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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO**

NOT REPORTABLE

Case no: 702/2019

In the matter between:

BABALWA FANI

First Applicant

MONDE ERIC FANI

Second Applicant

and

PHINDILE TSHANTSHANA

First Respondent

NOKWAZI AGNES DIFASI

Second Respondent

REGISTRAR OF DEEDS, KING

Third Respondent

WILLIAM'S TOWN

EX-TEMPORE JUDGMENT

Govindjee J

[1] The applicants seek declaratory relief ordering the respondents to pass transfer of immovable property situated in Dimbaza ('the property'). The first respondent ('Mr Tshantshana') disputes the existence and validity of an agreement of sale in respect of the property, as well as the payment of the agreed purchase price.

[2] The applicants are married to one another in community of property. The first applicant's father ('Mr Malawana') came to know that the first and second

respondents were selling the property, which was derelict. Mr Malawana agreed to purchase the property for the price of R30 000. A R20 000 part-payment was made in cash on 11 January 2006 after Mr Malawana, his wife, Mr Tshantshana and his wife met to finalise the sale and transfer of the property. Various documents were signed by these persons on 21 December 2006, including an application for transfer of the property to the Malawanas. Transfer was not effected due to outstanding amounts owed to the municipality, which none of the parties to the sale were able to pay.

[3] Mr Tshantshana and his wife subsequently applied to the municipality, unsuccessfully, to have the rates reduced during July 2007. Mr Malawana was only able to settle the outstanding balance of the purchase price and the amounts due to the municipality when he received his pension during May 2016. The second respondent had taken ill by this time, although the extent of her illness is in dispute. Mr Tshantshana advised Mr Malawana and his wife to come to Cradock to finalise the matter, and were also informed, to their surprise, that the purchase price had now increased by R46000,00 to R76 000,00.

[4] Mr Malawana decided to continue with the purchase of the property and visited Cradock during April 2017 to effect payment of the new outstanding amount, and to sign documentation at the offices of Mr Tshantshana's attorneys. The money was duly paid and received, as confirmed by a document titled 'Affidavit', but uncommissioned, signed by Mr Tshantshana on 27 April 2017 and containing the thumbprint of his wife.¹ That document further confirms Mr Malawana's version of events up to this point, as well as the payment of the sum of R46 000.

[5] Mr Malawana and his wife had now decided that the property should be transferred directly to the applicants, who had occupied the property since 2012. On the applicants' version, Mr Tshantshana and his wife agreed to this and a deed of sale, still reflecting the original purchase price, was entered into between the parties on 27 and 28 April 2017. Mr Tshantshana subsequently refused to attend to the

¹ Certified copies of the identification documents of the first and second respondents are attached to the affidavit of the conveyancer instructed to attend to the transfer of the property during 2006, filed in reply.

signature of the necessary documentation in order to effect transfer of ownership. On the applicants' version, the second respondent, who has since passed away, signed various related documentation before her passing by way of a thumbprint. The applicants made payment of transfer costs during April 2017 and settled the outstanding amount in respect of rates and taxes during August 2017.

[6] Mr Tshantshana opposes the application. He relies on the passing of his wife on 31 May 2019, together with her illness since 2012, although he cannot recall any precise dates. Mr Tshantshana claims that his wife could not make any reasonable judgment of her own due to her deteriorating health condition, but does not link this to a specific date, and provides no supporting documentation. The second respondent died intestate. As the estate was not reported and no administrator of the estate has been appointed, he suggests that transfer cannot pass until that process has been completed.

[7] Mr Tshantshana adds that he had been 'cajoled and lured' by the applicants' attorneys to sign the deed of sale, and that he would not have signed the document had he known what it was. He denies that his wife could have signed the documentation as she was 'in a vegetative state'. He also claims that there was no valid contractual relationship with Mr Malawana and non-compliance with the Alienation of Land Act, 1981.² Mr Tshantshana does not deal with the contents of Mr Malawana's affidavit, on the basis that it is a second 'founding' affidavit and may be ignored.

[8] An applicant is entitled to introduce further corroborating facts by means of a replying affidavit should the contents of the answering affidavit call for such facts, based on a common-sense approach.³ Such facts appear in the form of an affidavit from the attorney instructed to attend to the sale and transfer of the property during 2006. The confirmation extends to the increased purchase price, the replacement of the applicants in place of the Malawanas as purchasers and the difficulties experienced in contacting the respondents to finalise the matter, also on the part of

² Act 68 of 1981.

³ *eBotswana (Pty) Ltd v Sentech (Pty) Ltd* 2013 (6) SA 327 (GSJ) at 336G-H.

correspondent attorneys in Cradock. The affidavit of Kingwill explains the circumstances that resulted in the second respondent signing various documentation by affixing her thumbprint on 20 September 2017.

[9] Pothier says: 'It is indeed of the essence of the contract of sale, that the seller should not retain the right of property in the thing, when he is owner of it; and that in such a case, he should be bound to transfer it to the buyer.'⁴

In the case of immovable property, ownership passes upon registration of transfer in the Deeds Registry, coupled with all the standard requirements of intention to transfer ownership on the part of both parties.

[10] Section 2(1) of the Alienation of Land Act, 1981⁵ provides that no alienation of land shall, subject to the provisions of s 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto, or by their agents acting on their authority. A deed of alienation is defined to mean a document or documents under which land is alienated.⁶ It is permissible for parties to a deed of alienation to include only three provisions, namely those related to s 2(2A) of the Act, the thing to be sold and the price, being the essentialia of the contract. In *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC*,⁷ the SCA held that a deed of alienation that does not comply with section 2(2A) is not void *ab initio*, but voidable at the instance of the *purchaser*. That proviso accordingly requires no further consideration.

[11] It is readily apparent from a provincial Department of Housing and Local Government document contained in the papers that the first and second respondents clearly intended to sell the property to the Malawanas during December 2006. It is also clear that the applicants, Mr Tshantshana and his wife entered into a valid deed of sale during April 2017, constituting the entire contract between the parties. The property was sold for the sum of R30 000,00 and the applicants were responsible for

⁴ Pothier *Sale* Preliminary Article as quoted in G Glover *Kerr's Law of Sale and Lease* (4th Ed) (LexisNexis) (2014) p 163.

⁵ Act 68 of 1981.

⁶ S 1 of the Act.

⁷ *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC* 2007 (3) SA 100 (SCA).

the costs. That the purchase price was paid on 27 April 2017 is apparent from Mr Tshantshana's own signed statement of that date, which makes reference to his wife being party to the arrangement, and confirms Mr Malawana's version of events and the increased purchase price paid. It is equally apparent that the first and second respondent acknowledged receipt of the initial payment of R20 000 when this was received, and appended their signatures to a document confirming this.

[12] In the circumstances, any averments to the contrary contained in the answering affidavit are, in my opinion, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable so as to warrant their rejection on the papers.⁸ As the court held in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*.⁹

'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied ... There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[13] As Eksteen J held, on behalf of a full bench, in *M v van der Merwe*:¹⁰

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

⁹ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6 para 13.

¹⁰ [2014] ZAECHC 15

‘A real dispute of fact arises most obviously when the respondent denies material allegations made by deponents on the applicant’s behalf and produces positive evidence to the contrary.’

[14] The second respondent’s condition between 2012 and 2017 is a matter within Mr Tshantshana’s knowledge. He nonetheless fails to address the contention that Mr Malawana made arrangements with both him and his wife for the property to be transferred to the applicants, or to explain the circumstances in which she co-signed both the deed of sale and Mr Tshantshana’s document entitled ‘affidavit’, which made reference to her, on 27 April 2017 by affixing her thumbprint on each page. These documents are largely ignored in the answering papers.

[15] The remaining arguments advanced in the papers on behalf of the first respondent lack merit. Mr Tshantshana is content to disavow the Deed of Sale on the basis that it has been attached to Mr Malawana’s affidavit, rather than the affidavit of the first applicant. He also failed to answer the affidavit of Mr Malawana in its entirety, based on a misunderstanding of Uniform Rule 6(1). This subrule requires a notice of motion to be accompanied by at least one affidavit but there is authority that a notice of motion can be supported by any person who is in a position to provide the necessary material to support the claim, even if that person is not an applicant.¹¹ Various material allegations made by Mr Malawana are not addressed and, also for the other reasons already mentioned, must be accepted. The submission that Mr Tshantshana is left ‘with a doubt as to who has instituted these proceedings’ is simply disingenuous and there is no basis, on these papers, for affording him a further opportunity to do so, also given the applicants’ interests in bringing the matter to finality.

[16] It was for Mr Tshantshana to have given notice of his wife’s death to the Master, to have compiled an inventory within 14 days and to have secured letters of executorship or obtained directives from the Master, in terms of the Administration of Estates Act, 1965.¹² The failure to do so appear to constitute offences in terms of

¹¹ *Leth NO and Heath NO v Fraser* 1952 (2) SA 33 (O) at 36B.

¹² Act 66 of 1965.

that legislation. In any event, Mr Tshantshana accepts that he has assumed the responsibilities of a surviving spouse in a deceased intestate estate as provided for in the Intestate Succession Act, 1997. That aside, there appears to me to be no legal basis for these failures to prevent the applicants from the relief they seek.

[17] There is no basis for the averment that this Court lacks jurisdiction to hear the matter, or that there has been non-compliance with ss 2 and 28 of the Act.

[18] The first and second respondents jointly entered into a contract for the alienation of the property, which formed part of the joint estate.¹³ The presumption is that the sellers intended to make the applicants the owners of the property.¹⁴

[19] The applicants seek a mandatory interdict compelling the first and second respondents to act in order for their ownership rights to the property to be vindicated. The three requirements for granting this relief have been met: the applicants have demonstrated a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy. The injury amounts to a continuing violation of the applicants' rights and, given the averments made by the first respondent regarding his means, cannot be vindicated through payment of damages, which will in any event be difficult to assess, and involve expensive and time-consuming litigation. It would be inequitable to delay the granting of this relief purely on the basis that the second respondent has passed away. This occurred more than three years ago and no steps appear to have been taken to administer her estate in that time. In addition, she died intestate and Mr Tshantshana is the surviving spouse.

¹³ S 15 of the Matrimonial Property Act, 1984 (Act 88 of 1984), including the requirement of two witness signatures, relates to performance of a juristic act with regard to a joint estate without the consent of the other spouse, and is inapposite in the present instance. It relates to the performance of a juristic act by one of the spouses married in community of property, the starting point being that this is permissible without consent in instances other than those set out in subsections (2) and (3). The present instance deals with a case of common consent, rather than one spouse performing a unilateral act for which separate consent may be required: see HR Hahlo *The South African Law of Husband and Wife* (5th Ed) (1985) 251. In other words, this was a case of the joint entering into of a contract for the alienation of immovable property forming part of the joint estate, so that the s 15(5) requirement of two competent witnesses necessary where 'independent' consent is given is not required.

¹⁴ RH Zulman and G Kairinos *Norman's Law of Purchase and Sale in South Africa* (5th Ed) (2005) 3.

[20] Given the nature of the averments made by Mr Tshantshana and the manner in which he appears to have concocted a version to suit his own ends, and persisted therewith, it is appropriate that costs be awarded on a punitive scale.

Order

[21] The following order will issue:

1. The late filing of the first respondent's answering affidavit is condoned.
2. The first respondent and the estate of the second respondent pass transfer to the first and second applicants of the immovable property known as Unit No. [...] Dimbaza Location, Dimbaza, Eastern Cape Province within 10 (ten) days of the date of this Order;
3. The Sheriff of the above Honourable Court is authorised to forthwith sign the transfer and related documents for and on behalf of the estate of the second respondent, as seller;
4. In the event of the first respondent failing to pass transfer of the said property to the first and second applicants in terms of paragraph two of this Order, then in such event, the Sheriff of the above Honourable Court is authorised to sign the transfer and related documents for and on behalf of the first respondent as seller.
5. Pending the registration of transfer of the immovable property as aforesaid, the first respondent and the executor of the estate of the second respondent be interdicted and restrained from disposing of the said immovable property to any third party or from further encumbering the said property in any manner whatsoever;
6. the first respondent be and is hereby ordered to pay the costs of and incidental to this application on the scale as between attorney and client.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:27 October 2022
Delivered:27 October 2022

Appearances:

For the Applicant: Adv C Woods

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