



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Case No: 20991/2021

- (1) REPORTABLE: YES / ~~NO~~  
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~  
(3) REVISED.

DATE  
**23 March 2022**

.....  
SIGNATURE

In the matter between:

**LONGASIZWE BETTY MATINI**

Applicant

and

**JOHANNES TSAKANE MATINI**

First Respondent

**KHENSANI MARGARET MATINI**

Second Respondent

**KGOMOTSO BELLA MATINI**

Third Respondent

**MZAMANE WILLIAM KHOZA**

Fourth Respondent

**TSHIPA GLADYS KHOZA**

Fifth Respondent

**THE REGISTRAR OF DEEDS, PRETORIA**

Sixth Respondent

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**JUDGMENT**

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LAZARUS AJ

Introduction and factual background

1. This is an application for an order declaring the sale and subsequent transfer of an immovable property from the first respondent to the fourth and fifth respondent unlawful and certain consequential relief.
2. The basis for the declarator is that the sale agreement did not comply with section 15(2)(a) of the Matrimonial Property Act 88 of 1984 which requires a spouse married in community of property to obtain the written consent of the other spouse to alienate immovable property forming part of the joint estate.
3. It is common cause that the written consent of the applicant, who was married to the first respondent in community of property at the time the sale agreement was concluded, was not obtained as contemplated in the aforesaid question.
4. Section 15(9)(a) of the Matrimonial Property Act provides an exception to this prohibition. In terms of this section, when a spouse enters into a transaction with a person contrary to the provisions of, *inter alia*, section 15(2)(a) and that person does not know and cannot reasonably know that

the transaction is being entered into contrary to that provision, it is deemed that the transaction concerned has been entered into with the required consent.

5. The issue before me is whether this exception is applicable to the facts of this matter and accordingly whether the abovementioned sale agreement should be deemed to have been entered into with such consent despite it being common cause that such consent was not in fact obtained.

6. The relevant background appears from the affidavits filed and may be summarised as follows.

6.1. Prior to his marriage to the applicant, the first respondent was the owner of the immovable property situated at [....]. The first respondent acquired ownership of the property after the death of his erstwhile wife to whom he was married in community of property.

6.2. The first respondent and the applicant were married on 29 September 1998 in community of property.

6.3. During or about 2004, the first respondent approached the applicant to obtain her consent for the transfer of the property to the first respondent's (now late) sister and her husband, the fifth and fourth respondents respectively.

- 6.4. According to the first respondent, the applicant's attitude to the proposed sale was that she wanted nothing to do with the property and the proposed sale was never discussed again between the applicant and the first respondent.
- 6.5. The first respondent's version is corroborated by the evidence of the first respondent children (the second and third respondents - born of his previous marriage). In their affidavits, the second and third respondents state that prior to the sale they, together with the applicant and the first respondent, were called to a meeting with their grandmother to discuss the proposed sale of the property. At this meeting the applicant stated that she wanted nothing to do with the property and refused to be involved in any transaction regarding the property.
- 6.6. At that time, the second and third respondents lived at the property and the applicant and the first respondent lived at another property situated at [...].
- 6.7. The intention behind the sale, as is borne out by the subsequent sales and transfers of the property, was for the fifth and fourth respondents to purchase the property and sell it to the second and third respondents once they finished their schooling and started working and were able to purchase it.

- 6.8. According to the first respondent, the sale was a means to preserve the property for his children as the first respondent was in arrears in paying the bond instalments and the property was at risk of being auctioned by the financing bank.
- 6.9. As alluded to above, the property was duly sold and transferred to the fifth and fourth respondents during or about 2004 and was subsequently sold and transferred to the second and third respondents during or about 2010.
- 6.10. It does not appear to be in dispute that at no time prior or subsequent to the sale did the applicant make any financial contribution to the purchase or upkeep of the property.
- 6.11. The applicant and the first respondent are now in the process of getting divorced. Despite having displayed no interest in the property during the currency of their marriage, the applicant now wishes for the sale and transfer of the property to the fifth and sixth respondents and the subsequent sale and transfer of the property to the second and third respondents to be declared unlawful and for the property to be declared part of the joint estate which is to be divided between them in the divorce proceedings.

### Discussion

7. Recently, in *Vuyeka v Ntshane and Others* (unreported Case No. 518/2019 [2020] ZASCA 167 (11 December 2020), the Supreme Court of Appeal dealt with the consequences of the failure to acquire consent in terms of section 15 of the Matrimonial Property Act.
8. The court quoted with approval the following passages from an earlier decision of the same court (*Marais NO and Another v Maposa and Others* [2020] ZASCA 23; 2020 (5) SA 111 (SCA)) dealing with the effect and operation of section 15 of the Matrimonial Property Act:

*[26] The effect of s 15 may be summarized as follows. First, as a general rule, a spouse married in community of property “may perform any juristic act in connection with the joint estate without the consent of the other spouse”. Secondly, there are exceptions to the general rule. In terms of ss 15(2) and (3), a spouse “shall not” enter into any of the transactions listed in these subsections without the consent of the other spouse. Subject to what is said about the effect of s 15(9)(a), if a spouse does so, the transaction is unlawful, and is void and unenforceable. This, it seems to me, flows from what Innes CJ, in *Schierhout v Minister of Justice*, called a “fundamental principle of our law”, namely, that “a thing done contrary to the direct prohibition of the law is void and of no effect”. Thirdly, 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 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 in s 15(9)(a) is intended to protect the interests of a bona fide third party who contracts with that spouse.*

*[27] Section 15 thus seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other ...*

*[28] 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.*

*[29] The reference to reasonableness in the phrase “cannot reasonably know” imports an objective standard into the proof of this element: it must be established with reference to the standard of the reasonable person, in terms of what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw.*

*[30] In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries ...*

9. It is evident from the passages quoted above that the burden of bringing section 15(9)(a) into play rests on the first respondent in the present matter. It is the first respondent who is seeking to rely on the validity of the sale agreement concluded between himself and the fifth and sixth respondents.
10. The difficulty the first respondent faces in the present matter, however, is that notwithstanding a notice of opposition having initially been filed on behalf of the fourth and fifth respondents, the attorneys representing these

respondents subsequently withdrew as attorneys of record and no affidavits have been filed on behalf of the fourth and fifth respondents.

11. The only evidence of what the fourth or fifth respondents knew or may reasonably be assumed to have known is that the applicant and first respondent were married and, insofar as the proposed sale of the property is concerned, that the applicant wanted nothing to do with the property and refused to be involved in any transaction regarding the property.
12. It is also important to emphasise that the fifth respondent was the sister of the first respondent and was accordingly not in the position of a third party who has no knowledge of the circumstances of the spouse with whom he or she is contracting. The present case is, however, distinguishable from the case of *Visser v Hull and Others* 2010 (1) SA 521 (WCC), where the third parties were also relatives of the contracting spouse, for in that case the evidence was clear that the spouse and the third parties had fraudulently connived with each other to prejudice the other spouse's interests. There is no evidence in the present matter that the first respondent's conduct was in any way designed to prejudice the interests of the applicant.
13. To return to the test set out in *Marais'* case and endorsed in the *Vuyeka* case as quoted above, the question is whether it is reasonable to assume that the fourth or fifth respondents knew that consent for the proposed sale



was lacking and could not reasonably have known that consent had not been given.

14. Notwithstanding the scant evidence available, I am of the view that since the fourth and fifth respondents knew that the applicant wanted nothing to do with the property, it was reasonable for them to have assumed that the applicant would have had no objection to the first respondent entering into a transaction to dispose of the property. It was accordingly reasonable for the fourth and fifth respondents to have assumed that whatever consent the first respondent needed to deal with the property had been obtained.
15. I am accordingly satisfied that the sale agreement concluded between the first respondent and the fourth and fifth respondent falls within the ambit of section 15(9)(a) of the Matrimonial Property Act and must accordingly be deemed to have been entered into with the consent of the applicant.

#### Order

16. In the result the following order is granted:

16.1. The application is dismissed with costs

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Lazarus AJ  
Acting Judge of the High  
Court, Gauteng Division  
Pretoria

For the Applicant: V Mukwevho  
Instructed by: Shapiro Ledwaba Inc

For the First, Second and Third Respondent: K Mhlanga  
Instructed by: Nkosi SP Inc

Date of hearing: 20 October 2021  
Date of judgment: 23 March 2022