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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG**

CASE NO: 17370/2022

Heard on: 22/08/2023

Judgment: 24/10/2023

IN THE MATTER BETWEEN:

KESHIA MOHAMED-PADAYACHEE

FIRST APPLICANT

CLINT RAYMOND PADAYACHEE

SECOND APPLICANT

AND

RASHIDA MOHAMED

FIRST RESPONDENT

REGISTRAR OF DEEDS

SECOND RESPONDENT

JUDGMENT

STRIJDOM AJ

INTRODUCTION

- [1] In this matter the applicants seek the first respondent be ordered to effect transfer of an undivided one third share in Erf [...] Mulbarton, situated at 32 The Broads, Mulbarton ('the property') to each of the applicants, and should the first respondent fail to do so, that the Sheriff be authorised to sign all such documents which may be necessary to effect transfer as aforesaid.
- [2] The application was opposed by the first respondent, who appeared in person.

THE SALIENT FACTS

- [3] The applicants are married in community of property.¹
- [4] The first respondent is a 68-year-old pensioner.
- [5] The parties all currently live on the property. The applicants reside in the main house and the first respondent in a cottage on the property.²
- [6] During 2003, the first respondent resided in Walkerville. The area had become unsafe, and the applicants proposed that the first respondent and the first applicant's younger brother move in with the applicants. The applicants' then home could not accommodate everyone.³

¹ Caselines: 001 – 5; FA para 4, AA, para 59 (011 – 18)

² Caselines: 011 – 12 and 13 AA, para 35

³ Caselines: 011 – 13 AA, para 36

- [7] During 2004 the applicants found the property. It had a main dwelling and a cottage that could accommodate everyone. After discussing the property with the first respondent, it was decided that the applicants sell their existing home and submit an offer for the property.⁴
- [8] On 15 August 2004 an offer to purchase the property for R 720 000 was signed, reflecting the applicants and the first respondent as co-purchasers.⁵
- [9] The purchase price for the property was largely paid by the first applicant. The applicants had a shortfall of R 50 000, which the first respondent paid. The first applicant paid R 670 000.⁶
- [10] The property was registered subsequently in the first respondent's name. The municipal account in respect of services was also opened in the first respondent's name.
- [11] The first respondent, in her last will and testament of 15 August 2017, bequeathed, inter alia, the property to the first applicant.⁷
- [12] There has been a breakdown of trust between the parties during 2020, apparently triggered by the first respondent's payment of R 400 000 to the first applicant's brother to enable him and his wife to acquire their own home ('the underlying dispute').
- [13] The latter payment represents the proceeds of the sale of another property ('the Roseacre property'), which was registered in the first respondent's name, but as nominee for the first applicant.⁸
- [14] The first applicant's brother and his wife subsequently executed AOD's in favour of the first applicant on 18 March 2020 for payment of R 400 000.⁹

⁴ Caselines: 001 – 6; FA para 9; AA, para 60 [011 – 18]

⁵ Caselines: 001 – 7; FA para 11, Annexure 'APP1' [001 – 22 to 25]

⁶ Caselines: 011 – 14; AA, para 39

⁷ Caselines: 001 – 12; FA para 25; Annexure 'APP5' [001 – 34] at clause 2.1 [001 – 35]

⁸ Caselines: 001 – 13; FA, para 28; AA, para 90 [011 – 23]

⁹ Caselines: 001 – 14; FA, para 29; AA, para 93 [011 – 24]

[15] On 3 November 2021 a letter of demand was addressed to the first respondent, inter alia, demanding an undertaking that she will not sell the property. The first respondent has not responded to the demand.

THE RESPONDENT'S CASE

[16] The respondent opposes the application on the following grounds:

- 16.1 She denies that she caused the property to be registered in her name fraudulently. She states that she had an agreement with the first applicant that the property be registered in her name, allegedly as the first applicant did not want the property to form part of her joint estate with the second applicant, and that it would give the first applicant and her children some safeguard. The first applicant has accordingly known about the fact that the property was registered in the first respondent's name for 18 years.¹⁰
- 16.2 The second applicant did not contribute to the acquisition of the property '... whether financially or otherwise and no mention has been made of his contribution...'
- 16.3 The agreement between the parties on 12 August 2004 when '... the applicants and I signed and concluded an offer to purchase the property as co-owners, and it was further emphasised that the first applicant and I would effect payment for the property and its transfer costs...'
- 16.4 The first respondent alone paid for utilities, monthly maintenance and garden services, and from 2013 received a rebate as a pensioner from the City of Johannesburg and the applicants were '... enjoying the fruits

¹⁰ Caselines: 011 – 14; AA, para 41; para 43 [011 – 15]; para 63 [011 – 18]; para 64 [011 – 19]

of my labour...’ The applicants deny this in reply, pointing out that the first respondent is a pensioner since 1997, and that they in fact, all along, paid utilities and maintenance.

[17] The first applicant contends that she had no alternative, other than to have launched this application, for the following reasons:

17.1 The property was bequeathed to her in order to compensate for the incorrect transfer of the property into the first respondent’s name;

17.2 The fact that the first respondent has now changed her will;

17.3 The first respondent obtained a valuation of the property and has not reacted to the letter of demand, seeking an undertaking that she will not sell the property;

17.4 The ‘unauthorised transfer of funds’ to the first applicant’s brother following the sale of the Roseacre property.

LEGAL PRINCIPLES

[18] Section 4(1)(b) of the Deeds Registries Act 47 of 1937 provides for the rectification of a deed of transfer:

‘4 Powers of registrar –

...

(b) whenever it is in his opinion necessary or desirable to rectify in any deed or other document, registered or filed in his registry, an error in the name or the description of any person or property mentioned therein, or in the conditions affecting any such property, to rectify the error: provided that –

- (i) Every person appearing from the deed or other document to be interested in the rectification, has consented thereto in writing;
- (ii) If any such person refuses to consent thereto, the rectification may be made on the authority of an order of court;
- (iii) If the error is common to two or more deeds or other documents, including any register in his or her registry, the error shall be rectified in all those deeds or other documents, unless the registrar, on good cause shown, directs otherwise;
- (iv) No such rectification shall be made if it would have the effect of transferring any right...

[19] In **Weinerlein v Goch Buildings Ltd**¹¹ it was decided that:

‘...The policy of our registration laws with regard to fixed property requires the true contract under which the land is held, to be reflected on the register.’

[20] Although the more common application of the remedy of rectification is to the case of mis-recording due to the common mistake of both parties, rectification may also be granted when the mis-recording is due to the *dolus* of one party.¹²

[21] The applicants establish, with reference to the signed offer to purchase in respect of the property, that a common intention existed that the applicants and the first respondent be the co-owners of the property. This is not disputed by the first respondent.

[22] The first respondent contends that a new offer to purchase was subsequently concluded, reflecting her as the sole purchaser, by agreement with the first

¹¹ 1925 AD 282 at 293

¹² Vide: Christie R H and Bradfield G B. Christie’s The Law of Contract in South Africa (6th Edition, Lexis Nexis (2011) at 344

applicant, ostensibly because it would keep the property out of the applicants' joint estate, and it would be in the best interest if the property that the property be registered in the first respondent's name. The first applicant contends that the property was largely purchased with funds of the applicants' joint estate.

- [23] It is long-established that parties married in community of property hold the joint estate in equal shares.
- [24] The first respondent does not dispute that the property was largely paid by the first applicant. Such payment consequently carries with it the *ex lege* implication that payment was effected by both applicants, with the result that if the alleged agreement between the first respondent and the first applicant did occur, the second applicant would have a claim to his undivided half share from the first applicant.
- [25] It was argued by the first respondent that the applicants have been aware of the state of affairs for 18 years.
- [26] It is inferred that it is an imprecise reliance on a defence of extinctive prescription.
- [27] A claim for rectification of a contract is not susceptible to extinctive prescription.¹³
- [28] In this matter it was necessary to take a robust common-sense approach to the dispute, otherwise the effective functioning of the court can be hamstrung. A court must not hesitate to decide an issue of fact on affidavit, merely because it would be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in the affidavits.¹⁴
- [29] In my view, a proper case has been made out for the relief sought by the applicants.

¹³ Bester NO and Others v Schmidt Bou Ontwikkelings CC 2013 (1) SA 125 (SCA) at [12]

¹⁴ Soffiantini v Mould [1956] 4 ALL SA 171 [E]

30 In the result, the draft order marked “X” is made an order of court.

STRIJDOM JJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG

Appearances:

For the Applicants:	Adv J.G. Botha
Instructed by:	Klopper Jonker Inc.
For the First Respondent:	In person