



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 17111/20

In the matter between:

FIRSTRAND BANK LIMITED

PLAINTIFF

AND

BUKANI GLADWELL MQAMBELI N.O. EXECUTOR IN THE ESTATE

LATE THEMBEKA ETHEL BATALA (FORMERLY MQAMBELI)

ESTATE NO 001442/2019

FIRST RESPONDENT

CITY OF CAPE TOWN MUNICIPALITY

SECOND RESPONDENT

JUDGMENT DATED 20 DECEMBER 2021

THULARE AJ

[1] This was an application for an order by default, moved in the unopposed roll commonly referred to as Third Division, for a sum of money plus interest and costs and also, on the same papers, for an order declaring Erf 112871 Cape Flats situated in the City of Cape Town (the property) specially executable and the authorization for the Registrar to issue a warrant of attachment and the Sheriff to execute such warrant. The application is further for the Sheriff to sell without a reserve price or in the alternative for the court to set the reserve price and in the event that the reserve price is not achieved to authorize that the property may be sold at any subsequent sale to the highest bidder without a reserve price.

[2] On 3 February 2006 and 2 October 2006 Thembeke Ethel Mqambeli (the deceased) registered two mortgage bonds in favour of the plaintiff (FNB) as security for monies lent and advanced to her. The deceased bound as security for the debt, the property. In terms of the bonds and the debt the deceased was to make monthly payments to the plaintiff in discharging the amounts lent and advanced. The agreement included a term wherein in the event of failure to pay the monthly repayments, the full amount owing would be payable and that the plaintiff may seek the order declaring the property specially executable.

[3] The deceased passed on in December 2018 and as a consequence there were no payments made on the bond. In its founding affidavit, FNB indicated that it communicated with the Executor, who is cited as the first respondent in these proceedings. According to FNB, the Executor reported that there were no funds in the estate to pay the bonds and the Executor has been unsuccessful in selling the property, even though he had secured a buyer, because the Master did not approve

the sale as the minor child who is the heir refused to agree to the sale. FNB alleged that the property was not the minor child's primary residence as it was vacant. According to FNB it was prudent for the property to be sold by public auction as soon as possible to avoid vandalism of the property and to limit the financial loss to the estate due to increasing arrears, rates and taxes on the property. At the time of the application the arrears were R93 723.34 which was approximately 26 months instalments since November 2018.

[4] Section 28(2) of the Constitution provides:

"2. A child's best interests are of paramount importance in every matter concerning the child."

Section 28(1)(h) reads:

"28. (1) Every child has the right-

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;"

Section 7(1) provides:

"Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

Section 8(2) provides:

"Application

8. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

[5] The circumstances in this case raised a few issues that were pertinent to the just adjudication of the matter. It was not clear from the papers as to whether the Executor was also the care-giver of the child as defined in the Children’s Act, 2005 (Act No. 38 of 2005) (the CA). Care, in the CA, includes guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development as well as maintaining a sound relationship with the child. The papers reveal a serious problem. The Executor intended to sell the property to which the child is an heir, and the child refused to consent to the sale. In my view, the question of the care of the child needs further investigation and report by a Social Worker, in the interests of justice.

[6] Section 10 of the CA read as follows:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and the views expressed by the child must be given due consideration.

Section 14 reads:

“Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.”

[7] The child has the right to have access to adequate housing [section 26(1) of the Constitution]. The child's mother, the deceased, took reasonable measures within her available resources to provide the realization of this right of the child, in her lifetime. It follows, in my view, that the child cannot be deprived of the property, through a special execution by an order of court, when that court did not consider all the relevant circumstances. In this matter, the child is an interested person, as an heir, and I did not have facts to satisfy myself that the child would not be prejudiced by the sale. The reasons for the child's refusal to the sale remain unknown to the court. In my view, what was taken into custody and control by the Executor upon his appointment and what he did therewith in furtherance of the liquidation, distribution and administration of the estate is one of the relevant circumstances to be considered whether under the circumstances, the sale of the property was a just order to be granted. In my view, the appointment of a legal representative at state expense to represent the interests of the child in this matter is called for.

[8] Clause 13 of both Mortgage bonds read as follows:

"13 LIFE ASSURANCE

If any life assurance is taken out by the Bank by agreement with the Mortgagor, or if any such assurance is ceded to the Bank as additional security for the indebtedness secured under this Bond, the following provisions shall apply-

13.1 the Mortgagor shall do whatever is necessary to enable the Bank to take out the assurance, if applicable;

13.2 the Bank may take such steps as are necessary or desirable to procure the noting by the assurer of the cession, if applicable, including the execution on behalf of the Mortgagor of a separate document of cession.

13.3 if the assurance is or becomes invalid for any reason the Mortgagor shall immediately do whatever is necessary to enable the Bank to take out equivalent assurance or, at the option of the Bank, shall do whatever is necessary to take out equivalent assurance and to cede it to the Bank, and the provisions of this clause shall apply to such substituted assurance.

13.4 the Bank may at any time exercise any right under the assurance, including without limitation, the right to convert the assurance to fully-paid up assurance and the right to surrender the assurance.

[9] The silence of the Bank on this provision, and other provisions on insurance and their application to the case, were simply too loud to be disregarded. This is but one of the many cases that indicate that the Legislature needs to intervene in the space of estates left by deceased parents to minor children. The current framework allowed for a hostile mindset to prevail over the best interests of children. Blood is no longer on its own sufficient to rest with the impression that children whose parents are deceased were in honest and good care with relatives. This matter illustrates that we cannot trust the Banks to intervene where such need arise to assert the paramountcy of the best interests of children.

[10] Experience in civil child law taught that too many children burden the national fiscus in being rendered homeless and poor the moment their parents die, irrespective of the estate left by their parents. These children are often dumped with maternal grandparents in foster care placements. These children are beneficiaries and heirs of their parents' estates. These deceased estates are often sufficient to meet the needs of the children. The benefits of these estates are, however, often

enjoyed by other blood relations through greed and sometimes even by institutions in the financial sector generally through omissions of doing what is known to be the right thing to be done. The common law is not common to speak justice for all South Africans.

[11] Unless it becomes peremptory for the Master to also report to Legal Aid South Africa or the Legal Practice Council's Committee responsible for pro-bono work, and the Department of Social Services every estate where a minor is affected, and an exemption is provided only when such child has a legal representative of their own choice, blood relatives and financial institutions will continue to unduly benefit from estates to which, but for the failure of the justice system, they would not ordinarily be entitled. Children whose estates left by their parents may make them not to qualify as they may not be indigent, will continue to be dumped on the State welfare system while others unduly enjoy the deceased estates.

[12] In my view, the best interests of the minor child in this matter cast a duty on FNB, at least to inform Legal Aid South Africa and the Department of Social Development about its experiences in this matter around and about the child. The property is in Cape Town and the Executor is alleged to be in Butterworth. The whereabouts of the child were not disclosed, save to indicate that the property was found vacant. The child could be living in the streets in order to survive. FNB does not care and it appears according to them the child, its fate and future, is none of their business and it also should not be this Court's business. Their obsession is to sell the house and recover money and nothing more.

[13] In this matter FNB lacks the drumming of an African heartbeat. Doing business in South Africa, one wonders if FNB knows how to spell *Ubuntu* and can be considered and trusted to be a worthy stakeholder in constructing a democratic and Constitutional South Africa's jurisprudence that speaks to and provide answers for an African child, especially an orphaned child. Re-imagining a different way of knowing, seeing, being and doing, to create a post-colonial and post-apartheid South Africa, requires of us to be a nation at work, every day, in order to realise our ideal into reality.

[14] Over and above section 7(1), 8(2) and 28(2) and the provisions of the CA, this duty's genesis is also found in the preamble to the Constitution:

"We therefore ... establish a society based on democratic values, social justice and fundamental human rights."

In this matter the voice of the child is treated like an irritating mosquito in the juristic ear of FNB. It is either to be ignored or slapped out of existence by the court order sought. The child's rights do not feature even as a footnote in the script of the Bank. FNB finds it difficult to even acknowledge that the child has a name and did not mention it even once in the papers. FNB does not care as to where the child is living, and did not want even the court to at least know. FNB sought to sell the child's home left as an estate in which the child is an heir, without the child being heard by the court when the child objects to the sale at the instance of a person who appears to be the child's Uncle.

[15] Unless the courts intervene, the rights of children, especially to their deceased parents' estates, will remain academic exercises at conferences and lecture halls

which in time will just remain ineffective and irrelevant talk-shops. For the rights of the children to enjoy recognition and protection in the world of business and real life in general, courts should assert their position as upper guardians of children especially in the administration of their deceased parents' estates. In the roundness of time, the Legislature should enter the space and ensure that those who are placed in charge of estates in which children are affected, are held to account for those estates through proper governance systems. The Administration of Estates Act, 1965 (Act No. 66 of 1965) need some attention for it to mitigate the mischief in this case.

[16] For these reasons I make the following order:

- (a) The matter is referred to both Legal Aid South Africa, the Family Advocate and the Department of Social Development for investigation and report.
- (b) The matter is postponed to 15 March 2022 for LASA, the Family Advocate as well as a Social Worker's report.
- (c) The Registrar is to cause a copy of this order to be served on the Minister responsible for the portfolio of the Administration of Justice, Legal Aid South Africa, the Family Advocate and the Department of Social Development for his attention.
- (c) No cost order is made.

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DM THULARE
ACTING JUDGE OF THE HIGH

COURT

Counsel: Advocate Celeste Tate