

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

Case no: 779/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MMASEPHOSO AMELIA MAHLABA

Applicant

and

DIHLABENG LOCAL MUNICIPALITY

First Respondent

PHEELO JOHANNES MOTAUNG

Second Respondent

THE REGISTRAR OF DEEDS

Third Respondent

CORAM: HEFER AJ

HEARD ON: 30 NOVEMBER 2023

DELIVERED ON: 21 DECEMBER 2023

- [1] The essence of the relief sought by the Applicant is to have her be declared the lawful and sole owner of certain immovable property situated in B[...], Bethlehem, Free State Province.
- [2] The Applicant also seeks ancillary relief to the effect that *inter alia* the Registrar of Deeds is ordered to cancel the title deed in respect of the property and to cancel all rights accorded to the Second Respondent by virtue of such deed and/or other endorsements thereto.

Background facts:

- [3] According to the Applicant, the property concerned is registered in the name of the Late Cecillia Maletsatsi Motaung (the deceased), name. In support hereof, the Applicant attached a copy of a printed Windeed search dated 25 June 2018 confirming that the property concerned is indeed registered in the name of the deceased. It appears that the property was registered in the name of the deceased on the 11th of February 1992.
- [4] The Applicant basis her entitlement to the property on an alleged donation by the deceased to the Applicant.
- [5] In support of her contention in regards to such donation, the Applicant attached a sworn affidavit attested to before a Commissioner of Oaths being a police constable at the Bethlehem Police Station, dated 8 August 2001. According to this affidavit, the deceased declared *inter alia* under oath as follows:

“Op 2001-08-08 om 10:00 was by police stasie Bethlehem. Ek maak die verklaring, ek gee Mmasephos Amelia Mahlaba my erf ... by die extension two B[...], Bethlehem die nommer van die erf 4[...] ek gee ... ek bly by Z[...] straat 2[...]. Hy is my erf. Ek het twee erf ... hoekom ek gee Mmasephoso Amelia Mahlaba anner erf.”

- [6] From this document it appears that it was indeed the intention of the deceased to donate the property (the particulars of which correspond with the

property in regards to which the Applicant seeks a declaratory order), to the Applicant.

- [7] In further support of the relief sought, Applicant also attached a document from which it appears that application was made in regards to Site No. 4[...], B[...], Bethlehem to indeed transfer the property concerned to the Applicant. This document is also dated the 8th of August 2001 and is signed by the deceased as well as the Applicant in her capacity as beneficiary of such donation. This document was then further attested to by two witnesses.
- [8] The said document further contains wording to the effect that if the transfer of the property is as a result of a donation or sell thereof, the application should be confirmed by a lawful agreement of donation.
- [9] The deceased passed away on 26 April 2003. The Second Respondent was appointed by the Master of the High Court during 2019, Bloemfontein as the Master's representative in the deceased estate. From the letters of authority so issued, it is evident that the only asset which is reflected in the inventory in regards to the deceased estate is indeed the property concerned, namely "Erf 4[...] Extension 2, B[...], 970 – Dihlabeng".
- [10] According to the Applicant, she together with her late husband rented the property from the deceased and paid R200.00 per month rent. The deceased was at that stage staying at 2[...] Z[...] Street, B[...], Bethlehem. The Applicant further alleges that the deceased donated the property to her on the condition that she and her husband pay the First Respondent's account in full in regards to the arrears property in the amount of approximately R20,000.00. According to the Applicant, she and her husband did indeed pay the First Respondent's account as per agreement whilst they were residing on the property.
- [11] Referring to the documentation referred to above, the Applicant confirms that the deceased made an affidavit at the local Police Station on 8 August 2001 and that the necessary forms to have the property transferred were completed at the offices of the First Respondent. In this regard it needs to be mentioned

that the remainder of the documents relied upon by the Applicant in this regard, are two similar documents titled "Bethlehem Transitional Local Council" which contain the particulars of the property concerned. On the first thereof, in the paragraph headed as "Huurder" (Lessee), appears the name of the deceased and was indeed signed by the deceased on 8 August 2001. On the second, which is a similar document, the particulars of the Applicant appears also under the heading "Huurder" (Lessee), this document was then also signed by the Applicant on same date. On the first of these documents appear the word "staak op 2001-07-31" and on the second signed by the Applicant, appears the words "nuwe verbruiker plaas balans". A further document relied upon by the Applicant is an undated "Permit – Certificate of Occupation" in respect of the property concerned, issued to the Applicant.

- [12] According to the Applicant at the time when the affidavit was made by the deceased in August 2001, she and her husband did not have the funds at that time to pay for the transfer of the property. The Applicant's husband apparently passed away on the 19th of June 2006 whereupon the Applicant was appointed as the Master's representative in his estate. She then approached a firm of attorneys to assist her in registering the property in her name whereas she and her husband were married out of community of property. According to the Applicant, she inherited money from her late husband and that made it possible for her to pay for the transfer of the property. From the letters of authority issued to the Applicant in respect of her late husband's estate, it appears that the only assets reflected in the inventory are indeed furniture to the value of R22,000.00 as well as funds in the amount of R20,352.47 in a Capitec Bank account.
- [13] According to the Applicant, acting upon advice from her attorney, she signed a "Declaration and Acceptance of Donation" in regards to the property concerned, on the 13th of January 2017.
- [14] Subsequent to this acceptance being signed by the Applicant, Applicant's present legal representative, Mr N Theron from Legal Aid South Africa, Bethlehem, wrote a letter to the Second Respondent requesting him to sign

the necessary transfer documents in respect of the property concerned within a stipulated period of time, which he had refused to do.

- [15] According to the Second Respondent, the deceased was his natural mother. According to him he is the sole heir in the deceased estate of the deceased in terms of the provisions of Intestate Succession Act 81 of 1987. Second Respondent denies that the deceased at any stage donated the immovable property concerned to the Applicant. Second Respondent confirmed that the deceased was during her life resident at 2[...] Z[...] Street, Bethlehem, Free State Province. According to the Second Respondent, at the time of his mother's passing, he did not have the financial means to take the necessary steps to be appointed as the Master's representative and the executor of his mother's estate. He did not attend to the transfer of the property in his name as he did not want to occupy or reside on the immovable property since his mother's passing. During 2019 he decided to sell the property as he finally decided that he had no intention to reside on the immovable property concerned. He then approached the Master during 2019 to be appointed as the Master's representative to transfer the property in his own name to enable him to sell the property after his appointment as the Master's representative.

Discussion:

- [16] Both legal representatives appearing at the hearing, referred me to the provisions of Section 5 of the General Law Amendment Act 50 of 1956 which stipulates the following:

“No donation concluded after commencement of this act shall be invalid merely by reason of the fact that it is not registered or notarially executed: provided that no executory contract of donation entered into after the commencement of this act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting in his written authority granted by him in the presence of two witnesses.”

[17] I was also referred to Section 2(1) of the Alienation of Land Act 68 of 1981 which provides as follows:

“No alienation of land after the commencement of this section shall, subject to the provisions of section 28 be of any force or effect unless it is contained in the deed of alienation signed by the parties thereto or by the agents acting on their written authority.”

[18] As stated, the Second Respondent denies that any donation was made by the deceased.

[19] Mr Noge appearing on behalf of the Second Respondent, argued that the sworn affidavit deposed to by the deceased does not meet the requirements of a valid contract of donation in that it was not signed by two witnesses. This submission is not correct. According to Section 5 of the General Law Amendment Act, a donation only needs to be in writing and signed by the donor. Upon a proper consideration of Section 5 of the General Law Amendment Act, it is clear that the requirement of two witnesses, only comes into play when such written document is signed by a person acting on the donor's written authority which authority has to be granted by him in the presence of two witnesses.

[20] Mr Noge's further submission that it was necessary for the police official who commissioned the affidavit by the Applicant, to make a confirmatory affidavit to the contents of affidavit, also does not hold water.

[21] Whereas the affidavit of the deceased was indeed signed by her in her capacity as donor which is as required by Section 5 in a form of a written document, this document is to be regarded as a valid contract of donation for purposes of Section 5 of the General Law Amendment Act.

[22] It was further argued on behalf of the Second Respondent, that the alleged declaration of acceptance of donation relied upon by the Applicant does not constitute a valid document for transfer of immovable property as it was accepted after the donor had passed on the 26th of April 2003. This argument

however loses sight of the document already referred to in terms of which application was made on the 8th of August 2001, being the same date as the sworn affidavit by the deceased, which was signed by both the deceased as well as the Applicant in her capacity as beneficiary. By implication, this is an indication that on the same date, the Applicant already accepted the donation by the deceased. This is further confirmed by the wording in the further document titled "Bethlehem Transitional Local Council" containing the particulars of the property concerned where the following wording appears: "*Staak op 2001-07-31. Skenking aangeheg in die lêer asseblief*". This confirms that reference has been made to the donation which apparently has also been accepted by the Bethlehem Transitional Local Council.

- [23] In regards to the condition relevant to the Applicant to the effect that she and her deceased husband was obliged to pay the amount of approximately R20,000.00 in arrears, it can be accepted, although no clear proof has been provided that such amount has been paid. The further document referred to already titled "Bethlehem Transitional Local Council" also dated the 8th of August 2008 and signed by the Applicant, stipulates in particular: "*Nuwe verbruiker plaas balans*" which lends support to the Applicant's allegation that such an amount has indeed been paid.
- [24] The fact that the document concerned as indicated refers to a Lessee and not a Purchaser, as pointed out, also makes sense whereas the Applicant and her late husband were at that stage merely Lessees of the property concerned.
- [25] The application for transfer of the property concerned, as stated was also signed in the presence of two witnesses whose signatures appear on such document.
- [26] Of significance is that the Second Respondent only laid claim to the property and was issued the letters of authority by the Master after he was requested by the Applicant to sign the necessary documentation to effect transfer of the property concerned. This is 16 years after his mother passed away.

[27] *“... It must be borne in mind that, although it may be competent for a court to make a declaratory order in any particular case, the grant thereof is dependent on the judicial exercise by that court of its discretion with due regard to the circumstances of the matter before it”*.¹

[28] The Applicant seeks *inter alia* an order in terms of which she is declared to be “the lawful and sole owner of the immovable property”. It is clear that as the property is currently not registered in the name of the Applicant, that such declarator cannot be made. The Court can only make a declarator in regards to the validity of the documentation relied upon by the Applicant.

[29] The Applicant further *inter alia* seeks an order in the following terms:

“Ordering the First Respondent to provide the Applicant’s attorney with the name and all contact details, inclusive of cellular number and e-mail address of the official overseeing compliance with the order in paragraph 3 above, within two written days of this order;

In the event of the First Respondent or Second Respondent’s failure to comply with the order in paragraph 3 above within two months of this order, that the Sheriff, Bethlehem is authorised to forthwith take all necessary steps and to sign all necessary documents to effect registration of the abovementioned property in the name of the Applicant and thereafter to collect all fees and disbursements in this regard from the Second Respondent.”

[30] The Applicant has not made out a case for such relief and are therefore not entitled thereto. In particular, in regards to the Second Respondent, the Second Respondent as cited before Court, is not before Court in his capacity as representative of the Master. Any steps to be taken by the Second Respondent needs to be done by him in his capacity as such and any order against him in his personal capacity is therefore not competent in the present application.

¹ Reinecke v Incorporated General Insurances Ltd 1974 (2) SA 84 (A) at 85C.

[31] The Applicant further seeks an order in terms of which the Register of Deeds being the Third Respondent, be ordered to cancel the Title Deed in regards to the property and to cancel all rights accorded to the Second Respondent by virtue of the deed and/or any endorsements thereto. In this regard a report by the Registrar of Deeds dated 20 August 2021 had also been placed before me. In terms thereof “there is no record or data on the name of the Second Respondent”. Therefore, an order in those terms also appears to be redundant.

[32] As far as costs is concerned, in view of the fact that the Second Respondent was successful in opposing the application for the declaratory order to the effect that the Applicant is to be declared to be the lawful and sole owner of the immovable property concerned, whilst the Applicant was to a certain degree successful in her application in that a declaratory order (although in different terms) was obtained, I deem it appropriate that each party is to pay its own costs.

ORDER:

Therefore, I make the following order:

1. It is declared that:

- (i) The sworn affidavit deposed to by the late Cecillia Maletsatsi Motaung on 8 August 2001, is to be regarded as a valid donation for purposes of Section 5 of the General Law Amendment Act 50 of 1956;
- (ii) The Applicant is entitled to the transfer of the property known as 4[...] B[...], Bethlehem, Free State Province also known as Erf 4[...] B[...], Bethlehem, in her name.

2. Each party is to pay its own costs.

J J F HEFER, AJ

On behalf of the Applicant: Mr N Theron
Legal Aid South Africa
Bloemfontein

On behalf of the Second Respondent: Mr N Noge
Noge Attorneys
Phuthaditjhaba
c/o Matee Attorneys
Willows
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