REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 39164/2020
DATE: 16TH FEBRUARY 2022

REPORTABLE: ***NO***
OF INTEREST TO OTHER JUDGES: ***NO***
REVISED:

In the matter between:

HUMA, BOITUMELO	Applicant
and	
KRUGER, STEPHAN N O, In his official capacity as duly appointed Executor in the Deceased Estate: **HUMA, AUDREY**	First Respondent
SA HOME LOANS (PTY) LIMITED	Second Respondent
REGISTRAR OF DEEDS, JOHANNESBURG	Third Respondent
MASTER OF THE HIGH COURT, JOHANNESBURG	Fourth Respondent

Coram: Adams J

Heard: 23 November 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 16 February 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* system and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 16 February 2022.

Summary: Opposed application – final interdictory relief or claim for damages. Section 2(1) of the Alienation of Land Act 68 of 1981 – oral agreement to re-acquire immovable property of no force or effect – no legal basis for the relief claimed – applicant's cause of action not supported by the provisions of the said section – application refused –

ORDER

(1) The applicant's application against the first and second respondents is dismissed with costs.

(2) The applicant, when required to do so by the first respondent's attorneys, shall sign any and/or all of the necessary documentation required for the registration of the transfer of the property, being Erf [....], Zakariyya Park Extension 4 Township, Registration Division IQ, Gauteng Province, measuring 428 square meters, ('the property'), into the name of the estate late Audrey Huma, Estate number [....].

(3) Failing such signature by the applicant on request, the Sheriff of this Court for the district of Johannesburg North, be and is hereby authorised and directed to sign all such documentation, on behalf of the applicant.

(4) The applicant shall pay the first respondent's costs of this opposed application.

JUDGMENT

Adams J:

[1]. This is an opposed application by the applicant for interdictory relief against the first and second respondents in relation to his alleged ownership of immovable property in Zakariyya Park, Johannesburg ('the property'). The first respondent acts

herein in his official capacity as the duly appointed Executor in the deceased estate of the late Audrey Huma, who, according to the first respondent, is the true owner of the property, the full Deeds Office description of which is: Erf [....], Zakariyya Park Extension 4 Township, measuring 428 square meters, Registration Division IQ, Gauteng Province. The said property is at present and has been at all times material hereto registered in the name of the applicant. The second respondent is the bondholder in respect of the property, but the bond is presently paid up, which probably explains why the second respondent, although the application appears to have been properly served on it, plays no part in this litigation.

[2]. The particular relief prayed for by the applicant in his notice of motion is that the first and second respondents be interdicted and restrained from selling the property. In the alternative, the applicant applies for damages against these respondents and claims from them the amount of R120 810, which the applicant alleges represents the amounts paid by him on the bond account, pursuant to an alleged agreement reached between him and the deceased shortly before her death on 9 June 2018. Further alternatively, the applicant prays for an order that he be granted the right of first refusal to purchase the property. The latter prayer I can give short thrift to in that, howsoever one views the applicant's case, no cause of action, whether in contract or otherwise, is made out. The applicant's claim for that relief therefore stands to be dismissed without further ado.

[3]. The issue to be decided in this application is simply whether the applicant has been able to demonstrate that he holds ownership rights in the property, entitling him to the final interdictory relief claimed by him. This requires me to try the facts in the matter, but, more importantly, I am required to adjudicate the sustainability, from a legal point of view, of the applicant's cause of action.

[4]. These issues are to be decided against the factual backdrop as set out in the paragraphs which follow. For the most part, the important facts are common cause. Where there are factual disputes, my inclination is to go along with the first respondent's version on the basis of the *Plascon Evans*[1] rule. Moreover, the applicant had not filed a replying affidavit, which means that whatever the first

[1] *Plascon-Evans v Van Riebeeck Paints* 1984 (3) 623 (AD).

respondent averred in his answering affidavit I have to accept as fact. And, as contended in his written Heads of Argument by Mr Govender, who represents the first respondent in this application, it appears that the applicant is being opportunistic as 'Ms Huma is not here to speak for herself'.

[5]. As already indicated, the applicant alleges that a verbal agreement was entered into during April 2018 between himself and the deceased, in terms of which the deceased had handed back to him the property and all rights in and to the said property, including the rights to occupy and use same. He was also required, pursuant to this verbal agreement, to take over any and all responsibilities relating to the property, including the payment of the monthly instalments on the mortgage bond, which, so the applicant claims, had by then fallen into arrears.

[6]. It bears emphasising that this agreement in terms of which the deceased had ostensibly agreed to hand over to the applicant, on a silver platter, any and all of her rights in and to the property in question, was never reduced to writing. What was however reduced to writing is an agreement of settlement concluded between the applicant and the deceased on 24 November 2008 when they got divorced from each other by a decree of the Johannesburg Central Divorce Court. Before their divorce on 24 November 2008, the applicant and the deceased were married to each other in community of property and the property in question formed part of their community estate, although it was registered only in the name of the applicant, as is still the case to date. All of the aforegoing is common cause between the parties. What is more is that the agreement of settlement was also made an Order of Court, which order remains extant as we speak. In terms of the said agreement of settlement, which, as indicated, was made an order of Court, the deceased was 'to retain' the property, which she then did, although she never had it registered into her name.

[7]. It is therefore common cause between the parties that up to about 2018, the deceased was the owner of the property and had since 2008 been entitled to have the said property transferred into her name. This was however never done for reasons which are not altogether clear from the papers. The only dispute between

the parties is therefore whether such ownership of the property was transferred to the applicant, as alleged by him, during April 2018.

[8]. The first difficulty faced by the applicant is s 2(1) of the Alienation of Land Act, Act 68 of 1981, which provides as follows:

> '**2 Formalities in respect of alienation of land**
>
> (1) 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 in a deed of alienation signed by the parties thereto or by their agents acting on their written authority'.

[9]. The oral agreement, as alleged by the applicant, is therefore of no force or effect.

[10]. That, in my view, is the end of the applicant's application.

[11]. The applicant, however, argues that the aforegoing section does not find application *in casu* in view of the fact that, as things stand, the property is presently still registered in his name. There is no merit in this argument. The simple common cause fact of the matter is that the deceased is the true owner of the property and can at any time insist on transfer of same into her name. The fact that the property is not presently registered in her name is irrelevant. The only way in which her status as the owner of the property can be changed is by compliance with the provisions of s 2(1).

[12]. The applicant also submits that the alleged oral agreement between him and the deceased was entered into freely and voluntarily. The terms thereof, so the applicant contends, are not immoral, illegal or contrary to public interest, and therefore it should be upheld and enforced. In my view, this argument lacks merit. The particular provision, which imposes strict formalities in respect of the alienation of immovable property, fair or unfair as it may be perceived to be, is the law as things stand at present. It has not been held to be unconstitutional or, as contended by the applicant, *contra bonis mores*. There is a very good reason for its existence as part

of our law, that being certainty in respect of dealings involving immovable property. So, in my view, it cannot possibly be suggested that the particular provision should be struck down as being against public policy. As was held by the SCA in *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd*[2] at para 1:

'[1] Section 2(1) of the Alienation of Land Act 68 of 1981, which visits nullity upon a sale of immovable property, "unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority", was designed to promote certainty, and to avoid disputes, litigation and possible malpractice. Unfortunately, history has proved it to be fertile ground for litigation, the law reports being replete with decisions concerning the validity of deeds of sale of land. Consequently, it has been remarked that the section has failed to achieve its objectives, and it has indeed correctly been observed that, reading between the lines, the section is often abused, in particular "by unscrupulous sellers who regret having sold the property at the price they did and then try to rescind the contract because of non-compliance with the technical formality requirements of the Act". This comment is not without substance, but it may be somewhat unfair. Human nature being what it is, there may well have been many more disputes arising out of the sale of land, had no formalities been required, and, as Innes J observed in *Wilken v Kohler* 1913 AD 135 at 142, whether such a provision 'does not create as great hardships as it prevents, is a matter upon which opinions may well differ".' (My emphasis).

[13]. The aforegoing applies equally to the further argument raised on behalf of the applicant that the verbal agreement entered into between him and the deceased met the requirements for a contract and, therefore, *pacta sunt servanda*. This principle plays second fiddle to s 2(1), which is underpinned by and designed to promote certainty.

[14]. The applicant furthermore argues that his case is not based on the sale and/or the purchase of the property and therefore s 2(1) does not apply. His cause of action, so the applicant contends, is an enforcement of a binding oral agreement in terms of which the deceased offered him to take over the property and its risks

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[2] *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA).

including the payment of the bond from April 2018. There was no need for the deed of alienation, so it was argued by the applicant, to be reduced to writing because the property was still in the name of the applicant. This argument is self-defeating. If the property, which everyone agree is presently owned by the deceased, was not re-acquired by the applicant, then his case for the interdictory relief falls flat as he would then have no right to have the property remain registered in his name.

[15]. In sum, the applicant's application for an interdict should fail as being bad in law.

[16]. As regards the claim for damages against the first and second respondents, there are a number of difficulties with the applicant's case. As already indicated, if the alleged oral agreement is, as has been found by the Court, of no force and effect, then the applicant cannot claim damages for breach of contract. Furthermore, the applicant falls horribly short in proving the amount of his alleged damages. In fact, he gives no indication of how this amount is arrived at. So, for example, he does not provide the court with a schedule of the payments made by him to the second respondent from April 2018 to April 2020. Even more instructive is the fact that no proof of such payments are provided.

[17]. A further issue left in the air by the applicant in his supposed damages claim is whether or not he received any benefit and, if so, what the value of such benefit is. In other words, in calculating his damages, did the applicant take into account the fact that for the period between April 2018 and April 2020, and subsequently, he was in occupation of the property? Surely, if the applicant has a damages claim against either the first or the second respondent, or, for that matter, a claim for unjust enrichment, that consideration would reduce the amount of his damages quite dramatically. This is so especially since the applicant has now been in occupation of the property rent-free for an additional twenty months or so.

[18]. The claim for damages therefore stands to be dismissed.

[19]. In conclusion, I need to deal with first respondent's request that, in addition to dismissing the applicant's application, I should also compel him to give his cooperation in ensuring that the property is registered into the name of the estate

late of the deceased. I am satisfied that, in his papers before me, the first respondent has made out a case for such an order, which, would, in any event be based on a previous court order of the Johannesburg Central Divorce Court. I therefore intend granting such an order.

Costs

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

[21]. *In casu*, I can think of no reason why I should deviate from this general rule and I therefore intend granting costs in favour of the first respondent against the applicant.

Order

[22]. Accordingly, I make the following order: -

(1) The applicant's application against the first and second respondents is dismissed with costs,

(2) The applicant, when required to do so by the first respondent's attorneys, shall sign any and/or all of the necessary documentation required for the registration of the transfer of the property, being Erf [....], Zakariyya Park Extension 4 Township, Registration Division IQ, Gauteng Province, measuring 428 square meters, ('the property'), into the name of the estate late Audrey Huma, Estate number [....].

(3) Failing such signature by the applicant on request, the Sheriff of this Court for the district of Johannesburg North, be and is hereby authorised to sign all such documentation, on behalf of the applicant.

(4) The applicant shall pay the first respondent's costs of this opposed application.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON:	23rd November 2021 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013
JUDGMENT DATE:	16th February 2022 – judgment handed down electronically
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FOR THE SECOND, THIRD AND FOURTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance