does not pertain to the existence and validity of the alleged sale agreement between the deceased and the second respondent. It is no be noted that if the deceased and thereafter the second applicant was only tenants why was the last rent only paid during November 2000? This fact rather supports a version of an outright sale. Again, without making any decision in this regard, the first applicant may have a claim in delict against the second respondent should the first and second applicants be able to prove the validity and existence of the first sale agreement. Prescription may very well again play a role and this Court will not pronounce on this issue in this judgment.

[23] In summary, the applicants have failed to make out a case on the undisputed and common cause facts of the matter. The application could be decided on the papers and there was no need for the referral of the matter to trial. Moreover, the applicants must have foreseen the factual dispute considering prior correspondence between the parties.

[24] Consequently, the application is dismissed with costs.

RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 10 March 2022
Date of Judgment: 25 March 2022

APPEARANCES

For the Applicant: Mr. Mthenjwa David Hlatshwayo
Instructed by: Hlatshwayo — Mhayise Inc.

For the 1st Respondent: Adv. W F Wannenburg
Instructed by: Lawrence Melato Inc.

For the 2nd Respondent: Adv. W F Wannenburg
Instructed by: Kruger and Kruger Attorneys