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REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 25437/18

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE

SIGNATURE

In the matter between:

T M

First Applicant

B Q

Second Applicant

ESTATE LATE: MAKGOSI MARIA ALBERTINA

Third Applicant

And

JOHN MOKUTU MONO

First Respondent

MAPULA SHEREEN MONO

Second Respondent

NOTHEMBA GEORGE ATTORNEYS

Third Respondent

MASTER OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Fourth Respondent

REGISTRAR OF DEEDS,

JOHANNESBURG

Fifth Respondent

JUDGMENT

BOKABA AJ

1. In these proceedings the first and second applicants state that they are the grandchildren of Maria Makgosi Dube who died intestate on 22 January 2005. They assert that at the time of her death Makgosi Dube was survived by V M, who became the executor the estate of Makgosi Dube, and F Q, who is the mother of the first and second applicants. The first and second applicants claim that the third applicant's estate is the subject-matter of this application.

2. The order sought by the first and second applicants is as follows:

"1.1 That the supposed certificate issued on 2 October 2015 in terms of section 42(2) of the Administration of Estate Act 66 of 1965 ("the Act") as amended by which the fourth respondent allegedly endorsed a

power of attorney dated 16 September 2016 signed by Mr, V M in his capacity as the executor of the estate of the Late Maria Makgosi Albertina Dube authorising the transfer of the immovable property described as Erf [...] Munsieville, registration division I.Q, Gauten Province measuring 457 (four five seven) square meters held under Deed of Transfer Number TL43146/2015 (“the subject-property”) dated 16 October 2015 from the estate of the Late Maria Makgosi Albertina Dube to John and Shereen Mono, the first and second respondents respectively be invalidated and/or set aside;

1.2 That the transfer of the property by the Executor in the estate of the Late Maria Makgosi Albertina Dube to the first and second respondents under Deed of Transfer Number TL43146/2015 be set aside;

1.3 That the subject property be reverted to the estate of the Late Maria Makgosi Albertina Dube held under Certificate of Registered Grant of Leasehold TL58577/1992 for the due administration by the remaining heirs and the Master in accordance with the provisions of the Act;

- 1.4 *That the Fifth Respondent be ordered and directed to cancel the Deed of Transfer Number TL43146/2015 and transfer the subject property into the estate of the Late Maria Makgosi Albertina Dube estate number 1522/2005;*
 - 1.5 *That the first and second respondents who are the registered co-owners of the subject property and are in possession of the current Title Deed be ordered to surrender the Deed of Transfer No. TL43146/2015 dated 10 October 2015 to the Applicants' attorneys or the Fifth Respondent for due cancellation;*
 - 1.6 *In the event of the First and Second Respondents not surrendering the said Deed of Transfer TL43146/2015, the Fifth Respondent be ordered and directed to cancel the said deed and transfer the property as stipulated in the prayers above;”*
3. The first applicant in particular, claims that he is a beneficiary to the estate of the Late Maria Makgosi Dube by virtue of, and as evidenced by, a site permit issued at the instance of Makgosi Dube and dated 21 August 1989. The site permit indicates that the first respondent is the dependent of Makgosi Dube and is permitted to reside with her at site number [...] Munsieville. The first applicant states that the

second applicant is his brother and is also a beneficiary of the estate of the Late Maria Makgosi Dube.

4. The first and second applicants state that at the time of the death of Ms Makgosi Dube on 22 January 2005 they were residing at the property with their mother, F Q, and together with their two minor siblings, namely, L Q and B Q. It is common cause that the first and second applicants were evicted from the property by the first and second respondents in February 2018. It is also common cause that on 27 January 2005 and following the death of Ms Makgosi Dube, Mr V M, who was one of the two surviving children of the late Makgosi Dube, was issued with letters of executorship by the Master of the High Court, Johannesburg. On 15 May 2015 Mr M entered into a written sale agreement with the first and second respondents for the purchase of the property.
5. On or about 16 September 2015 and following the sale transaction, the third respondent was appointed as transferring attorneys for the property from the estate of the Late Makgosi Dube into the names of the first and second respondents. On or about 16 October 2015 the property was registered into the names of the first and second respondents.
6. Evidence on the record indicates that V M died on 13 February 2018 and F Q, the applicant's mother, died on 5 May 2013.

BASIS ON WHICH THE APPLICANTS SEEK RELIEF

7. The primary basis on which the first and second applicants seek relief is that Mr V M, who acted as the executor of the estate of the Late Makgosi Dube, and concluded the sale of the property, lacked authority to do so. The first and second applicants claim in this regard that the fifth respondent was improperly and unlawfully induced to facilitate the transfer of the property by the fraudulent actions of Mr V M and the third respondent.
8. The first and second applicants have attached various documents to their papers in an attempt to prove that V M lacked authority to act as the executor of the estate of the Late Makgosi Dube. One such document is what appears to be an affidavit deposed to by one Mphanama Mphatheleni who states that she is the assistant master of the South Gauteng High Court. The affidavit states as follows –

“The endorsement of the section 42(2), power of the transfer to attorney endorsed on the 02 October 2015 under the estate Late Makgosi Maria Albertina Dube, Master reference number: 1522/2005 was fraudulently made and as such the transaction is illegal and the date stamp appended in the power of attorney has been concealed as every date has a unique number.”

9. Attached to the applicants' papers is also an undated letter ostensibly issued by Master of the High Court which calls upon V M to attend to the office of the Master urgently with the letter of authority dated 27 January 2005. The applicants have also attached to their papers, the judgement and order issued by the Magistrate's Court for the district of Mogale City and dated 19 September 2017 evicting the first and second applicants from the property. I shall return later to this judgement and order.
10. The first and second respondents contend that the relief sought by the first and second applicants is incompetent on a number of grounds. In this regard the first and second respondents have also raised a number of points in limine. First, they assert that the third applicant can only be represented by an executor and therefore it is not possible for the third applicant to issue process by itself as it does not exist. They also assert that the first and second applicants have no locus standi to bring this application before this Court.
11. Second, the first and second respondents assert that the relief sought by the applicants is incompetent as they should have sought a relief to grant an order confirming that V M was not the executor of the estate or was not duly authorised to act on behalf of the estate of the Late Makgosi Dube. Third, they claim that the executor of the estate of the Late F Q should have instituted a claim in the event that her estate was to inherit from the estate of the Late Makgosi Dube.

12. Regarding the Deed of Sale in terms of which the property was subsequently transferred to them, the first and second respondents contend that the transfer was duly signed by a duly appointed executor of the estate of the Late Makgosi Dube and that all the relevant certificates in terms of the provisions of section 42(2) of the Administration of Deceased Estates Act 66 of 1965 were duly complied with and presented to the satisfaction of the Registrar of Deed, the fifth respondent. I should mention that only the first and second respondents are opposing the relief sought by the applicants in these proceedings.

LITIGATION HISTORY BETWEEN THE PARTIES

13. It is common cause that on or about 15 May 2015 the first and second respondents entered into a written sale agreement with Mr V M, who was the executor of the estate of Makgosi Dube, in respect of the property. The third respondent acted as the transferring attorneys of the property. The property was registered into the names of the first and second respondents on or about 16 October 2015. It is also common cause that during September 2017 the first and second respondents brought an application seeking the ejectment of the first and second applicants from the property. These proceedings were brought before the Magistrate's Court for the district of Mogale City. The basis on which the ejectment was sought was that the first and

second respondents were the owners of the property and that the first and second applicants were in occupation of the property.

14. In terms of the judgement of the Magistrate's Court dated 19 September 2017 and which has been annexed by the first and second applicants to the papers, the following is apparent;

14.1. The first and second respondents contended that they had purchased the property from the estate of the Late Makgosi Dube;

14.2. The first and respondent applicants contended that they were heirs of the Estate of the Late Makgosi Dube and stood to inherit the property or portion thereof;

14.3. The first and second applicants contended that the matter should be referred to the Master's office for investigation and that they sought to remain on the property until the dispute has been resolved; and

14.4. That the first and second respondents had failed to prove that the first and second applicants were in unlawful occupation of the property.

15. What is clear from the judgement is that in those eviction proceedings, the first and second applicants had challenged the validity of the sale of the property on the basis that the Master's office, had to their knowledge, not appointed an executor of the estate of Makgosi Dube and contended further that the sale of the property to the first and second respondents was unlawful.
16. The Court found that there was a valid deed of transfer in the names of the first and second respondents. The Court found further that the first and second applicants were aware of the sale of the property to the first and second respondents and had done nothing to approach the Court challenging the sale or to stop the transfer of the property to the first and second respondents. Accordingly, the Court ordered the first and second respondents to vacate the property by 27 November 2017.

The doctrine of res judicata

17. In my view, the first and second applicants have brought the current application to deal with the same issues that were dealt with by the Magistrate's Court in the eviction proceedings. Those eviction proceedings remain unchallenged. In those proceedings the issue of the ownership, transfer of the property and the alleged illegality of the transfer were fully dealt with and a final determination and an order was made by the Court.

18. The doctrine of *res judicata* prohibits the reconsideration of a case that has already been finally determined by a court. The doctrine is based on the following –

“The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if the parties are free to continuously approach courts on multiple occasions in the matter.”¹

19. The doctrine of *res judicata* deals with a situation where the same parties are in dispute over the same cause of action and/or the same relief. The current state of the law in respect of *res judicata* has been expressed as follows –

¹ ***Thwala v S*** 2019 (1) BCLR 156 (CC), at paras 10 and 16.

“[22] As mentioned earlier the plea of *res judicata* in this case takes the attenuated form commonly referred to as *issue estoppel*. *Res judicata* deals with the situation where the same parties are in dispute over the same cause of action and the same relief, and in the form of *issue estoppel* arises:

‘Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms ...’

[23] Although initially controversial that decision has subsequently been endorsed by this court as falling within the realm of *res judicata*. The current state of the law was summarised by Scott JA in the following passage:

'Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio res judicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be

construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of res judicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis ... Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood (1893) 10 SC 177 at 180, “unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals”.’²

20. It is clear from the judgement of the Magistrate’s Court in the eviction proceedings that what arose before Court was the validity of the sale of the property and the basis on which the Master’s office had appointed Mr V M as the executor of the estate of Makgosi Dube. On both of the issues the Magistrate’s Court found that there was a valid deed of transfer of the property into the names of the first and second

² *Aon South Africa (Pty) Ltd v Van den Heever NO and Others* 2018 (6) SA 38 (SCA), at paras 22 and 23.

respondents and that the first and second applicants were aware of and had done nothing to approach the court to challenge it.

21. In these proceedings the primary basis on which the first and second applicants seek relief is that there was an improper and unlawful transfer of the property to the first and second respondents. In particular, the first and second applicants claim that the fifth respondent was improperly and unlawfully induced to facilitate a transfer of the property by the fraudulent actions of Mr V M, the executor of the estate of the Late Makgosi Dube, and the third respondent. The issue of the lawfulness of the transfer of the property is pertinently dealt with in the Magistrate's Court judgement. A finding of unlawfulness of the transfer by this Court will contradict that eviction judgement in circumstances where this Court is not sitting as a court of appeal. Any such finding will be in conflict with the principle of *res judicata*.
22. In conclusion, I find that the relief sought by the first and second applicants in these proceedings will involve a reconsideration of the very issue that was before the Magistrate's Court in eviction proceedings. Naturally, the relief sought by the first and second applicants appears, on the face of it, to be somehow different from the relief sought by the first and second respondents in the eviction proceedings. The issues, however, remain the same. This will in any event be covered by the elements of *res judicata* in the form of issue

estoppel.³ The factual allegations around the validity of the transfer of the property by V M to the first and second respondents formed the crux of the first and second applicants' defence in the eviction proceedings. So was the issue of the executorship. These issues were finally determined by the Magistrate's Court.

23. I do not deem it necessary to go into the some of the defences raised by the first and second respondents given the conclusion that I have reached on the application of the doctrine of *res judicata*. Accordingly the application must be dismissed with costs.

24. I make the following order:

24.1. The application is dismissed with costs.

TJB BOKABA

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

FOR APPLICANTS: MS N NDLOVU

³ *Aon South Africa (Pty) Ltd v Van den Heever NO and Others* (supra).

INSTRUCTED BY: PHUNGO INCORPORATED

FOR RESPONDENTS: MR GOVENDER

INSTRUCTED BY: SMITH VAN DER WALT INC.