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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: - 57041/2020

- 1. REPORTABLE: NO
 - 2. OF INTEREST TO OTHER JUDGES: NO
 - 3. REVISED: YES
- Date: 14 November 2023

In the matter between:

LETHABO GUSTEL ELIZABETH MOLEFE

Applicant

AND

DAKALC MAMUTSHAVHI

1st Respondent

MARCEL DANIEL DELPORT

2nd Respondent

BEST BRIDGING 77 (Pty) Ltd

3rd Respondent

THE STATION COMMANDER- SAPS KAMMELDRIFT

4th Respondent

THE REGISTRAR OF DEEDS

5th Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14 November 2023.

JUDGMENT

ERASMUS AJ

INTRODUCTION

1. Central to the application before me is the selling and the subsequent transfer of the once common home of the applicant, the first respondent and their minor children, to the name of the third respondent. The relief sought by the applicant includes a request that the sale be declared null and void and that it should be set aside and that the property should be transferred back to the name of the first respondent.

2. During October 2020 the applicant obtained a Court order on an urgent basis declaring her alleged eviction from the immovable property situated at Erf [...] Aventurine Street, Zambezi Lifestyle Estate, Derdepoort, Ext 14 (Erf [...] Derdepoort Extension 13) ("the immovable property") to be illegal and unlawful. In terms of this Court Order the applicant was placed in the undisturbed possession and was granted unhindered access to the immovable property pending the finalisation of Part B of her application. For the purposes of this judgment it is not necessary that I refer to the other relief that was granted during October 2020 as it does not form part of the issue before me.

3. Armed with this order, the applicant sat back, failing to drive Part B of her application to finality. The fact that she did not drive the matter to finality is also evident from the fact that the applicant served and filed her replying affidavit out of time. It is the 2nd respondent who took the necessary steps to bring the application to finality.

**PROCEDURAL ASPECTS: FILING OF FURTHER AFFIDAVITS
AND CONDONATION FOR THE LATE FILING OF AFFIDAVITS**

4. Before I turn to deal with the issues at hand, I will briefly deal with some procedural aspects I was caused on by the parties to consider.

5. Firstly, the replying affidavit by the applicant was filed out of time. There is an application for condonation for the late filing of this affidavit. I will allow the late filing of the replying affidavit even though the applicant does not succeed in setting out sufficient facts to succeed with condonation. [It is important that a]l the facts be considered. There is no prejudice for any of the respondents if the replying affidavit is allowed. None of the respondents also raised any prejudice.

6. The second and third respondents served and filed a supplementary affidavit. This is accompanied with a formal application to file this affidavit. This was served as far back as September 2021. This application is opposed by the applicant and she seeks an order that this affidavit not be allowed into the record.

7. The second and third respondents properly dealt with the reasons why this supplementary affidavit is necessary.

8. As stated above, it is important that all the facts are considered.

9. The applicant can not claim that she is prejudiced by the filing and acceptance of this affidavit. At the date of the hearing of Part B of her application, the applicant had access to this supplementary affidavit for more than 18 months. She therefore had the opportunity to file an affidavit dealing with the aspects raised in this affidavit if she wanted to address any of these issues. It is also prudent to note that the replying affidavit by the applicant was filed on a date after this affidavit/ application by the second and third respondents were filed. She therefore had the opportunity to deal with the aspects raised in the supplementary affidavit.

10. There is no reason why this affidavit should be disallowed.

11. The only aspect is therefore the costs associated with the opposition of this application to have the further affidavit filed.

12. There is in my view absolutely no basis for the opposition of this application to file a further affidavit. The second and third respondents sought the costs of this application only in the event of opposition. Like I have already indicated, there is simply no basis for the opposition of this application and costs therefore should follow the event. The applicant should pay the costs of the opposition.

ISSUES TO BE DETERMINED

13. Part A of the application was dealt with by my sister the Honourable Madam Justice Makhubele on 30 October 2020. I therefore do not have to consider Part A of this application. I also do not have to express any views whether this order was granted correctly or not. The only outstanding aspect of Part A of the application is the aspect of costs. I will deal with the issue of costs herein later.

14. I am called upon to determine Part B of the application by the applicant (including the costs of Part A of the application).

15. The relief in Part B of the application is phrased as follows in the Notice of Motion:

"PART B

1 The safe agreement concluded between the Applicant and Respondent in respect of the immovable property situated at and known as ERF [...] Derdepoort Ext 14 ('immovable property') as well as the subsequent registration of the property in the names of the 2nd Respondent be declared null and void and be set aside

2. That the Fourth Respondent be directed to cancel the registration of the above mentioned property made pursuant to the sale agreement concluded between the

1st Respondent and the third Respondent and that the property be restored to the 2nd Respondent.

3. That any party opposing this application be ordered to pay the costs of this Application."

16. It is prudent to note that at no stage did the applicant amend the Notice of Motion.

17. The applicant, in her heads of argument, formulated the questions before the Court as follows:

"THE ISSUE

9. The issue to be decided herein is whether the applicant was rendered homeless after the forceful eviction from the immovable property known as and situated at Erf [...] Derdepoort Ext 14 which was declared illegal and unlawful by this Honourable court on 30 October 2022.

10. The honourable court to decide whether the first and second respondents complied with the court order granted on 30 October 2022 wherein it was ordered that:

10.1 The applicant be placed in undisturbed possession and unhindered access to the property.

10.2 That the first and/or second respondent and any other person acting on their instructions are directed to restore the applicant to the immovable property and return all her furniture and personal effects removed from the immovable property for her use."

18. In their turn, the second and third respondents formulated the issues to be determined as follows:

"QUESTION TO BE DETERMINED BY THE HONOURABLE COURT:

The following questions should be determined by the Honourable Court:

4.1 was there any duty on the 3rd Respondent, duly represented by the 2nd Respondent, to make enquiries as to whether or not the Respondent was married? ; and

4.2 whether or not the sale agreement is null and void due to the absence of spousal consent, even where there was no duty on the 3rd Respondent to make any enquiries regarding the marital status of the 1st Respondent?

4.3 Whether a factual dispute exists on the papers before the Honourable Court coupled with the fact that the Applicant cannot claim the relief contained in Part B of her application, by means of application procedure and without leading verbal evidence. In amplification of the aforesaid, and notwithstanding the contents of paragraphs 4.1 and 4.2 herein supra, it would seem that the First Respondent in any event disputed being married by means of customary law to the Applicant."

19. I cannot agree with the applicant in her summary of what I should consider and determine. The Heads of Argument is inconsistent with the Notice of Motion, and specifically Part B thereof. It is unclear on what basis the applicant contends that I should determine the issues as set out in the Heads of Argument.

20. The aspect formulated in paragraph 9 of the Heads of Argument has already been determined.

21. The relief summarised in paragraph 10 of the Heads of Argument by the applicant leans to a Contempt of Court type of application. If this is what the applicant is of the view should be determined, then the application should be dismissed outright as no evidence is placed before me to determine a Contempt of Court application. No facts are before the Court supporting this relief and the Notice of Motion does not make provision for this relief.

22. Further hereto, the supplementary affidavit by the second and third respondents also speaks to the contrary. It is clear there is an agreement between the parties that the third respondent may rent out the property to a third party. There are therefore clearly no ma/a tides by the second and/or third respondents. The applicant consented to this arrangement.

23. If the applicant wanted the Court to make a finding on Contempt of Court, she should have brought a further application.

24. I am in agreement with the formulation of the relief as set out by the second and third respondents as that is in line with the wording of Part B of the Notice of Motion.

SALIENT FACTS

25. During June 2018 the first respondent purchased the immovable property. It was registered in his name on[y.

26. The applicant contends that she is married to the first respondent on or about 14 July 2018 at Soshanguve. According to her evidence they are married in terms of customary law, they never signed an Antenuptial Agreement and that they are therefore married in community of property. The first respondent did not partake in these proceedings, but from the facts set out in the affidavits the existence of the marriage seems to be a contentious issue between the applicant and the first respondent.

27. Of this alleged marriage between the applicant and first respondent, two minor children were born. From the facts it seems as if the minor children are in the primary residence of the applicant.

28. Part of the alleged joined estate between the applicant and the first respondent is the immovable property. As stated above, the immovable property was at the time registered in the name of the first respondent only.

29. The third respondent, an innocent third party, purchased the immovable property from the first respondent on or about 30 June 2020. In the Sale Agreement, the first respondent indicated that he is unmarried. The sale included certain movable assets. The purchase price was for the amount of R2 000 000.00. The purchase price, save for the amount of R50 000.00, was paid by the third respondent. There was an arrangement with the first respondent that the last R50 000.00 will only be paid over to the first respondent once the third respondent receive undisturbed possession of the property. The amount of R50 000.00 has not been paid yet.

30. During August 2020 the first respondent informed the applicant that he is in the process of selling the immovable property. The applicant informed the first respondent that she does not consent to the sale of the property and that she will not give her consent for such sale. The applicant proceeds and speculates as to the reason why the first respondent sold the property and states that his motive was to deprive her of her share in the joint estate on the date of divorce.

31. The evidence is silent on the steps the applicant took after the first respondent informed her during August 2020 that he is in the process of selling the immovable property. The first steps, according to the evidence before me, the applicant took was after the proverbial horse has bolted and the property was already sold and transferred to the name of the third respondent.

32. Unfortunately, the marriage relationship between the applicant and the first respondent broke down to such an extent that the applicant instituted divorce proceedings against the first respondent. A divorce summons was issued by the applicant during September 2020. At the time the application was launched, the summons has not been served on the first respondent yet.

33. In the Summons:

30.1 No evidence is tendered what the alleged joined estate consists of; and

30.2 And as far as it relates to the patrimonial consequences of the marriage, the applicant sought the division of the joint estate.

34. The immovable property was transferred into the name of the third respondent on or about 23 October 2020. The third respondent is therefore the lawful and registered owner of the immovable property.

35. On 27 October 2020 the first respondent, in writing, requested the second respondent to remove all the possessions of the applicant from the immovable property.

36. On the morning of 28 October 2020 the applicant received a telephone call from her gardener, enquiring from her why she is moving from the immovable property. She left her work and on her arrival at the immovable property she discovered that the first and second respondents are busy removing her furniture and personal belongings from the immovable property to a storage facility.

37. The applicant was present when the items were removed from the immovable property. She was accompanied by members of the South African Police and some of her family members.

38. This was also the first date the second respondent learned about the alleged customary marriage between the applicant and the first respondent.

39. The applicant contacted her attorney of record for assistance. On investigation by the attorney of record it became evident that the immovable property was transferred into the name of the third respondent. It was discovered that the property was already sold as far back as 30 June 2020.

40. The applicant proceeded to the urgent court for relief. The first respondent did not oppose the application. This application was, however, opposed by the second and third respondents.

41. On 30 October 2020 the Honourable Judge Makhubele J granted an order declaring the "eviction" of the applicant from the immovable property to be illegal and

unlawful and she granted an order that the applicant be placed in undisturbed possession of and unhindered access to the immovable property.

42. The applicant, despite the order, did not return to the property.

43. The immovable property was then vacant for the period between the end of October 2020 until the middle of April 2021. The immovable property, as a result of the fact that it was vacant for the mentioned period, accumulated damages. By agreement between the parties (the applicant, the third, second and third respondents), the property was then leased to tenants, which rental income would be for the benefit of the third respondent.

44. In summary, the case of the applicant is that she is married to the first respondent in community of property. The immovable property concerned forms part of the joint estate of herself and the first respondent. That the first respondent did not have her written consent to sell the property to the third respondent.

EXISTANCE OF A CUSTOMARY MARRIAGE BETWEEN THE APPLICANT AND THE FIRST RESPONDENT

45. At the time of the institution of the application the divorce summons has not been served and there is no evidence before the Court as to the progress of the divorce action between the applicant and the first respondent.

46. It, however, seems as if the existence of the customary marriage between the applicant and the first respondent is disputed by the first respondent.

47. It is not for me to make any comment or finding on the existence of the customary marriage. This is, in the event that the divorce action is not being finalised yet, something for the Divorce Court to determine.

48. I will, however, for the purposes of the determination of the dispute before me have to accept that the applicant and the first respondent is married. This position of

myself cannot and should not be construed as a finding that the applicant and the first respondent is indeed married by way of custom. It is not for this Court to decide.

APPLICABLE LAW

(c) "

52. The second and third respondents on their turn highlights the provisions of section 15 (9) (a) of the Matrimonial Property Act, which reads as follows:

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

(a) That person does not know and cannot reasonably know that the transaction is being entered into the contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be."

53. In his argument, Mr Van Wyk who acted on behalf of the second and third respondents referred me firstly to the judgment in the matter of Maris NO and Another v Maposa and Others I where the Court held that:

"... if a listed transaction is entered into without the consent of the non-contracting spouse, that transaction will nonetheless be valid and enforceable if the third party did not know and could not be reasonably have known of the lack of consent. While the consent requirement is designed to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, the 'deemed consent' provision ins 15 (9)(a) is intended to protect the interests of a bona fide third party who contracts with that spouse. Section 15 thus seeks to strike a balance between the interest of the non-consenting spouse, on the one hand, and the bone fide third party, on the other."

54. Mr Van Wyk also referred me to the judgment of Vuyeka v Ntsahne and others II where the Court held as follows:

"A third party to a transaction contemplated by ss 15 (2) or (3) that is entered into without the consent of the non-contracting spouse is required, in order for consent to be deemed and for the transaction to be enforceable, to establish two things: first, that he or she did not know that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given. In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it, the burden of bringing s 15 (9)(a) into play rests on the party seeking to rely on the validity of the transaction."

55. It was further stated that:

" ... the representation that the deceased was unmarried was made in formal legal documents, one of which was signed by the deceased. The appellant was entitled to rely on those representations and nothing would have given him pause for thought, and required him to enquire further."

56. Mr Matlala acting on behalf of the applicant did not provide me with any authority to the contrary.

57. The applicant also did not make out any arguments why the facts before me are distinguishable from the facts set out in the judgments relied on by the second and the third respondents.

58. I, after a proper consideration of the facts before me and the two judgments, could not find any basis why the matter before me is distinguishable from the judgments. I am therefore bound by these judgments.

APPLICATION OF THE LAW TO THE FACTS

59. I have already summarised the facts herein above.

60. On consideration of the wording of Section 15 of the Matrimonial Property Act, it is clear that the legislator refers to the knowledge of the third party to the transaction and not that of the spouse or proposed spouse. The requirements do not speak to the mind of the contracting spouse.

61. This is also confirmed in the judgments Mr Van Wyk referred me to.

62. On considering the facts before me, the applicant only speaks to the intention of the first respondent. She states that "I suspected that the sale was motivated by nothing but the malicious intent to diminish the value of the joint estate and to deprive me of my share in the joint estate on divorce because I had made him aware that I intended to proceed with the divorce. I subsequently commenced the action on the 2nd September 2020." I have already indicated that this is mere speculation. I am not of the intention to partake in this speculation.

63. Save for this speculative statement by the applicant, she placed no evidence before me indicating that the second and third respondents reasonably could have known or indeed did know that that first respondent was married as alleged.

64. There is also no way the second and third respondents could determine this aspect. The alleged customary marriage was not registered with the Department of Home Affairs. Even if the second and third respondents did a search at the Department of Home Affairs it would have shown that the first respondent is unmarried.

65. The applicant did not place any evidence before me as to how it was possible for the second and third respondent to establish the marital status of the first respondent. I align myself with the judgments mentioned herein above - the contracting party can act on the information set out in the Sale Agreement.

66. I therefore cannot fault the second and third respondents in the manner in which they dealt with the execution of the Sale Agreement.

67. I do not understand the provisions of Section 15 of the Matrimonial Property Act to place a duty on the innocent contracting party to go on a quest in order to determine the true state of a contracting party's marital status. This is not what Section 15 of the Matrimonial Property Act requires. This is also not how the Supreme Court of Appeal interpreted Section 15 in the already mentioned judgments. If that is what is expected of an innocent party, it will in any event lead to an absurdity.

68. There is absolutely no evidence before me which justifies the granting of an order that the sale agreement should be set aside, and that the immovable property should be transferred back into the name of the first respondent.

69. Moreover, this is not the end of the road for the applicant. It is not for this Court to give advice to litigating parties, but the applicant finds protection in Section 15 of the Matrimonial Property Act seeking an order in the divorce proceedings for an adjustment in her favour. This remark again should not be construed as a finding that she is entitled to an adjustment in her favour. She still needs to prove her claim should she decide to seek the relevant adjustment.

70. What is also significant of the application by the applicant is that she does not tender the repayment of the purchase price back to the third respondent. I questioned Mr Matlala for the applicant on this aspect. There was no proper response on what conceivable basis it is acceptable that the joint estate should enjoy the benefit of the payment of the purchase price as well as the transfer of the immovable property back into the name of the first respondent. There was no tender that the purchase price should be paid back - not in the affidavits filed nor during argument.

71. There undisputed facts before me is that the biggest portion of the purchase price was already received by the first respondent.

CONCLUSION

72. From the discussion and the case law it is clear that there is no duty or responsibility that rests on the innocent contracting party to establish the correctness of the marital status of the party to an agreement. The third respondent, represented by the second respondent, therefore acted reasonably in accepting the correctness of the status as set out in the Sale Agreement.

73. There is no basis on which I can find that the sale agreement is null and void.

74. The applicant failed to place any evidence before me that the second and/or third respondent knew that the first respondent is in actual fact married.

75. Further, even if I find that there was a duty on the contracting party to do an investigation on the correctness of the marital status of the seller, there is before me no evidence how the second and third respondents could established that the first respondent is in actual fact married (as alleged by the applicant).

76. For the reasons mentioned above the application should fail.

EFFECT OF THE ORDER

77. I have already stated that this application should fail. This order will therefore bring an end to the order of 30 October 2020.

78. This will have no negative effect on the position of the applicant and the minor children as the immovable property is currently being rented out to another innocent third party. This is by agreement between all the involved parties.

79. This order also does not close the door on the applicant's possible claim against the first respondent for the possible adjustment on the division of the alleged joint estate.

PUNATIVE COST ORDER

80. The second and third respondents seek that costs be granted on a scale as between attorney and client. I do not find sufficient grounds in the opposing affidavit or the supplementary affidavit to justify the punitive costs. Punitive costs are not for the mere taking. There is no conduct by the applicant justifying a punitive costs order.

81. This is therefore refused.

COSTS OF THE APPEARANCE ON 26 APRIL 2023

82. The matter was set down for hearing on 26 April 2023 as per the directive issued.

83. On the day of hearing, the applicant appeared in person. She explained to me that her attorney is booked off due to illness. She was, however, not armed with a medical certificate.

84. In light of the fact that the matter has been dragging since 2020 and that the applicant failed to take any steps to finalised the matter, I have decided to stand the matter to later in the week for argument. I have also requested that Mr Matlala provide me with a medical certificate confirming that he was booked of ill in light of the fact that there was a request that the wasted costs be paid de bonis propriis.

85. The matter then proceeded virtually on Friday 28 April 2023 giving the applicant's attorney the opportunity to argue the matter.

86. The question arises who should pay the costs for the appearance on 26 April 2023.

87. Mr Matlala did provide me with his medical certificate proving that he was booked off. I, again, do not have to pronounce on the contents of the medical certificate, but the certificate confirms that he was booked off. There is therefore no basis why a cost order de bonis propriis should be granted.

88. The costs reserved on 26 April 2023 therefore should follow the event.

RESERVED COSTS OF THE URGENT APPLICATION

89. It is unclear why the costs of the urgent application of October 2020 were reserved. That Court was in the best position to determine the costs of that application.

90. I have to rely on arguments and the facts before me.

91. What is before me is that an order was granted, that the applicant did not move back into the property and there is no evidence that she approached the Court again in order to enforce the order that was granted in her favour. The only conclusion I can come to was that this order was given in vain.

92. There is before me no reason why the second and the third respondents should be out of pocket for an order that was never executed on.

ORDER

The following order is therefore made:

1. Condonation is granted for the late filing of the replying affidavit by the applicant;

- 2.

- 2.1 The second and third respondents are granted leave to file the supplementary affidavit;

- 2.2 The applicant is ordered to pay the costs associated with the opposition of the formal application to have the supplementary affidavit allowed as evidence;

3. Part B of the application by the applicant is dismissed;

4. The applicant is to pay for the costs on a party and party scale of the application including the costs reserved on 30 October 2020 as well as 2 April 2023.

Erasmus AJ Acting
Judge of the High Court of South Africa
North Gauteng Division, Pretoria

Appearances:

For the Applicant:	Mr Matlala
For the first respondent:	No appearance
For the second and third respondents:	Adv Van Wyk
For the fourth respondent:	No appearance
For the fifth respondent:	No appearance
Date of delivery:	14 November 2023

i (642/2018) [2020] ZASCA 23
ii (518/2019) [2020] ZASCA 167