IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION : DURBAN

CASE NO: 11764/2015

In the matter between:

ROBERT STEVEN TOMLINSON	**FIRST APPLICANT**
LALLITHA TOMLINSON	**SECOND APPLICANT**

and

YOLANDA TOMLINSON N.O.	**FIRST RESPONDENT**
THE MASTER OF THE HIGH COURT, DURBAN	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS FOR THE PROVINCE OF KWAZULU-NATAL	**THIRD RESPONDENT**
THE SHERIFF, SCOTTBURGH	**FOURTH RESPONDENT**

ORDER

The following order is granted: -

1. **It is declared that the agreement concluded on 25 October 2013 between the late Rachael Francis Tomlinson and the applicants for the sale by the former to the latter of a one-half share in Erf 110 Ifafa was valid and binding when it**

was concluded, and remains so, upon the assumption that the signatures which purport to be those of the late Rachael Francis Tomlinson on the written agreement are found to be her's.

2. The costs incurred in these proceedings with regard to the issue dealt with in paragraph 1 of this order are reserved for the court finally determining the application.

JUDGMENT

Delivered on: Friday, 19 March 2021

OLSEN J

[1] The applicants are married to each other in community of property. The first respondent is the first applicant's sister. She is cited in her representative capacity as executor of the estate of their late mother, Mrs Tomlinson. These proceedings also involve the estate of the father of the first applicant and the first respondent, Mr Tomlinson. Where I refer to Mr Tomlinson or Mrs Tomlinson in this judgment I intend to refer to the parents of the first applicant and the first respondent.

[2] Mr and Mrs Tomlinson were married in community of property. When they were both alive Mr and Mrs Tomlinson were the registered owners of a property known as Erf 110 Ifafa (the "property"). Mr Tomlinson died on 31 December 2012 bequeathing his one half undivided share in the property to the first applicant and the first applicant's brother, Denzel. That half share was transferred to the brothers in November 2014, leaving Mrs Tomlinson the owner of the other undivided half share in the property.

[3] In his founding affidavit the first applicant explains that his mother was not gainfully employed and was in need of financial assistance from time to time. He provided it to her with loans of money. Shortly after his father's death, Mrs Tomlinson suggested to the first applicant that she sell her undivided half share in the property to the first applicant at a price equivalent to the sum of the loans made to her from time to time, the price to be discharged by set-off. A written agreement to that effect was concluded on 25 October 2013.

[4] The issue as to when the liquidation and distribution account in Mr Tomlinson's estate was confirmed has not being canvassed in the papers. It seems probable, judging from the fact that the first applicant and his brother Denzel only received transfer of their inheritance a year after October 2013, that when the agreement for the sale of Mrs Tomlinson's undivided half share in the property was concluded in October 2013 the joint estate was still under the administration of Mr Tomlinson's executor.

[5] According to the first applicant, his mother not only signed the sale agreement referred to above, but also the documents necessary to be signed by her in order to effect transfer of her half share in the property to the first applicant. There was a hold up, apparently connected with an expired rates clearance certificate, which brought about that by 20 October 2014, when Mrs Tomlinson died, her undivided half share in the property had not yet been transferred to the applicants.

[6] The first respondent was appointed executrix in the estate of her mother on 9 February 2015.

[7] The first respondent refused to accept the claim made by the applicants to transfer of the property as a result of which this application was instituted in October 2015. The applicants seek an order directing the first respondent to do all things necessary in her capacity as executrix to transfer the undivided half share of Mrs Tomlinson in the property to the applicants.

[8] In April 2017 the application was referred for the hearing of oral evidence on issues, the extent of which suggests that in fact there ought to have been a referral to trial. When the Judge President called the roll on which the matter appeared on 7 December 2020, the first applicant was unable to attend to give evidence because he was in Mozambique and, as I understand the transcript of the proceedings on that day, was unable to return because of the Covid pandemic. An application for an adjournment on that ground had been launched some six weeks before 7 December 2020. At the suggestion of Mr *Chetty*, who appears for the first respondent, the Judge President adjourned the matter to the expedited roll with a view to having one of the issues which could be disposed of without evidence decided separately and first. It was a question raised by the first respondent, as to whether the agreement between the applicants and the late Mrs Tomlinson was one which complied with the provisions of the Alienation of Land Act, 68 of 1981 (the "Act"). That issue was argued before me on 22 February 2021. The papers were in something of a muddle, as a result of which I sought clarity from the parties as to what was in issue in the case, and as to the grounds upon which it was contended that the agreement was not in compliance with the Act. I was advised by Mr *Chetty* that there were three bases upon which the first respondent resists the application. One was the issue to be argued before me on that day. The second is an issue as to whether Mrs Tomlinson had indeed signed the agreement. (It is apparently the intention of the first respondent to lead a handwriting expert on this issue.) The third issue arises because the first respondent does not accept that the purchase price of R445 000 had indeed been discharged.

[9] As to this last issue I posed a question to Mr *Chetty* as to the basis upon which the first respondent would advance the proposition that the purchase price had not been paid, or that the applicants have to prove that it had been paid, if the court should find that the late Mrs Tomlinson indeed signed the sale agreement. I asked the question because in the sale agreement the seller acknowledges having received the price from the purchaser. Mr *Chetty's* response was to abandon that issue. I thought it best in the circumstances to write out my understanding of the issues in the case and the positions adopted by the parties, and to read that back to them for their confirmation, with a view

to settling exactly what was left in this case. My summary, which I set out immediately below, was confirmed by the parties.

‘(a) The court has to decide first whether the agreement complies with the Alienation of Land Act, the sole challenge being as to whether the late Mrs Tomlinson needed the executor of her husband's estate to be a co-signatory to the agreement between the applicants and her, or whether indeed only the executor of her late husband's estate could sign such an agreement. This issue has to be decided on the assumption that the late Mrs Tomlinson did sign the agreement.

(b) If it is found that the agreement was not in compliance with the Act, the application must be dismissed. If the issue is decided in favour of the applicants, a declaration of compliance with the Act must be made, and the further issue in the matter decided after the court has heard oral evidence.

(c) The sole issue to be decided by the court hearing the oral evidence would be whether the late Mrs Tomlinson signed the agreement. If it is held that she did, the application must succeed. If it is held that she did not sign the agreement, the application must be dismissed.’

[10] The argument for the first respondent on the issue to be decided at this stage proceeds along the following lines.

(a) Upon the death of a spouse married in community of property the surviving spouse
is not immediately and automatically vested with dominium of a half share in any property belonging to the joint estate. She is restricted to a right against the executor to half the nett balance available in the joint estate, which may eventually turn out to include a half share in immovable property due to the spouse by virtue of the marriage in community of property, if the property is not sold to discharge debts.

(b) Until the estate is finalised the only person with power to sell what the surviving spouse might regard as her half share of immovable property is the executor.

(c) If Mrs Tomlinson purported to sell a half share as agent of the executor, the truth of the matter is that she had no such authority.

(d) Perhaps expanding on (c) above it is contended that the agreement does not comply with the Act "in that it has not been signed by the owner or someone authorised to sign on the owner's behalf as seller".

(I will refer to these legs of the argument as "proposition (a)", "proposition (b)", and so on.)

[11] Proposition in (a) is correct. (See *Fischer v Ubomi Ushishi Trading CC and Others* 2019 (2) SA 117 (SCA), para 26.) The position was put as follows in Corbett et al *The Law of Succession in South* Africa 2nd ed (2001) at 15.

'And where a man or woman who was married to his or her spouse in community of property dies, the heirs of the predeceased spouse do not acquire co-ownership in individual assets of the joint estate, but merely the right to claim from the executor half of the nett balance of the joint estate. Nor is a survivor, despite having been during the lifetime of the predeceased spouse co-owner of half of the joint estate, vested with *dominium* of half of the assets. Like the heirs of the predeceased spouse, the survivor is restricted to a right against the executor to half of the nett balance.' (Footnote omitted)

The matter might be put slightly differently. For the duration of the marriage the survivor was a co-owner of the whole of the joint estate; but for so long as the marriage subsisted, the whole of the estate was not just undivided but indivisible (the extraordinary remedy of *Boedelscheiding* and s 20 of the Matrimonial Property Act, 88 of 1984 aside).

[12] Proposition (b) is not correct. It would be correct if it was confined to the proposition that until the estate is finalised, the only person with power to dispose of property in the estate – ie deliver it into the ownership of someone else – is the executor

exercising his or her functions as such according to law. It is that power of disposal that the executor exercises when he or she delivers property to heirs or, in the case of a marriage in community of property, to the surviving spouse as to the half share due to that spouse by reason of the marriage in community of property. If it is necessary or proper, according to the laws governing the winding-up of deceased estates, to sell property with a view to delivering it into the ownership of a third party, it is the executor who has the power to do that.

[13] Mr *Chetty* developed the first respondent's argument on proposition (b) with reference to certain dicta in *Booysen & others v Booysen & others* 2012 (2) SA 38 (GSJ). The facts of that case are not perfectly clear to me. In simplified form they appear to have been as follows. Mr and Mrs Booysen were married in community of property. They owned a piece of immovable property. They had executed a joint will in terms of which the survivor would be the only heir of the first-dying of them. Mrs Booysen died. At a stage when the estate was not yet finalised Mr Booysen concluded a written agreement in terms of which he sold the immovable property in question to one of his children. (Mr Booysen himself then died a little later, but that was of no consequence in the case.) Two other Booysen children then became the applicants who sought an order against the child who had bought the property from their father, setting aside as invalid the agreement which had been concluded and interdicting the executor from registering transfer of the property to the child to whom it had been sold by Mr Booysen. The court granted the relief. What is not clear from the judgment is whether the application was launched because the child to whom the property had been sold was seeking to enforce it against the estate of the late Mrs Booysen, which was still under the control of the executor of the estate of Mrs Booysen. (One would think that this was the case, because the interdict against the executor was sought.) Neither is it clear that in terms of the agreement between Mr Booysen and the child to whom the property was sold, Mr Booysen purported to convey a right to that child to claim the property directly from the deceased estate. It does seem clear that Mr Booysen did not in terms of the agreement purport to act as agent of the executor of his wife's estate.

[14] Against that background Mr *Chetty's* argument for proposition (b) is based essentially on paragraph 12 of the judgment in *Booysen*. That paragraph follows the learned judge's exposition of the principle which is Mr *Chetty's* proposition (a). It reads as follows.

'From the above, it is more than plain that the late Joseph Booysen, in the present matter, did not gain ownership of the whole joint estate upon the death of his wife, Dora Booysen. He therefore had no legal capacity to enter into the disputed sale agreement with the first and the second respondents regarding the immovable property. It was the prerogative of the executor, the fourth respondent, to do so. The uncontroverted evidence is that the estate of the late Dora Booysen is not finalised, and the first and final liquidation and distribution account has not been approved, for reasons advanced by the executrix. The sale was invalid ab initio and falls to be set aside.'

[15] Given the gaps in my knowledge of the precise terms of the agreement under consideration in *Booysen*, I cannot comment on the ultimate conclusion reached in that case. However if, as appears to be the case, the learned judge intended to convey that solely because Mr Booysen had not yet acquired ownership of the property he lacked the legal capacity to conclude an agreement for its sale, I cannot agree. The point of my departure from the principle stated in paragraph 12 of *Booysen* is simply stated in A J Kerr, *The Law of Sale and Lease* 3 ed (2004) at page 7.

'Those new to the subject [the subject the learned author is speaking about is the law of sale] are often surprised to learn that someone else can sell their, or anyone else's, property. The tendency is to assume that, apart from questions of agency, only the owner of a thing can sell it. This again overlooks the fact that in entering into a contract one is undertaking an obligation or obligations, not doing what an obligation requires. So if A sells B's property to C the resultant legal position is that A is obliged to make B's property available to C. He will therefore attempt to obtain it. If he succeeds, he can make it available to C and the contract is performed. If B will not let him have it, he (A) fails to perform and is in breach of contract. In such circumstances C has an action against A for damages for breach of contract. It is not so uncommon as may be thought for someone to sell someone else's property.' [Footnotes omitted]

That proposition is well established in our law, and the Act does not provide that the sale of immovable property is an exception. As to the continued existence of the rule, and its applicability to immovable property, see *Van Wyk v The MEC: Department of Local Government and Housing of the Gauteng Provincial Government* (1026/2018) [2019] ZASCA 149 (21 November 2019) at para 9:

'The high court held '[n]otwithstanding being satisfied that the execution of the sale agreements was proven, for the seller to be able to pass transfer or for the sale agreement to constitute a valid sale, the seller should be the owner or have been authorized by the owner to sell the property'. In that, it was plainly wrong. It is trite that it is not a requirement for a valid contract of sale that the seller must be the owner of the thing sold. As it was put in *Köster v Norval*:[1]

'In *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) 743H-744A, Botha JA summarized the legal position as follows:

"Dit is duidelik dat dit vir 'n geldige koopkontrak volgens ons reg geen vereiste is dat die verkoper van die koopsaak eienaar daarvan moet wees nie. Ofskoon dit die doel van die koopkontrak is dat die koper eienaar van die verkoopte saak moet word, is die verkoper egter nie verplig om die koper eienaar daarvan te maak nie. Hy moet die koper slegs in besit stel en hom teen uitwinning vrywaar. Dit beteken dat die verkoper daarvoor instaan dat niemand met 'n beter reg daartoe die koper wettiglik van die verkoopte saak sal ontneem nie, en dat hy, die verkoper, die koper in sy besit van die saak sal beskerm".[2]

G R J Hackwill, *Mackeurtan's Sale of Goods in South Africa*, 5th ed states:

"As has been indicated elsewhere, although the parties to a contract of sale usually contemplate a transfer of ownership in the thing sold, this is not an essential feature of the contract, and sales by non-owners are quite permissible". (p 23, para 3.1.1.)

"The delivery required of a seller is the delivery of undisturbed possession (*vacua possessio*) coupled with the guarantee against eviction. It is not necessary that the seller should pass the ownership, for the implied engagement of the seller is a warranty against eviction and not a warranty of title, but he must divest himself of all his proprietary rights in the thing sold in favour

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[1] *Köster v Norval* [2015] ZASCA 185; [2015] JOL 34890 (SCA) para 4.

[2] Loosely translated as: 'It is clear that it is not a requirement of our law for a contract of sale to be valid that the seller must be the owner of the thing sold. Although it is the purpose of the contract of sale that the purchaser will become the owner of the thing sold, the seller is not obliged to give ownership thereof to the purchaser. He is only obliged to place the purchaser in possession and to warrant that he will not be evicted. This means that the seller guarantees that no-one with a stronger right thereto will deprive the purchaser of the possession of the thing sold and that the seller will protect the purchaser's possession of the thing.'

of the purchaser." (p 66, para 6.2)
(See also De Wet & Van Wyk, *Kontraktereg en Handelsreg*, 5th ed, vol 1 p 329)'.

[16] At the time when she sold it to the applicants in this case, Mrs Tomlinson was not the owner of the half share in the property which she sold to the applicants. Dominium of what she regarded as her half share by reason of her marriage in community of property had not yet passed to her. But, on the basis of the principle confirmed in *Van Wyk*, that did not render her agreement to sell the property to the applicants invalid or void. The subject of the sale was described in the agreement as "a one-half (½) share in and to Erf 110 Ifafa, …". There is no doubt about the half share the parties had in mind. In his will Mr Tomlinson had left his half share in the property to his sons, the first applicant and Denzel. What remained was the subject of the sale agreement concluded between Mrs Tomlinson and the applicants.

[17] Notwithstanding that the contract contained some clauses which were not perfectly suitable given the peculiar nature of the sale, what is clear is that Mrs Tomlinson undertook to bring about the transfer of the half share in question from herself to the applicants. She certainly did not purport either to act on behalf of the executor of her husband's estate or to confer on the applicants a right to make a claim against her husband's estate.

[18] What the applicants seek to do in this application is enforce their claim for delivery against the estate of Mrs Tomlinson, she having died prior to passing transfer of a half share in the property to the applicants. It is not a defence raised by the executor of Mrs Tomlinson's estate that neither Mrs Tomlinson nor her estate actually received the half share from the estate of Mr Tomlinson. (And if the position is that Mr Tomlinson's estate is not yet finalised, there is no suggestion that it is not anticipated that a half share in the property will pass to Mrs Tomlinson's estate by virtue of her marriage in community of property to Mr Tomlinson.)

[19] I conclude that the first respondent wrongly contends that the contract between the late Mrs Tomlinson and the applicants was invalid.

[20] As to proposition (c), it is correct that there is no evidence that Mrs Tomlinson concluded the sale agreement with the applicants on the authority of the executor, but equally clear that she sold the property as a principal, and not as agent.

[21] Proposition (d) is one I have already dealt with. There is no requirement in our law that a deed of sale of immovable property must be signed by the owner or by someone authorised to sign on the owner's behalf as seller.

[22] I conclude, therefore that the point in issue must be decided in favour of the applicants.

[23] As to costs, after some debate counsel agreed that if the applicants were successful on the issue argued first, the costs incurred in these separated proceedings should be reserved for decision by the court finally determining the application. There is no need for me to canvas the issues discussed in argument prior to counsel reaching this agreement. In my view their decision is correct.

I make the following order.

1. It is declared that the agreement concluded on 25 October 2013 between the late Rachael Francis Tomlinson and the applicants for the sale by the former to the latter of a one-half share in Erf 110 Ifafa was valid and binding when it was concluded, and remains so, upon the assumption that the signatures which purport to be those of the late Rachael Francis Tomlinson on the written agreement are found to be her's.

2. The costs incurred in these proceedings with regard to the issue dealt with in paragraph 1 of this order are reserved for the court finally determining the application.

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OLSEN J

APPEARANCES

Date of Hearing:	Monday, 22 February 2021
Date of Judgment:	Friday, 19 March 2021
Applicants' Counsel:	Mr S Morgan
Instructed by:	Singh & Gharbaharan Applicants' Attorneys 1st Floor, Allybro Centre Umzinto…KZN (Ref: Mr Singh/MP) (Tel: 039 – 974 2525 / 974 1488) (Email: sglegal@scottburgh.co.za) **c/o S Ramrachiasingh & Associates** 6 Stanhope Crescent Westville North…Durban (Tel: 031 – 2062853)
First Respondent's Counsel:	Mr T Chetty
Instructed by:	Theyagaraj Chetty Attorneys Defendants' Attorney 296 Randles Road Sydenham Durban…4091 (Ref: Mr T Chetty) (Tel: 031 – 2080527) (Email: theyagaraj@telkomsa.net)