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

Case number: 2020/8534

Date of hearing: 8 August 2022

Date delivered: 29 August 2022

REPORTABLE: YES

INTEREST TO OTHERS JUDGES: YES

REVISED

In the application between:

MILO MOREWANE N.O.

Applicant

and

ELIAS RAMPOTO N.O.

First Respondent

THE MASTER OF THE HIGH COURT,
JOHANNESBURG

Second Respondent

THE REGISTRAR OF DEEDS,
JOHANNESBURG

Third Respondent

EKURHULENI METROPOLITAN
MUNICIPALITY

Fourth Respondent

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] Is a donation inter vivos of property which you do not own valid? That is the crisp issue for determination in this case.

[2] Applicant, the executor in the estate of the Late Magana Victor Ntholi seeks an order, firstly, declaring that the late Poto Jacob Rampoto validly donated the immovable property situated at Erf [...] M [...] Township, Registration Division I.R., The Province of Gauteng ("the property") to the late Ntholi, and, secondly, that the property must be transferred to the estate. First respondent is the executor in the estate of the late Poto Jacob Rampoto, the current registered owner of the property. Second to fourth respondents have not opposed the application.

[2] A brief history of the matter is as follows:

[2.1] Fourth respondent was the registered owner of the property until 2002.

[2.2] First respondent's grandmother. Emily Rampoto resided in the property until her death in 1989.

[2.3] On 18 January 1989, and after Emily Rampoto's death, the City Council of Katlehong (as it was then) issued a letter in which it stated that the improvements on the property had been transferred to Emily Rampoto's heir, Jacob Rampoto, to be held in trust for his brother Joseph Rampoto.

[2.4] The two brothers continued to reside in the property. Later they rented out the property so that they could pay for Joseph Rampoto's care. He passed away on 30 November 1999.

[2.5] On 7 June 2000 Jacob Rampoto entered into a written deed of donation in terms of which he donated the property to Ntholi, which reads (in part) as follows:

"WHEREAS THE DONOR is the right full owner of the immovable property situated and known as House no.[....] M [....] Section, Katlehong which is comprised of a four roomed house (herein referred to as the property)

WHEREFORE THE DONOR hereby donates the said property to the done who hereby accepts the donation. " (sic)

[2.6] On 6 February 2002 fourth respondent sold the property to Jacob Rampoto for R 3 432.19. Transfer to Jacob Rampoto was effected on 21 June 2002.

[2.7] Jacob Rampoto passed away on 24 December 2002.

[2.8] On 12 April 2019, nearly seventeen years after Jacob Rampoto's death, first respondent was appointed as executor of his estate.

THE LATE JOSEPH RAMPOTO'S CLAIM TO THE PROPERTY

[3] Before I deal with the core issue in the matter, I must first briefly touch on a submission made by first respondent. First respondent has taken the extraordinary position that the deceased, whose estate he administers as executor, acted improperly by donating the property to Ntholi. He accuses Jacob Rampoto of failing to fulfil his obligations as executor of Joseph Rampoto's estate, of being dishonest, and of failing to protect the interests of the estate. It is quite an unusual situation.

[4] First respondent alleges that the property was "given" to Emily Rampoto, but that she passed away before she could take transfer thereof. The property, it is argued, then vested in her estate, and was inherited by Jacob Rampoto, who

held it in trust for Joseph Rampoto. Therefore, respondents say, Jacob Rampoto was not entitled to donate the property, as it vested in Joseph Rampoto's estate.

[5] In an affidavit deposed to in support of an application to evict the Ntholi family, first respondent alleged that Emily Rampoto was allocated the house in terms of the Housing Amendment Act, 2001. and that, at the time of the "application" it was in the process of being transferred to her. I am not sure what application is being referred to.

[6] This version cannot be correct. Firstly, the Housing Amendment Act, 2001 amended the Housing Act, Act 107 of 1997 which came into operation eight years after Emily Rampoto had already passed away. Secondly, the Housing Act did not provide for the allocation of subsidized housing. Thirdly, the letter of the City Council of Katlehong, upon which first respondent relies, merely states that the improvements on the property were transferred to Jacob Rampoto, to be held in trust for Joseph Rampoto. There is no indication what right, if any, Emily Rampoto had to the property itself, nor what was intended by the directive that it was to be held in trust for Joseph Rampoto.

[7] There is no evidence that Joseph Rampoto had any right to the property. What I do have is a deed of transfer, which records that the property was transferred from fourth respondent to Jacob Rampoto, in terms of section 13 (1) of the Upgrading of Land Tenure Rights Act, Act 112 of 1991. Transfer could only have been effected in terms of this section if fourth respondent was satisfied that Jacob Rampoto held some type of land tenure right to the property, and that his right was capable of being converted to ownership. Therefore, Joseph Rampoto's heirs could not have had any right to the property, and Jacob Rampoto was entitled to dispose of the property as he wished.

CAN A DONOR DONATE FUTURE PROPERTY?

[8] This brings me to the central question in the matter: Was the donation by Jacob Rampoto of the property valid, even though he was not ¹the owner thereof, only holding a land tenure right at the time of the donation.

[9] A donation is an agreement which is induced by pure benevolence whereby a person who has no legal obligation to do so, undertakes to give something to another person, and in respect of which gift the donor receives no consideration. ¹

[10] It is common cause that when the donation agreement was entered into, fourth respondent was the registered owner thereof, and Jacob Rampoto only had a *spes* that he might take ownership at some stage in future.

[11] Voet² says that anything *in commercio* may be donated. He took the view that it was possible to donate all of one's property, present and future. Grotius stated that a donation inter vivos of all property present and future was invalid, as it impeded the making of a last will. However, Grotius³ did not oppose the donation of some of the donor's property, which the donor did not yet own at the time when the donation was made. Although I cannot find any writings specific to this subject, it seems to me that the Roman-Dutch writers recognized that one can donate property which you will only own at some future moment in time. Van Leeuwen⁴ was of the same view as Grotius, that the donation of all of a donor's estate, present and future, was invalid, as it precluded the making of a will. Van Leeuwen also did not have any objection to the donation of part of a person's future property.

[12] Voet ⁵ recognized that one was able to donate the property of another, although he said that the owner would have to acquiesce in the

¹ *Avis v Verseput* 1943 AD 331; *Commissioner for Inland Revenue v Estate Hulett* 1990 (2) SA 786

² *Commentarius* 39.5.10, 19; See also: Van der Linden, Koopmans Handboek 1.15.1

³ Grotius *Inleiding* 3.2.11

⁴ R.D.L. 4.30.6

⁵ *Commentarius* 39.5.10

donation for ownership to transfer. However, the fact that the donor did not own the property at the time of donation did not render the donation agreement itself invalid.

[13] In *Meyer v Rudolph*⁶ Mrs Elsie Rudolph donated to her nephew (inter vivos) all of the cattle that she would own at her death. By definition the donation of the cattle that she would own when she died would include those that she did not yet own at the time of the donation. Broome J said:

"In my opinion, the weight of authority is in favour of permitting a donation of this kind and the reasons for forbidding it have ceased to operate. "

[14] In *Lawsa*⁷ the author says:

"Everything which is in commercio may be the subject of a donation. If the promise to donate involves the property of a third party, ⁸dominium will not be passed on transfer to the donee unless the third party acquiesces in the gift. If the third party has not granted permission, then the donee can only acquire ownership by means of prescription. "

[15] The above passage was quoted with approval in *Savvides v Savvides and Others*⁸. It appears, from the above authorities, that there is no impediment to a person donating something that he does not own at the time of donation. The same principles apply to the sale of property. It is possible, in South African law, to sell someone else's property. ⁹ The seller is obliged to acquire the property and to effect transfer of ownership to the purchaser, and if he is unable to do so, he will be liable for damages. I see no reason why the same should not apply to a donation agreement.

⁶ 1917 38 NPD 159

⁷ Joubert, WA, *The Law of South Africa* (1979 Ed) Vol 8 para. 124; See also *Joubert v Enslin* 1910 AD 5

⁸ 1986 (2) SA 325 (T)

⁹ *Grotius* 3.14.9; *Van Leeuwen CF* 1.4.19.21; *Alpha Trust (Pty) Ltd v Van Der Walt* 1975 (3) SA 734 (A); *Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA 134 (N) at 142 C

[16] In *Mc Bride v Jooste and another*¹⁰ the Court granted an application for the return of a Porsche motor vehicle which the first respondent alleged had been donated to him. The Court did so on the grounds that the donation agreement had not been proven. The Court also considered the fact that the alleged donor was not the owner of the motor vehicle and said:

"It is important to note that in a contract of donation the gift is made with the intention that it should forthwith become the property of the recipient and that it would not be returned to the donor under any circumstances. In my mind that presupposes that the person making the donation must have some title to the property which he intends to donate, which title will give him the right or power to dispose of the property. "

[17] The Court consequently found that even if the agreement had been proven, it would not have been valid as the applicant had not been the owner of the vehicle at the time when it was allegedly donated. In my view the above remark was an obiter dictum. However, even if it were not, I respectfully disagree with the learned Judge. There is no authority that a donation is aimed at transferring ownership 'forthwith'. In fact, the authorities are to the opposite effect, that one may make a donation which will only take effect far into the future. Secondly, a donation is not cast in stone and can (with some exceptions) be revoked at any stage. The *McBride* judgment did not deal with the authorities to which I have alluded, and I respectfully do not believe that this dictum reflects the common law position.

[18] I find, therefore, that the donation agreement was valid, and that effect should be given thereto.

[19] I make the following order:

**[19.1] It is declared that the property known as Erf [....] M [....]
Township, Registration Division I.R, The Province of Gauteng ("the**

¹⁰ [2015] ZAGPHC 20 (6 February 2015)

property") was legally donated to the Late Magana Victor Ntholi by virtue of the deed of donation dated 7 June 2000.

[19.2] Third respondent is ordered to effect registration of transfer of ownership to the Estate Late Magana Victor Ntholi;

[19.3] First respondent is ordered to sign all documents required for the aforesaid registration of ownership to be effected, failing which the Sheriff of Court is authorized and ordered to sign such documents.

[19.4] The first respondent shall pay the costs of the application.

**SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG**

COUNSEL FOR APPLICANT:	Adv. N. Gavoor
ATTORNEY FOR APPLICANT: Inc	Nzondo Kunene Mosea
COUNSEL FOR RESPONDENT:	Adv M. Lebese
ATTORNEYS FOR RESPONDENT:	Ratseke Attorneys
DATE HEARD:	8 August 2022
DATE OF JUDGMENT:	29 August 2022