IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – PORT ELIZABETH)

CASE NO: 549/2010
DATE HEARD: 13/08/2012
14/08/2012
DATE DELIVERED: 18/09/2012

In the matter between

NOXOLO EDITH DLUKULU N.O	**Plaintiff**

and

THE MASTER OF THE HIGH COURT	**First Defendant**
MYNARD BEJA	**Second Defendant**
THE REGISTRAR OF DEEDS, CAPE TOWN	**Third Defendant**
NEDBANK LIMITED	**Fourth Defendant**
LAWRENCE MASIZA VORSTER INC	**Fifth Defendant**
THANDI TONISI	**Sixth Defendant**

JUDGMENT

ROBERSON J:-

[1] The plaintiff was authorised by the first defendant (the Master) to administer the estate of the late Nomvula Isabella Radu (the deceased), who died on 13

June 2003. The plaintiff is the daughter of the deceased. On 25 July 1990 the immovable property described as Erf 7748 Motherwell (the property) was registered in the names of the deceased and the second defendant (Beja), each having a 50% share.

[2] In this action, which is defended only by Beja, the plaintiff claims the following relief:

[2.1] For a declaration to the effect that:-

[2.1.1] the Second Defendant enjoys no rights in and to Erf 7748, Motherwell, situated at 5 Kwenxurha Street, NU6, Motherwell, Port Elizabeth;

[2.1.2] Erf 7748, Motherwell, situated at 5 Kwenxurha Street, NU6, Motherwell, Port Elizabeth is the property of the deceased, Nomulva Isabella Dlukulu;

[2.1.3] the appointment, by First Defendant, of the Second Defendant as the executor of the Late Nomvula Isabella Dlukulu to be of no force or effect;

[2.1.4] the sale of Erf 7748, Motherwell, situated at 5 Kwenxurha Street, NU6, Motherwell, Port Elizabeth to the Sixth

Defendant to be of no force or effect;

[2.2] An order setting aside the Second Defendant as the executor of the late Nomvula Isabella Dlukula;

[2.3] An order interdicting the Fifth Defendant from taking any steps to transfer Erf 7748, Motherwell, situated at 5 Kwenxurha Street, NU6, Motherwell, Port Elizabeth to the Sixth Defendant;

[2.4] An order in terms whereof such of the Defendants as may defend this action are ordered to pay the costs thereof;

[2.5] An order granting the Plaintiff such further and/or alternative relief as this Honourable Court may deem appropriate.

PLEADINGS

[3] It is necessary to set out the particulars of claim and the plea in some detail, because in both cases, the evidence fell short of what was pleaded, and demonstrated that to some extent the allegations in the pleadings were speculative and based on assumptions.

Particulars of claim

[4] It was alleged in the particulars of claim that during 1990 the deceased wanted to purchase the property, but her application to the Natal Building Society, now Nedbank (NBS), for a loan was rejected and she was advised that her application would be favourably considered if she could procure a surety and co-principal debtor. The deceased approached Beja, who undertook to bind himself as surety and co-principal debtor if NBS granted a loan to the deceased. In circumstances unknown to the plaintiff, and as a result of an error or a misunderstanding on the part of NBS officials, or the attorneys attending to the registration of the property, the property was registered jointly in the names of the deceased and Beja, and a mortgage bond was registered over the property by the deceased and Beja, in favour of NBS. Beja at all times only intended to be bound as surety and co-principal debtor and had no intention to acquire rights in the property. All payments in reduction of the loan from NBS were made by the deceased, and after her death the balance of the debt owing to NBS was discharged by the proceeds of an insurance policy over the life of the deceased, which policy had been ceded to NBS. During 2008 Beja was authorised by the Master to administer the estate of the deceased. It was alleged he did so fraudulently, by misrepresenting to the Master that he was the deceased's brother. During 2009 Beja sold the property to the sixth defendant.

Plea

[5] Beja pleaded that he and the deceased intended to purchase the property because they were involved in a romantic relationship and planned to marry. He and the deceased were assisted in applying for a loan by developers "Galf Coopers Construction" (the name must be Gough Cooper). He and the deceased were told that in order for the loan to be approved they had to see a doctor for tests so that insurance could be obtained for the loan. They were then sent to attorneys who were to attend to the transfer of the property, which was transferred into both their names. He denied that he undertook to be a surety and co-principal debtor, and that the property and the bond were registered in both his and the deceased's names as a result of an error or misunderstanding. He denied that he intended only to be a surety and co-principal debtor and that he had no intention to acquire rights in the property. He denied that the deceased made all the payments in reduction of the loan, but admitted that the proceeds of the policy over the life of the deceased were paid to NBS. After the deceased died, he was called to a meeting at the offices of the plaintiff's attorneys, at which meeting he was told to sign documents to effect the transfer of his half share of the property to the estate. He refused to do so. After a second meeting was called which the plaintiff did not attend, he was advised by the attorneys to approach the Master to apply to be appointed as executor. He denied that his appointment was fraudulently obtained and pleaded that he had informed the Master that he was the deceased's boyfriend. He admitted selling the property to the sixth defendant, and that he appointed the fifth defendant to attend to the conveyancing.

INTERDICT

[6] On 2 March 2010 the plaintiff was granted an order interdicting Beja and the fifth defendant from taking steps to transfer the property, and interdicting Beja from dealing with the estate of the deceased, pending the outcome of this action.

EVIDENCE FOR THE PLAINTIFF

[7] Mr Mzwandile Ngqumetyana testified that he was a relative of the deceased and has a close relationship with her family. During 2007 he, the deceased's sister Edith, the plaintiff, and the deceased's son Mthetheleli, went to the plaintiff's attorneys of record for the purpose of having the property transferred to the plaintiff and Mthetheleli. The person who attended to them at the attorney's office, with reference to a document produced on a computer, informed them that Beja's name was on the title deed and that they should meet with him. They were shocked at the news because none of them knew him. They were advised to speak to Beja to see if he was prepared, as he expressed it, "to take his name out". Ngqumetyana said that Edith remembered that the deceased had wanted to buy a house and had applied for a loan at the bank, but her income was insufficient. The deceased had then asked Beja to assist her because they were working together at Pick and Pay, and told him that they should combine their salaries so that she could qualify for a loan and purchase the property.

[8] Ngqumetyana found out where Beja lived and he and Mthetheleli went there and met him. They introduced themselves and told Beja that they had come to see him because they had discovered that he was a co-owner of the property and the property was to be transferred to the deceased's children. For that purpose, again as it was expressed, "his name had to be removed". Beja had forgotten about the property but after their explanation he remembered it and seemed not to have a problem with their request, and agreed to it. Beja was ill at the time and an arrangement was made that they go the next day to the attorneys. The next day they travelled together to the attorneys' offices and the person assisting them explained to Beja the purpose of his presence there. Beja refused to sign documentation and said that he had R20 000.00 invested in the property. Ngqumetyana told him they were not going to give him R20 000.00 and that he should produce documents proving that he had put that sum into the house. Beja did not produce such documents, and left before the meeting was concluded. Beja did not contribute in any way to the purchase of the property, because there were no documents or receipts to prove that he did. Deductions were made from the deceased's salary in payment of the loan. After the death of the deceased the house was paid off by the proceeds of the life policy and certain death benefits paid out by Pick and Pay. It was put to Ngqumetyana in cross-examination that Beja had paid a R1 500.00 deposit towards the property. He said that Beja made no mention of that payment at the attorneys' offices.

[9] Documents relating to Beja's appointment by the Master recorded that his relationship to the deceased was stated as "brother". According to Ngqumetyana, Beja was not related to the deceased and he did not know of a relationship between them. The deceased and Mthetheleli's father, whose name he forgot, were in a relationship at the time she purchased the property. He agreed that the deceased previously lived at Kwazekhele but disputed that Beja would have stayed overnight there because it was against the customs of the deceased's mother, with whom the deceased lived. He could not dispute that the deceased and Beja were taken to the property to view it, and signed a "happy letter".

[10] According to Ngqumetyana no further meetings were called or held with Beja at the attorneys' offices, and thereafter Beja threatened that he was going to sell the house and sent estate agents to view the property.

[11] Two affidavits were read into the record by Ngqumetyana, one purporting to be by the deceased and the other purporting to be by Beja. Both documents were discovered by the plaintiff. The Rule 37 minute provided *inter alia* that it was agreed that no issues could be decided by production of proof by way of affidavit, and that documents discovered by them could be handed in and referred to at the trial without the necessity for formal proof thereof, subject to the right of either party to demand formal proof of any particular document should the other party wish to make use of that document. Both affidavits reflected that they

were signed on 25 April 1995 before a commissioner of oaths at Motherwell police station.

The affidavit of the deceased read as follows:

> "On 1990 I bought a house from Premier Homes, at Motherwell.
>
> Mrs Tenant who was employed under Premier Homes together Mr Holleys. They ask Mynard Beja as my security. That was a mistake because of unaware that he will be as the owner. I now wish that the mistake to be corrected that I am the lawful owner of this house 5 Kwenxurha Street. Everything paid by me."

The affidavit of Beja read as follows:

> "I am the lawful owner of the said house. On 1990 when Miss Dlukulu bought a house from Premier Homes. I had been asked by Miss Tanant and Mr Holles that I must produce my I D document, unaware that the house will be registered on my name. I now wish to certify that the owner of the house is Miss Dlukulu as she paid for everything."

[12] The plaintiff testified that she met Beja for the first time at the attorneys' offices. The deceased had never mentioned a relationship with Beja, and the deceased had a relationship with Methetheleli's father, Jackson Jokolo, from 1987 until 1990, when she purchased the property. The deceased never told her about her intention of purchasing the property, and she knew nothing of the circumstances leading up to the purchase. She did not know that the deceased

had problems in securing a loan. She merely learned that the deceased had the property. The plaintiff lived with the deceased at Kwazekhele, and at the property from 1990, and Beja had never lived at the property. When it was put to her that Beja had lived there for a brief period, she said she did not know him. She too said that the deceased's mother would not have allowed him to stay overnight when they lived at Kwazekhele.

[13] She was shocked when she learned that Beja was a co-owner of the property but accepted that he was. She did not know if he had contributed towards the purchase of the property, and said that the deceased was employed and had paid for the house. She was asked in cross-examination if she had learned that there was a dispute about his entitlement to a 50% share in the property and her answer was no. When asked if she wanted Beja to remain a co-owner, she said no, but when asked what she wanted him to do, she said nothing. She said she was unable to say that he could not have a 50% share. When asked if he were to offer to sell his 50% share would she accept the offer, she said she did not understand. Eventually when asked what she wanted out of the court proceedings, she said they wanted the property to be part of the deceased's estate because Beja had not contributed anything towards its purchase. She knew this because he never produced any documents to prove a contribution. She agreed that she did not know if he had contributed anything and was unable to say that he could not benefit.

EVIDENCE OF BEJA

[14] Beja testified that he and the deceased had a romantic relationship from 1987 until 1994. They met in 1987 at Pick and Pay where she was employed. At the time he was employed at Firestone. He would sleep over occasionally at her mother's home and the deceased would sleep over at his home. He met the deceased's mother and did not notice that she was strict. He and the deceased decided to purchase the property because they planned to marry, and went to Gough Cooper where they produced their payslips and were told to pay a deposit of R1 500.00. The purchase price of the property was R45 000.00. He paid the deposit because he was employed at the time. They were asked how many bedrooms they wanted and were also shown a picture of a completed house. At Gough Cooper they were given forms to complete and to take to attorneys in Central (presumably Port Elizabeth Central). There their blood was taken and they were weighed, and they signed certain documents. The document they were given at Gough Cooper was to purchase the property. They returned to Gough Cooper, where they were told to wait until the house was built.

[15] When the house was completed, he and the deceased went to see it and signed a "happy letter". He lived in the house with the deceased for about three months, during which time he never saw the deceased's children in the house, and did not live with them there. He only learned who they were when he met them at the attorneys' offices.

[16] He and the deceased did not borrow the purchase price. They combined their salaries to see if they qualified to purchase. He and the deceased had discussed the deduction of the instalment of R450.00 from her salary to be paid to the bank. The instalment was deducted from her salary and he paid his share to her in cash. He was shown a copy of the deceased's payslip dated 30 June 2000 which reflected a deduction of R555.00, and he said he had given her half of that amount. He did not know if the money deducted from the deceased's salary and the amount he gave her was paid to Gough Cooper because he is not educated. He did not know that Gough Cooper had to be paid. He accepted that Pick and Pay paid the deductions from the deceased's salary to the bank and said that when he and the deceased purchased the property, they went to the bank where they were told the money had to be paid in instalments. However, when shown an NBS statement of loan account in his and the deceased's name, and a letter addressed to both of them from NBS informing them of a reduction in the interest rate and a new instalment, he said he had never borrowed money from the bank. He had never before seen a statement from the bank. He did not dispute that the bank had paid Gough Cooper in full, because he was not present.

[17] He agreed that he and the deceased registered a bond over the property. His understanding is that a bond is registered when a property is bought on credit and deductions are made from your salary. If you do not pay, the house is taken.

[18] After a misunderstanding between him and the deceased because of his drinking, he moved to an area known as Shukushuma. There he lived in a shack and later moved to an RDP house. The shack had no electricity and a bucket toilet and was not of the same standard as the property he and the deceased had bought. He and the deceased decided that he should go and live in the shack because they were fighting and he was afraid that he would be arrested. Their relationship continued after he moved and she would visit him at the shack. This arrangement continued after he left the property, until the relationship ended in 1994. The relationship ended because there was no love between them and they argued. He possessed no documents pertaining to the property because he left them with the deceased.

[19] During cross-examination he was shown a sketch of a floor plan of a house, showing the layout of rooms, and was asked if that was the property. He said that the boundary was different and that the rooms depicted in the sketch were not correct, for example that a room marked "bedroom" was the dining room. He was then informed that the sketch was made up by the plaintiff's attorney and was not a sketch of the property. His response was to say that he did not have a good memory of the property because he had not lived there for a long time.

[20] He was unaware that the deceased died in 2003 and only found out when Ngqumetyana, the plaintiff, and Mthethetheleli arrived at his home. Ngqumetyana asked him if he knew the property was registered in his name and

he said that he knew. They told him he should transfer the property into the name of the deceased's children, and he said he would only do so if he could get his 50% share. Ngqumetyana said they should go to the attorneys' offices. At the attorneys' offices the attorney was not there and they were attended to by a secretary, who asked who the co-owner was. He said that he was and she said she wanted to speak with him and not the others. The following day he fetched the family members and took them to the attorneys' offices, where they met a female attorney, who told him that Ngqumetyana and the deceased's children had said that he was going to transfer his share of the property. Beja said only if he got his 50%, at which he and Ngqumetyana argued and Ngqumetyana was told to leave. Beja denied that he had walked out of the meeting. The attorney said they should try and solve the problem but no agreement was reached, and that is why he decided to sell the property so he could get his 50%.

[21] A further appointment had been made with the attorneys but the family failed to attend and eventually he asked the attorney what he should do and was told to do as he wanted. He asked for a copy of the deceased's death certificate and identity document and approached the Master. Once he received the letter of authority he took steps to sell the property. He did not complete the documents which he signed at the Master's office which reflected that he was the deceased's brother and he did not say he was the deceased's brother. He is uneducated and was merely told to sign.

[22] He denied that he had signed the affidavit in which he was purported to have said that the deceased was the owner of the property, or that he had purchased a house from Premier Homes. He did not go to Motherwell police station and knew nothing about the document.

[23] With regard to the affidavit of the deceased, he said he did not know what a suretyship was but after it was explained to him, he said it had not been agreed between him and the deceased that he would be a surety, and that they had purchased the property together. There had been no mention of a suretyship at Gough Cooper, he had not met Holleys and Tenant, and he did not know who he had met at Gough Cooper.

[24] His present stance is that the property should be sold or he should given his 50% of the property, presumably the value of his share. Although it was put to Ngqumetyana that Beja had not mentioned the sum of R20 000.00 at the attorneys' offices, Beja said he had asked for R20 000.00 after thinking about it and because the purchase price was R45 000.00.

[25] When asked why he had done nothing about enforcing his right in the property from 1990 until 2007, he said that he did not have a reason to evict the family because he knew the property was his, but he decided to do so when he learned they wanted it transferred to them. If he had not known of the deceased's death he would have let her stay in the property.

[26] After their relationship ended in 1994, he and the deceased did not discuss what would happen about the property. He continued to pay her money towards the property until his employment with Firestone ceased in 1996. He did not tell her that he could no longer pay, because he had erased her telephone number, although he knew where she lived and worked. He was confused because he had lost his employment and he decided to go home.

DISCUSSION

[27] Ngqumetyana and the plaintiff impressed me as honest witnesses. The thrust of their evidence was that Beja's co-ownership of the property was a shock and a surprise because they did not know him and the deceased had not discussed Beja's involvement in the purchase of the property with them. Neither of them could testify directly about the circumstances of the purchase of the property but it was clear that they honestly believed that the deceased had paid for the property. They did not attempt to fabricate evidence to support the plaintiff's case, and the plaintiff in particular displayed no bias whatsoever against Beja. She seemed not to understand fully why she was in court but in my view that did not reflect adversely on her honesty.

[28] Beja was not an altogether satisfactory witness. At times he failed to answer a question directly and it had to be repeated. His evidence was also confusing and contradictory. Although he said he did not know that Gough

Cooper had to be paid, he accepted that Gough Cooper had been paid by the bank. He said that he and the deceased had gone to the bank, but denied that he had ever borrowed money from the bank. Ngqumetyana's evidence that Beja had initially agreed to transfer his share of the property was not challenged in cross-examination, and it was also put to Ngqumetyana that Beja would deny mentioning R20 000.00 at the attorneys' offices, whereas it was Beja's own evidence that he did mention that sum. On the other hand he was adamant that he and the deceased had intended to purchase the property together and that there was no mention of a suretyship.

[29] The only evidence on the part of the plaintiff which shed any light on Beja's involvement in the purchase of the property was that of Ngqumetyana, when he referred to what the deceased's sister had told them. This was hearsay evidence but it was not objected to. The evidence of Ngqumetyana and the plaintiff did not support some of the allegations in the particulars of claim, namely that the deceased was advised to find a surety, that Beja undertook to be a surety and co-principal debtor, and that owing to an error on the part of NBS or the conveyancing attorneys, he became the registered co-owner. I understand the difficulty the plaintiff had in proving these allegations, because events took place some twenty two years ago, and the evidence of the deceased was not available.

[30] Beja's evidence was a little more consistent with his pleadings, but he clearly had no idea why his blood was drawn or why he was weighed, and did not understand the purpose of a loan to pay the seller and a purchaser's obligation

then to pay the bank which lent the money. Yet it was pleaded on his behalf that he went to the doctor for the purpose of obtaining insurance and that he and the deceased had been assisted by Gough Cooper in applying for a loan.

[31] It was submitted on behalf of the plaintiff that the evidence proved that Beja never intended to take transfer of the property and reference was made to the judgment in *Legator McKenna Inc and another v Shea and Others* 2010 (1) SA 35 (SCA), specifically the abstract theory regarding the passing of ownership.

[32] One must consider the evidence as a whole and the probabilities. It is a fact that the property was registered in the names of the deceased and Beja. In order for that to happen, there must have been a written sale agreement as well as the usual documentation signed for the purposes of registration of the transfer and the bond. It is in my view improbable that all these documents would have been prepared in error, and that Beja should rather have signed a deed of suretyship. It was not part of the plaintiff's case that Beja acquired ownership by fraud or duress committed against the deceased. The case is that he acquired ownership as a result of a mistake on the part of NBS or the attorneys, and that his true intention, namely to be a surety, was not given effect to. The fact that all the necessary documentation must have been prepared for signature by the deceased and Beja, means that Gough Cooper and NBS must have accepted that the deceased and Beja were purchasing the property jointly. There must have been communication between the deceased and Beja on the one hand, and

Gough Cooper and NBS on the other hand, which precipitated the drawing up of the documents.

[33] The combining of their salaries, which was Beja's evidence as well as what the deceased told her sister, is more consistent with the deceased and Beja being joint purchasers. If the deceased's income was insufficient to qualify for a loan from NBS, it meant that they were of the view that she could not afford the instalments. A suretyship would not have solved that problem, but joint salaries would have. Beja's evidence that he and the deceased went together to Gough Cooper and to the attorneys was not disputed, and indeed it is probable that they did so, in order to sign the necessary documents. If Beja had intended merely to be a surety, it is improbable he would have gone to view the property when it was completed and signed a "happy letter". I do not think he could have fabricated this evidence. If he did not intend to purchase, it is unlikely that he would have known what a "happy letter" was.

[34] The affidavit purporting to be that of the deceased was, as I understand the Rule 37 minute, not admitted as the truth of its contents. In any event Beja disputed that he had been asked to be a surety. He also denied signing the affidavit allegedly made by him. The signature on the affidavit was very different from his signature on the documents which he admitted signing at the Master's office. In my view therefore the plaintiff did not prove that Beja had signed the affidavit.

[35] Beja's evidence that he had merely signed the documents at the Master's office and had not told the official that he was the deceased's brother was not challenged. In my view his evidence in this regard was not inherently improbable. There was no evidence to prove that he already knew that the plaintiff had been issued with a letter of authority and that he therefore acted fraudulently in obtaining a letter of authority. His actions in obtaining a copy of the deceased's identity document and death certificate and going to the Master's office demonstrate in my view that he was genuinely trying to protect his rights in the property.

[36] I am however of the view that Beja's account of a romantic relationship with the deceased was improbable. It was not disputed that the plaintiff and Mthetheleli lived with the deceased both at Kwazekhele and at the property from 1990. Yet Beja simply said he had not lived with the deceased's children. If he had lived with the deceased at the property for three months, he would definitely have met her children. The improbability of his evidence is strengthened by his account of events which took place thereafter. He moved to a shack without amenities, yet continued his relationship with the deceased. After the relationship ended he did not discuss with her what was to happen about the property, and when he ceased making payments to her, did not inform her. His reason for doing so, namely that he had erased her telephone number, was most unconvincing.

[37] His evidence of making payments to the deceased was also suspect. When he was shown her June 2000 payslip, he said he had paid her half of the amount which was deducted, yet later in his evidence said he had stopped paying in 1996 when he stopped working.

[38] The fact that he only took some action about the property when he met with the deceased's family, indicates that in the intervening period he had no intention of exercising his right as a co-owner, and only regarded himself as an owner when he was asked to relinquish his ownership. These various aspects of the evidence go some way in showing that he did not intend to acquire ownership.

[39] If it is improbable that NBS and the attorneys made a mistake about the intentions of the deceased and Beja, how did he end up as a co-owner? Beja and the deceased were obviously not strangers to one another. There must have been at least a friendship between them for them to combine their salaries, sign documents together, view the property together, and sign a "happy letter". Given these facts, it is not improbable that there was an agreement between them to purchase the property jointly. I cannot see in what other capacity Beja signed the documents and acquired ownership. If he thereafter failed to honour whatever arrangement there was between him and the deceased regarding repayment of the loan which had been granted to them jointly, that failure might be grounds for a different action by the plaintiff on behalf of the estate. Such a

failure would explain his lack of interest in the property over the years.

[40] I am of the view that the evidence falls short of what the plaintiff is required to prove for the purposes of the present action, namely that Beja never intended to become an owner and to take transfer. Despite the improbabilities of his evidence to which I have referred and the inferences to be drawn from his attitude towards the property in the period between the termination of his alleged relationship with the deceased, and his meeting with her family, I cannot disregard the evidence to which I have referred which supports the probability that he and the deceased intended to purchase the property jointly. When one weighs the competing probabilities, I am not satisfied that the plaintiff has discharged the onus on her to prove otherwise.

ORDER

[41] Absolution from the instance is granted, with costs.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:-

For the Plaintiff:- Mr L Schoeman, instructed by Boqwana Loon & Connellan Attorneys, Port Elizabeth.

For the Second Defendant:- Adv M Marele, instructed by Lawrence Masiza Vorster Inc Attorneys, Port Elizabeth