REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 37227/2011

2/12/2016

Reportable: No
Of interest to other judges: No
Revised.

In the matter between:

JANE RAMORASWI	**FIRST APPLICANT**
SIPHO RAMORASWI	**SECOND APPLICANT**
EVA RAMORASWI	**THIRD APPLICANT**
and	
SARAH HLONGWANE	**FIRST RESPONDENT**
ELMA MATLALA	**SECOND RESPONDENT**
SEMAKALENG LUCIA BOIKANYO	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT, PRETORIA	**FOURTH RESPONDENT**
NEDBANK LIMITED	**FIFTH RESPONDENT**
THE REGISTRAR OF DEEDS, PRETORIA	**SIXTH RESPONDENT**

and

CASE NO: **14614/2009**

In the matter between:

ELMA MATLALA	**FIRST APPLICANT**

SEMAKALENG LUCIA BOIKANYO	**SECOND APPLICANT**
and	
MAPULE SARAH HLONGWANE	**FIRST RESPONDENT**
MACY RAMORASWI	**SECOND RESPONDENT**
UNLAWFUL OCCUPIERS OF 300 CHABANGU STREET MAMELODI WEST PRETORIA	**THIRD RESPONDENT**

JUDGMENT

MALIJ

[1] On 15 May 2012 my sister the Honourable Judge Molopa-Sethosa J made an order as to consolidate the two cases, being case numbers 14614/2009 and 37227/2011, under case number 37227/2011.

APPLICATION UNDER CASE NUMBER 37227/2011

[2] This is an application for an order compelling and directing the fourth respondent to withdraw the certificate of appointment issued to the first respondent. The order is further sought that the fourth respondent appoint the first applicant as the executor in the estate of the late Ramoraswi Moseapudi Ramoraswi, declaring and cancelling the sale agreement by the first respondent to the second and third respondents as null and void *ab initio,* and finally directing the second and third respondents to transfer the said immovable property to the Ramoraswi Family Trust.

[3] The issue for determination is whether the first respondent was entitled to sell the immovable property, to be discussed below, to the second and third respondent.

[4] The first respondent appears to be the relative or at least well known to the applicants. There is a disputed appointment of the first respondent as the administrator of the deceased estate of the late Moseapudi Ramoraswi who died intestate and left a certain immovable property forming the subject matter of this application.

[5] The second and the third respondent bought the property from the first respondent. The

first and the fourth respondent do not oppose the application. The fifth respondent will abide by the court order.

[6] The fourth respondent is the Master of the High Court who amongst other is responsible for the supervision of the administration of deceased estates.

[7] The fifth respondent is the holder of a mortgage bond registered over the said immovable property.

APPLICANTS CASE

[8] It is submitted on behalf of the first to third applicants that they are siblings, born from the marriage of the late Mantsho Emily Ramoraswi and Ngwako Ramoraswi. Ngwako Ramoraswi was the only child and son of the late Moseapudi Melita Ramoraswi ("deceased") Therefore the applicants are the grandchildren of the deceased.

[9] The deceased died intestate on 14 November 1997. The deceased left behind the immovable property known as Erf […] ,Mamelodi, Registration Division JR, Gauteng situated at […], Mamelodi West, Pretoria ("the property"). The applicants lived in the property with their parents.

[10] According to the applicants the estate devolved to their father because of the rules of intestate succession. Their father did not register the deceased estate. Their father died on 25th November 1998 and their mother, who passed away on 24 March 2004, also did not register the deceased estate and neither her late husband's estate.

[11] On 31 March 2004 the first applicant registered the estate of their mother, Mantsho. The applicants submit that by virtue of the deceased having died intestate, the property devolved to their parents who also died intestate, therefore they are beneficiaries in the deceased's estate, to wit property.

[12] On or about August 2010 the applicants were served with an eviction order because they were in unlawful occupation of the property. The case for eviction has been instituted by the first and second respondents, being the applicants under case 14614/09.

[13] The applicants learnt that letters of administration of the deceased estate *"to represent*

the intestate of the late Ramoraswi Moseapudi Melita[1]*"* was issued on 25 January 2007. The first respondent then sold the property to the second and third respondents. The information regarding the sale of the property came to the first applicant's knowledge on or August 2008 when the first respondent attended to the property for viewing purposes. The property was transferred to the second and third respondent on 18 July 2008.

[14] According to the applicants the property was donated to the first respondent by the deceased in terms of a deed of donation. The copy of the said deed of donation was annexed to the applicant's supplementary affidavit filed on 25 July 2016, three days before the hearing of this application. The applicants by their own admission, state that the first applicant was in possession of the copy of the deed of donation as early as 2007 and she provided same to her attorneys. The first applicant did not provide any explanation about the absence of the original deed of donation.

[15] The copy of deed of donation is allegedly signed by the deceased on 16 November 1997, whilst the deceased passed away on 14 November 1997. It is upon these grounds that the applicants submit that the appointment of the first respondent as an administrator of the estate is invalid. The first respondent had no right to sell the property.

[16] It is further submitted that another factor causing the said deed of donation to be suspicious is that the deceased was literate. She was able to write and could have been in a position to draw her signature rather than to insert a thumb print as seen in the said copy of the deed of donation.[2]

[17] In the supplementary affidavit the applicants state that she informed the first respondent about the invalid deed of donation between 2007 and 2008.

RESPONDENTS CASE

[18] Ms Erasmus, on behalf of the respondent submitted that the applicants should have brought the case by way of action as there is a factual dispute. The counter argument proffered on behalf of the applicants is that the application can still be decided on papers. I fully agree with the applicants' submission.

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[1] See J8 page 73 of the paginated papers
[2] See Paragraph 6.2 of the supplementary affidavit

[19] The respondents have raised a defence of estoppel against the applicants. This is because the second and the third respondents are *bona fide* purchasers who bought the property on the strength of the representation by the first respondent. The first respondent was in possession of the letters of administration of estates as alluded above.

[20] In *Levi and Others* v *Zalrut Investments (Ply) Ltd*[3] at 487 F - H where van Zyl J stated:

> *"In any event, even in the* case *of illegal or invalid acts, should there be no considerations of public policy which militate against the recognition of estoppel, estoppel may still be raised.* See *Trust Bank van Afrika Bpk v Eksteen 1964 (3)* SA *402 (A) at 415-416 A (per HOEXTER A.JA* as *he then was):*
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> *"The doctrine of estoppel is an equitable one, developed in the public interest, and it* seems *to* me *that, whenever* a *representor relies on* a *statutory illegality, it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other hand."*
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> [26] The general principle is that estoppel is not allowed to operate in circumstances where it would have a result which is not permitted by law. A defence of estoppel cannot be upheld if its effect would be to render enforceable what the law, be it the common law or statute law, has in the public interest declared to be illegal or invalid. See the Chapter on Estoppel by P J Rabie in Lawsa Volume 9 (2nd Edition) paragraph 673. The principle finds firm and unequivocal articulation by the Supreme Court of Appeal at various passages in the case of City of Tshwane Metropolitan Municipality v RPM Bricks.[4] At paragraph 16, it was stated by Ponnan JA:
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> *"It is settled law that* a state *of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel (Trust Bank van Afrika Dpk v Eksteen 1964 (3) SA 402 (A) at 411H-4 HR), for to do* so *would* be *to compel the defendant to do something that the statute does not allow it to do. In* effect *therefore it would* be *compelled to commit an illegality (Hoisain v Town Cleric. Wynbe,y 1916 AD 236)."*
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> At paragraph 23 D-F:

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[3] 1986(4) SA 479 (W)

"Estoppel cannot, as I have already staled, be used in such a *way as to give* effect *to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence. That consequence cannot vary from* case *to case. "Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in* a *particular case" (per Marais JA in* Eastern *Cape Provincial Government & others v Contractprops 25 (Fly) Ltd20U1 (4) SA 142 (SCA) paragraph [9])... "*

And further at paragraph (24] H-J:

"The approach advocated by the teamed Judge, if endorsed, would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the ultra vires doctrine nugatory. None of that would be in the interests of justice. Nor. can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality."

[21] The applicants counter argument to the respondents' defence is that the owner of the property is the deceased estate which was not represented, therefore estoppel cannot be raised in the circumstances. The applicants' argument does not take the case further because the respondents never bought the property from the deceased estate. In fact the property was never registered as the property of the estate; even the applicants, by their own admission, never registered the property in their mother's estate in 2004 whom they claim was once a beneficiary because of the laws of intestate succession.

[22] There was a reasonable and lawful representation made by first respondent who appears to be the applicants relative and or family member. This is inferred from the applicant's averment that they once instituted a case of domestic violence against the first respondent's sons. By applicants own admission they knew that she had a claim to the property as early as 2007 and they did not take any action.

[23] It was further submitted on behalf of the respondent that annexing of the copy of the deed of donation almost 7 (seven) years later post reference is suspicious. The explanation submitted on behalf of the applicants regarding the huge gap for production of the deed of

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[4] 2008 (3) SA (1) SCA

donation is that the said copy of the deed of donation was provided to their attoneys before the drafting of the founding affidavit. There is no explanation by the attorneys or any confirmation regarding the applicants' averments. This is rather strange as it appears that the applicants rely on the invalidity of the deed of donation for their claim.

[24] I take note of the suspicious copy of the deed of donation, because of the discrepancy of dates between the date of death of the deceased and the date of signature. The failure by the applicants to explain the whereabouts of the original deed of donation and the failure by their attorney to file a confirmatory affidavit or explanation as to why this important document to the applicants' case only surfaces at the eleventh hour cannot assist matters.

[25] The second respondent disputes that the first applicant informed her about the deed of donation on her two visits to the property. Instead on the first visit of the second respondent in company of one Shadrack an estate agent, the first applicant was glad to show them the property and never appeared surprised about the sale of the property. She went to the extent of showing the first respondent and Shadrack the outside rooms where the tenants resided. There is no counter argument submitted on behalf of the applicants in this regard.

[26] According to the second respondent she never met the first respondent as the sale of property was concluded through Shadrack, the estate agent. As a result the second respondent's inability to contact the first respondent has hindered the second respondent to obtain a confirmatory affidavit.

[27] The conduct of the applicants is not acceptable. The applicants could not explain their inaction for almost 12 years, as the applicants state that the first applicant was appointed as the administrator of her mother's estate in 2004. In 2007 the first applicant was harassed by the sons of Mrs Hlongwane who claimed the property as their mother's house and in 2008 she got to know about the intended sale of the property and failed to act until the property was transferred. Despite all the above knowledge the applicants did not take action.

[28] Having regard to the above I find that the respondents are bona fide purchasers. There is no reason why the defence of estoppel cannot be upheld, because the success of the defence of estoppel in the present matter will not result to what is legally impermissible. In fact it is the second and the third respondent's legally founded right to have the property registered in their own names. In passing, my view is that the applicants have a recourse against Mrs Hlongwane. As alluded above it seems as if the applicants know her better.

[29] In the result the application is dismissed with costs.

APPLICATION UNDER CASE NUMBER 14614/2009

[30] Section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 ("PIE") provides:

> *"Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.*

[31] Section 4 (7) of PIE provides:

> *"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings* are *initiated,* a *court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in* a *sale of execution pursuant to* a *mortgage, whether land has been made available or can reasonably be made available by* a *municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."*

[32] The first respondent in the eviction case is Sarah Hlongwane who does not stay in the property. The second respondent, Ms Macy Ramoraswi made submissions in respect of her and other unlawful occupiers 'personal circumstances. The only concern raised by the unlawful occupants is that their respective minor children stays with them. She does not state why they cannot find alternative accommodation, rather states that she is a single parent looking after her child although he is a major. It's common cause the unlawful occupiers knew about the sale of the property in 2008.

[33] The applicants in the eviction case are *bona fide* purchasers, who have been paying the bond instalments since 2008. The first applicant also has a minor child. The applicants bear heavy financial burden because they have been carrying cost of their current accommodation and have to pay bond instalment to the fifth respondent since 2008. The personal circumstances of the applicants far outweigh those of the respondents (who are unlawful occupiers).

[34] Having regard to the above I find that it is just and equitable for the respondents in the case of eviction to vacate the property.

[35] In the result it is ordered that:

[35.1] The first and/or second and/or third respondents and all other persons occupying the premises through the first and/or second and/or third respondents is to vacate the property situated at […], Mamelodi West, Gauteng within 30 days of this order;

[35.2] In the event that the first and/or second and/or third respondents and all other persons occupying the premises through the first and/or second and/or third respondents fail to vacate the property, above, as per paragraph [35.1] the Sherrif of the High Court, Wonderboom is authorized and ordered to evict the first and/or second and/or third respondents and all other persons occupying the premises through the first and/or second and/or third respondents from the said property;

[35.3] The first and second respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

N.P. MALI
JUDGE OF THE HIGH COURT

Case number;	37227/2011
Counsel for the Applicants:	Adv J Jooste
Instructed by:	DYSON INC
Counsel for 2•d respondent:	Adv N Erasmus
Instructed by:	SHAPIRO & SHAPIRO INC
Counsel for 5th respondent:	Adv H Smit
Instructed by:	CLIFFE DEKKER HOFMEYER
Case number:	14614/2009

Counsel for the Applicants:	Adv N Erasmus
Instructed by:	SHAPIRO & SHAPIRO INC
Counsel for 2nd respondent:	Adv J Jooste
Instructed by:	DYSON INC
MATTER HEARD ON:	28 July 2016
DATE OF JUDGMENT:	2 December 2016