



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

Case No: 30124/2019

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

21 September 2023
DATE


SIGNATURE

In the matter between:

RATAEMANE, SOLOMON N.O

Applicant

and

SANTU MOFOKENG FOUNDATION N.P.C

First Respondent

BARTZ LUNETTA

Second Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG

Third Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 September 2023.

JUDGMENT

MALINDI J

Introduction

[1] The Applicant seeks orders in terms of the notice of motion as follows:

[1.1] Declaring the Donation Agreement entered into by the deceased Mr Santu Mofokeng (“Mr Mofokeng”) and the First Respondent, Santu Mofokeng Foundation NPC (“the Foundation”) dated 16 November 2015 invalid *ab initio* and unenforceable;

[1.2] The First and Second Respondents (“the Respondents”) return the artworks of Mr Mofokeng to the Applicant within seven days of the court order;

[1.3] The Respondents render a complete and full account to the Applicant of any and all transactions concluded by the Respondents with any and all third parties in respect of or in any respect pertaining to the works of Mofokeng;

[1.4] The Respondents pay to the Applicant all the monies in their possession derived from the artworks of Mr Mofokeng within seven days;

[1.5] The Respondents handover to the Applicant all the communication records, including attachments, in respect of the artworks of Mr Mofokeng;

[1.6] The Respondents be interdicted and restrained from dealing in any way with the artworks of Mr Mofokeng or holding themselves out as authorised to deal with or to represent or to act as agents with regards to the artworks of Mr Mofokeng; and

[1.7] The Respondents to pay the costs of suit on the attorney and client scale.

[2] At the commencement of proceedings counsel for the Applicant, Mr Harms, indicated that although the Applicant stands by the submissions made in the Applicant's heads of argument the only prayer that he would address the court on is the first prayer since a finding in favour of the Applicant in respect thereof would result in the rest of the prayers being upheld. Conversely, that the dismissal of the first prayer would result in the rest of the prayers not successful.

The Parties

[3] The Applicant herein is Mr Solomon Rataemane, in his official position as the executor of Mr Mofokeng's deceased estate. He was appointed executor on 1 February 2021. The application was initially brought by Ms Boitumelo Johanna Mofokeng ("Ms Mofokeng") who had remarried Mr Mofokeng on 15 March 2016. She was appointed administrator of the property of Mr Mofokeng after his death on 26 January 2020.

[4] The First Respondent is the Foundation, a non-profit company which has the stated objective of protecting the legacy off Mr Mofokeng in terms of the memorandum of incorporation signed by Mr Mofokeng on 10 December 2015.

[5] The Second Respondent is Ms Lunetta Bartz ("Ms Bartz"), a consultant in the art

world. She is cited in these proceedings because since 2008, she had worked closely with Mr Mofokeng and he had asked Ms Bartz in 2009 to manage his life's work. Ms Bartz did so until 2016.

[6] The Third Respondent is the Master of the High Court, against whom no relief is sought and has not participated in these proceedings.

[7] For convenience, the First and Second Respondents shall be referred to collectively as the Respondents.

Background

[8] Mr Mofokeng was a world-renowned African photographer and author of several books on photography. He passed away in January 2020.

[9] During 2008 Mr Mofokeng approached Mr Warren Siebrits ("Mr Siebrits"), with a view of housing his artworks at Mr Siebrits' gallery. He had arrived with his large collection of photographs and requested that Mr Siebrits "*take custody and care of them*". Ms Bartz was Mr Siebrits wife at the time and had therefore met Mr Mofokeng in this context. Ms Bartz took up the task of being specifically responsible to curate and commercialise Mr Mofokeng's artworks.

[10] In May 2009, when Mr Siebrits' gallery closed, Mr Mofokeng requested Ms Bartz to continue offering him professional assistance in managing his artworks. His request was accepted. Their relationship continued for six years. This included arranging international exhibitions of Mr Mofokeng's work in London in 2009, Paris in 2011, Norway in 2012 and Berlin in 2014. This included travelling

together to international and local exhibitions.

- [11] In August 2015, Mr Mofokeng and Ms Bartz concluded the “Exclusive Agency Agreement”, the purpose of which was to entrust Ms Bartz with the exclusive management of his photographic collection and commercial prints. The Exclusive Agency Agreement terminated on or about 16 November 2015 when the Donation Agreement was entered into on the same date, the result of which was to donate all Mr Mofokeng’s artworks to the Foundation. The Foundation was further granted exclusive copyright over those artworks.
- [12] In 2013, Mr Mofokeng was involved in a motor vehicle accident and began to suffer from slurred speech.
- [13] Mr Mofokeng suffered a deterioration in his health and consulted numerous doctors in 2014 and 2015.
- [14] In October 2015, Dr Anderson disclosed to Ms Bartz that Mr Mofokeng was afflicted with a terminal disease and that his life expectancy was about three years.
- [15] During this time Ms Mofokeng came back into Mr Mofokeng’s life and excluded Ms Bartz from attending to Mr Mofokeng either professionally or as a guardian and confident.
- [16] As stated above, Ms Mofokeng remarried Mr Mofokeng on 15 March 2016, four months after the signing of the Donation Agreement.

Submissions

[17] The Applicant's primary submission is that Mr Mofokeng was mentally incapacitated and did not have the requisite mental capacity to conclude the Donation Agreement at the time that it was concluded. In support of this assertion, the Applicant relies on the appointment of Ms Mofokeng as the administrator of Mr Mofokeng's property in terms of section 62 of the Mental Health Care Act 17 of 2002 and submits that an administrator in terms of the Act only gets appointed over persons who are mentally ill or persons with severe or profound intellectual disability. This submission was not pressed on during argument. Instead, the alternative was argued vigorously. That is, that in the event that it is found that Mr Mofokeng had the requisite mental capacity to conclude the purported donation agreement, the Applicant submits that the conclusion and enforcement of the Donation Agreement is contrary to public policy.

[18] Reliance was placed on the case of *Sasfin (Pty) Ltd v Beukes*¹, which reads as follows:

"These provisions do not, in my view, necessarily exclude the existence of a nil indebtedness, and do not provide a cogent answer to the arguments supporting the contrary view.

The effect of what I conceive to be the proper interpretation of clause 3.4 and 3.14 was to put Sasfin, from the time the deed of cession was executed, and at all times thereafter, in immediate and effective control of all Beukes' earnings as a specialist anaesthetist.

¹ 1989 (1) (A) at paragraph 13f-14a.

On notice of cession to Beukes' debtors Sasfin would have been entitled to recover all Beukes' book debts. In addition, Sasfin would have been entitled to retain all amounts so recovered, irrespective of whether Beukes was indebted to it in a lesser amount, or at all. This follows from the provisions in clause 3.4 that Sasfin would be 'entitled but not obliged' to refund any amount to Beukes in excess of Beukes' actual indebtedness to Sasfin. As a result, Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to an end, as clause 3.14 specifically provides that 'this cession shall be and continue to be of full force and effect until terminated by all the creditors'. Neither an absence of indebtedness, nor reasonable notice to terminate by Beukes in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end. An agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy."

[19] It is submitted on behalf of the applicant that the conclusion of the Donation Agreement effectively placed all of Mr Mofokeng's artworks under the control of the Respondents, and reduced Mr Mofokeng to a beggar with no stable income and no means to support himself and his family. For this reason, it is submitted that the agreement is contrary to public policy.

[20] The First Respondent's submission is that the Applicant has failed to elaborate upon the assertions that the Donations Agreement is lacking fairness, justice and reasonableness as required in *Beadica 231 CC and Others v Trustees for the*

*time being of the Oregon Trust and Others.*²

[21] In *AB v Pridwin Preparatory School*³ it was held that abstract values of fairness and reasonableness are not basis to escape the consequences of a contract because they are not substantive rules. The Constitutional Court has confirmed *Pridwin* by holding that courts must employ the constitution and its values “*to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their lives.*” This means that the principle that contracts freely and voluntarily entered into, should be honoured unless the party claiming that a contract is contrary to public policy can show that the contract suffers excesses that the constitutional values, and demand that the contract or parts thereof are so oppressive that public policy demands that a party should be freed therefrom.⁴

[22] The two submissions made on behalf of the Applicant that the Donation Agreement placed Mr Mofokeng “*virtually in the position of a slave, working for the benefit of the First Respondent*” and that what exacerbates the situation is that “*at the time of signing the purported donation agreement, Mofokeng was battling with a terminal disease and therefore needed all the resources he could get at his disposal in order to, firstly, take care of himself in his last days on earth, and, secondly, secure a good future for his family after his death.*” There is no substantiation in respect of both submissions.

² 2020 (5) SA 247 (CC).

³ 2019 (1) SA 327 (SCA).

⁴ 2020 (5) SA 247 (CC) at paragraph 71.

[23] On the other hand, the First Respondent made a submission that distinguishes the *Sasfin* case from the case of *Beadica*, in that in *Sasfin* a doctor signed a deed of cession in favour of a finance company, which had the effect of placing the company in control of the doctor's earnings and book debts irrespective of the amount to which the doctor was indebted. This effectively deprived the doctor of his income and means of supporting his family. The court held that an agreement having such an effect was clearly incompatible with the public interest and was, therefore, contrary to public policy. The Second Respondent associate's herself with these submissions.

[24] The Respondents, together, demonstrated that Mr Mofokeng continued to receive earnings from the sale of his artworks and was looked after by Ms Bartz even though there was no such obligation under both the Donations Agreement and the Exclusive Agency Agreement. As stated above, the common background facts indicate the income made by Mr Mofokeng and how the Second Respondent took care of him both in regard to his deteriorating health and for his general upkeep. In addition, Mr Mofokeng kept his independent banking accounts in which significant amounts of money resided.

[25] Mr Mofokeng's position is summarised in the First Respondent's submissions as follows:

"Accordingly, in the period after the donation agreement had allegedly left Mr Mofokeng with no source of income, he was paid directly the sum total of R217 500 over an 8-month period. ... this was in addition to any other sources

of income that he might have had. For example, in early 2016, after the Donation Agreement was concluded, Mr Mofokeng was awarded a prize for his photography in the amount of 70 100 Euros. Nor does this sum total include the amounts paid on his behalf to third parties.”

[26] When Mr Mofokeng was diagnosed with a debilitating disease in 2015, he formed the view that he should preserve his legacy hence he agitated for the establishment of a foundation. This evidence indicates that it was not mental incapacity that had afflicted him. The medical evidence before court excludes mental incapacity. His wish to preserve his legacy was expressed as far back as 2009. At this time, he had also indicated to the Second Respondent that none of his family members were capable of assisting him in that regard. He had already in 2010 executed his last will and testament in which he sought to bequeath his artworks to the Smithsonian institute for that purpose.

[27] At the time of the establishment of the Foundation and the entering into of the Exclusive Agency agreement, four people were involved including Mr Mofokeng. That is, the Second Respondent, Ms Lucia van Zyl and Ame Bell (nee Snyman). On the other hand, the evidence in support of Ms Mofokeng is as stated above. Ms Mofokeng had been divorced from Mr Mofokeng at the relevant time, and only remarried him on 15 March 2015. She can therefore not testify as to Mr Mofokeng’s mental capacity at the relevant time except in speculative terms.

[28] The test whether a person was, at the relevant time, capable of managing the particular affair in question or that they could understand and appreciate the

transaction that they entered into was set out in *Pheasant v Warne*⁵ and *Theron v AA LIFE Assurance Association Ltd*⁶ The enquiry into mental capacity is an objective assessment of a person's mental capacity at the time of contracting or executing a particular affair. Admissible evidence has to be tendered.

[29] Ms Mofokeng has sought to rely on medical evidence. By this time, the following medical reports had been made: Mr Mofokeng suffered from slurred speech after a motor vehicle accident in 2013; On 7 May 2015 Dr Anderson diagnosed Mr Mofokeng with progressive supranuclear palsy; On 27 October 2015 Dr Anderson referred Mr Mofokeng to physical therapy, speech therapy and occupational therapy. Doctor Anderson described Mr Mofokeng 's condition as a Parkinson's Plus Syndrome where the patient has the inability to look up or down, has multiple falls with serious injuries, has dysphagia with the inability to speak and communicate.

[30] It is clear from this medical evidence that at that time of the conclusion of the Foundation Agreement Mr Mofokeng was suffering from physical conditions that were debilitating. There is no evidence of mental incapacity in the circumstances. The only evidence available is that of the Second Respondent to the effect that Mr Mofokeng was in sound mind several years before and at the time of the signing of the Donation Agreement dated 16 November 2015. Ms Mofokeng re-entered Mr Mofokeng's life only on 15 March 2016 and cannot testify as to his mental capacity before then. She has not provided admissible evidence required to assess a person's medical condition or capacity at the time of entering into an

⁵ 1922 AD 481 at 488.

⁶ 1995 (4) SA 361 (A).

affair or transaction.

[31] I therefore come to the conclusion that the Applicant has not made out a case on the papers that Mr Mofokeng suffered mental incapacity at that time of the establishment and signing of the Foundation Agreement, and the memorandum of understanding on 10 December 2014 and resolutions preceding the signing of the Donation Agreement.

[32] As Mr Harms properly submitted, a finding that the Donation Agreement was properly entered into would dispose of the remaining prayers. The Respondents have made the same submission but proceeded to address various preliminary points. The Applicant would not be entitled to the relief of the return of Mr Mofokeng's artworks and the money derived from them; a full account by the Second Respondent for all matters concerning Mr Mofokeng's artworks; an interdict preventing the Second Respondent and the Foundation from dealing with and presenting themselves as agents or representatives of Mr Mofokeng's artworks.

[33] The balance of the prayers flow from the agreements entered into as a result of the Donation Agreement. Their validity has not been impugned. It is not necessary to go into the defences in respect of these further prayers as the defences were proffered in the event that the Donation Agreement was found to be invalid.

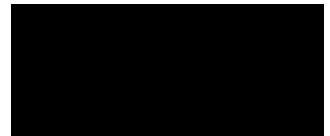
Conclusion

[34] The Applicant has failed to establish that Mr Mofokeng lacked mental capacity

when he entered into the Donation Agreement and resulted in the donation of his artworks to the Foundation. The evidence of the Second Respondent establishes that he in fact had mental capacity to enter into the Donation Agreement, the Exclusive Agency Agreement and

[35] In the circumstances the following order is made:

1. The application is dismissed.
2. The Applicant is to pay the costs of the First and Second Respondents, including costs of counsel.



**G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

APPEARANCES

COUNSEL FOR APPLICANT: INSTRUCTED BY:	Adv NS Nxumalo Mthembu Inc Attorneys
COUNSEL FOR 1 ST RESPONDENT: INSTRUCTED BY:	Adv JJ Meiring Webber Wentzel
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DATE OF THE HEARING:	14 November 2022
DATE OF ORDER:	17 August 2023
DATE OF REASONS:	21 September 2023