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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no:3337 /2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the appeal of:

M[...] A[...] M[...]

APPLICANT

and

T[...] S[...] M[...]

FIRST RESPONDENT

LEBOGANG MACDONALD SAILA

SECOND RESPONDENT

PALESA MAMPESI SAILA

THIRD RESPONDENT

THE REGISTRAR OF DEEDS: BLOEMFONTEIN

FOURTH RESPONDENT

JUDGMENT BY:

MOLITSOANE, J

HEARD ON:

06 JULY 2023

The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 19 JULY 2023. The date and time for hand-down is deemed to be 19 JULY 2023 at 11h00

[1] In Part A of this application, the Applicant seeks an order to interdict the Second and Third Respondents from proceeding with their eviction application instituted in the lower court and also to restrain them from selling or alienating immovable property known as erf...Mangaung Metropolitan Municipality [Extension 17] (the joint property) pending an application to be brought in Part B to nullify and cancel the sale and transfer of the said joint property to the Respondents. Only the Second and Third Respondent (the Respondents) oppose this application.

[2] The Applicant and the First Respondent (Mr M[...]) were married in community of property on 8 December 2000. Their marriage was dissolved by an order of the court on 27 January 2023. Although the Applicant says that Mr M[...] sought an order of forfeiture in the divorce proceedings, she and Mr M[...] chose not to play open cards with the court as to the final relief granted. The evidence tempts one to believe that the Court ordered the division of the estate. None of them chose to attach their final order of divorce to their papers.

[3] On 29 July 2022, before the dissolution of the marriage between the Applicant and Mr M[...], the latter sold and transferred the joint property to the Respondents. It is the case for the Applicant that she was unaware of the said sale and transfer and she thus did not consent to said sale and transfer.

[4] The respondents resist the granting of Part A of this application. The essence of their case is that they are the registered owners of the joint property. They allege that they bought the joint property from Mr M[...] through an estate agent after seeing the property posted on facebook where it was advertised for sale. According to them, all communication and dealings towards the conclusion of the sale agreement were communicated and interacted with the estate agent and the conveyancing attorneys. According to them, they did not know Mr M[...] at all.

[5] According to the respondents, they only came to know that Mr M[...] was married after registration of the joint property in their names. The high-water mark of their defence is based on the protection afforded by section 15(9) of the Matrimonial Property Act 88 of 1988(the Act). The Respondents contend that they had no

knowledge that Mr M[...] was married or had to obtain the consent of the Applicant before he sold the joint property to them. They contend that they were bona fide purchasers and were entitled to protection.

[6] The requirements for an interim interdict are trite. In order for the Applicant to succeed in securing an interim order, he/she must establish the following:

i. A prima facie right even though open to some doubt;

ii. A well-grounded apprehension of irreparable harm if interim relief is not granted;

iii. That the balance of convenience favours the granting of an interim interdict, and;

iv. That there is no other satisfactory or adequate remedy available to the applicant.

[7] Whether the Applicant has established a prima facie right even though open to some doubt must be adjudicated on the undisputed evidence before the court. It is apt to take note that the Applicant did not file any replying affidavit to the answering affidavit of the Respondents. It is undisputed that the Applicant and Mr M[...] were married in community of property during the sale and transfer of the joint property to the Respondents. It is further not in dispute that during the sale and transfer aforesaid the Applicant did not give her consent to Mr M[...] to sell the joint property.

[8] From the evidence it is clear that the Applicant relies on section 15(2)(a) of the Act which provides as follows:

“(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse-

- a) alienate, mortgage, burden with servitude or confer any other real right in any immovable property forming part of the joint estate;
- b) enter into any contract for the alienation, mortgaging, burdening with servitude or conferring of any real right in an immovable property forming part of the joint estate”

[9] On the other hand, the Respondents rely on section 15(9)(b) of the Act, which provides as follows:

When a spouse enters into a transaction with a person contrary to the provisions of subsections (2) and (3) of this section, or an order under section 16(2), and –

- a) that person does not know and cannot know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into without the consent required in terms of the said subsection (2) or 93), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon division of the estate.

[9] The Respondents relied heavily on the case of *Vukeya v Ntshane and Others*¹. Like in this case, in *Vukeya*, the spouses were married in community of property. The sale and registration of their immovable property was sold by one spouse without the consent of the other spouse. The non-contracting spouse was deemed to have consented to the sale because the third party did not know and could not reasonably have known that the first respondent’s consent was lacking. On

¹ (518/2019) [2020] ZASCA 167;2022(2) SA 452(SCA) (11 December 2020).

the version of the Respondents it would appear as though this case is on all fours with the application before me.

[10] This court heard full arguments on the merits of Part B. Needless to point out that this court is not ceased with the final determination of the rights of any of the parties herein. The alleged unlawfulness of the sale of the joint property hinges on the proper application of sections 15(2)(a) and 15(9) of the Act as set out above. Unlike in this case, *Vukeya* dealt with the final determination of the rights of the parties therein. In this case, I am not called upon to make such a determination. I am unable to say more on the dispute in this case as in my view, the court seized with Part B of the application would be better placed to deal with this impasse.

[11] In my view, the applicant, married in community of property to Mr M[...] at the time of the sale and transfer of the joint property, has succeeded to establish that she has a prima facie right though open to some doubt to obtain temporary relief pending the finalisation of Part B. Such a right is crystallised by the allegation that as a co-owner of the joint property, the same was sold without her knowledge and consent. Admittedly the court may after hearing all the evidence order against her but that is not the test at this stage.

[12] The applicant and her children would suffer irreparable harm if this interim order would be declined. "...Under the *Setlogelo* test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue..."²

The interests of justice demand also that this court should hold over the eviction proceedings between the parties pending the final determination of the rights of the parties herein, The balance of convenience favours the granting of this order.

² National Treasury v Opposition to Urban Tolling Alliance 2012(6) SA 223 (CC) para 50.

[13] I am satisfied that there is no other satisfactory remedy to afford protection to the Applicant. I accordingly order as follows:

ORDER

IT IS ORDERED THAT:

1. The Applicant's non-compliance with the Uniform Rules of this Court relating to forms, time periods and rules of service is hereby condoned;
2. Pending the determination of PART B of this application, the eviction proceedings in the Magistrate Court under Case number 41541 be stayed;
3. Pending the determination of Part B of this application, the Second and Third Respondents are interdicted/ prohibited from selling or alienating ERF 2[...] Mangaung (Extension 17) District Bloemfontein;
4. The costs shall be costs in Part B of the Application.

P. E. MOLITSOANE, J

On behalf of the Applicant: Adv. Mohono
Instructed by T Ndou Attorneys
BLOEMFONTEIN

On behalf of the Respondents: Adv. Steenkamp
Instructed by Bezuidenhouts Attorneys INC.
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