IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1083/2021

In the matter between:

G. L. MAZOMBA FUNERAL UNDERTAKERS (PTY) LTD Applicant

and

MTOBA FUNERAL SERVICES (PTY) LTD Respondent

JUDGMENT

RUGUNANAN, J

[1] The respondent seeks leave to appeal against my judgment delivered *ex tempore* on 14 October 2021. The application for leave to appeal was delivered on 15 October 2021. The judgment followed argument in an eviction application instituted by the applicant under the *rei vindicatio*. The subject matter of the application concerned fixed commercial property situated at 7 Leopold Street, more specifically described as Erf 1092 and Erf 1093, King William's Town ("the property"). The order attendant on the judgment essentially directed the respondent to vacate the property and to restore possession to the applicant within 14 days and to pay the costs of the application.

[2] The notice of application for leave to appeal comprises of some twenty grounds of appeal inessential to the findings in the judgment and irrelevant to addressing the substantial issue inherent in the cause of action set out in the applicant's papers. Succinctly articulated, the substantial ground of appeal is that the applicant's reliance on a title deed to support its claim for the return of the property in terms of the *rei vindicatio* is unsustainable for the reason that ownership of the property is vested in a deceased estate by application of the abstract theory of the transfer of ownership.

[3] The abstract theory – as opposed to the causal theory – of transfer postulates that the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction, which in this case is the sale of the property by Staircase Solutions (Pty) Ltd ("Staircase") to the applicant. The causal theory, on the other hand, requires a valid underlying legal transaction or *iusta causa* as a prerequisite for the valid transfer of ownership (see *Legator Mckenna Inc. and Another v Shea and Others* 2010 (1) SA 35 (SCA) at paragraphs [20] and [21]). The causal theory makes the transfer of ownership of a real right dependant on a valid underlying contract. This theory lays down that, if the cause for the transfer of a real right is defective, the real right will not pass despite the fact that there has been delivery or registration of the *res*. In terms of the abstract theory, provided that the agreement for the transfer of the real right (i.e. the real agreement) is valid, the real right will pass in the pursuance and implementation of that agreement, notwithstanding that the underlying contract is defective.

[4] The *rei vindicatio* is a remedy available to an owner for reclaiming property from whomever is in possession thereof. In vindicatory proceedings it is trite that the owner need do no more than allege and prove that he is the owner and that the other party is holding the property; the *onus* being on that party to allege and establish an enforceable right (such as a right of retention or a contractual right) to continue to hold

against the owner (see *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-D which dealt with the *rei vindicatio* and the burden of proof in ejectment proceedings).

THE UNDERLYING REASONING IN THE JUDGMENT

[5] The reference to *Chetty v Naidoo* makes it plain that the applicant has the *onus* to prove ownership of the property in question. At the very least, in vindicatory claims proof of ownership has to be adequate (see *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) at 744A-B). The applicant has put up a certified copy of the title deed to the property with date of registration indicated as 5 October 2020.[1] In *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at page 82 it is stated that the best evidence of ownership of immovable property is the title deed (see also *Bowley Steels (Pty) Ltd v 10 Sterling Road (Pty) Ltd and Another* (2016/2461) [2017] ZAGPJHC 196). The respondent has not seriously and unambiguously disputed the title deed, contending instead that it vests the applicant with bare *dominium* in the property.

[6] Evident from the papers in the main application are the following undisputed facts:

(i) The applicant purchased the property on 25 May 2020 from Staircase Solutions (Pty) Ltd ("Staircase"), the previous registered owner;

(ii) The respondent is currently in occupation of the property;

(iii) There is no agreement between the applicant and the respondent to justify the respondent's possession and occupation of the property; and

[1] Founding affidavit, annexure GL3

(iv) There never existed a lease agreement (or any other agreement) between Staircase and the respondent, which lease, by operation of law would have transformed into an agreement between the applicant and the respondent.

[7] It is trite that motion proceedings are determined on the basis of common cause facts (see *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [27]). On the undisputed facts, and of course accepting the best evidence as to ownership, there can be no conclusion other than that the applicant discharged the *onus* and established its entitlement to the relief prayed for in its notice of motion. This approach underscores the reasoning that informed my judgment.

BACKGROUND

[8] In seeking leave to appeal it was contended for the respondent that its director Ndileka Mtoba, in her personal capacity, was given a right to permanently occupy the property and this right extended to the respondent by virtue of her involvement in the conduct of its business. Hence the applicant would have bare *dominium*. Ndileka Mtoba maintains that full *dominium* in the property vests in the estate of her deceased father Robert Mtoba who died intestate in 1993, and goes on to explain that her mother Nodi Mtoba, who was married in community of property to her father, was appointed executrix to the latter's estate.

[9] Ndileka Mtoba discloses that her mother Nodi Mtoba bought the property but that in accordance with a family agreement the title deed *"be registered in the name of our mother as a keeper thereof – keeping it for us as heirs pending the eventual and final winding up of our father's estate."* I pause to state that the family members who were privy to the alleged agreement included Ndileka Mtoba, her sister Nomfuneko Mtoba

and their mother Nodi Mtoba. A third sibling named Xhanti Mtoba had long been deceased since 1995.

[10] By deed of transfer registered on 9 May 1995 Nodi Mtoba acquired ownership of the property until her death in 2018. Following the death of her mother, Ndileka Mtoba asserts that she assumed the role of *de facto* executrix of her late father's estate, the administration of which has not been finalised to date. For this reason, so it was argued, the property vests in the estate of the deceased Robert Mtoba.

[11] The explanation that *dominium* in the property vests in her deceased father's estate is certainly convoluted; but in support thereof reliance is placed on the abstract theory for advancing the argument that full *dominium* vests in the estate of Robert Mtoba in terms of the real agreement with Nodi Mtoba, the executor of his estate.

[12] The difficulty confronting the respondent is the absence of a confirmatory affidavit by Nomfuneko Mtoba to substantiate the averments by Ndileka Mtoba in respect of the alleged agreement. As a point of departure Nomfuneko Mtoba deposed to an affidavit in support of the applicant's relief. In addition, it is nowhere apparent in the respondent's papers as to how or from whom was the alleged right to permanent occupation of the property conferred upon Ndileka Mtoba. Furthermore, her explicit acknowledgment that the title deed to the property reflects registration in the name of her deceased mother renders the contention that full *dominium* of the property continues to vest in the estate of Robert Mtoba, unconvincing.

[13] In evidence the applicant placed before this court:

(i) the title deed presently held in its name after acquiring registration and transfer on 25 May 2020;

(ii) the title deed of Staircase (as the previous owner and seller to the applicant), which title deed indicates that Staircase acquired registration and transfer of title in its name from Nodi Mtoba on 26 September 2017; and

(iii) the deed of transfer in favour of the late Nodi Mtoba, (the previous owner and seller to Staircase) indicating that she acquired registration and transfer of title from Frederick Bentley Chalmers and Pamela Grace Chalmers on 9 May 1995.

[14] None of the aforementioned deeds record any real rights or servitudes – neither in favour of the respondent, nor in favour of Ndileka Mtoba. Indeed, the *causa* for each transfer has not been faulted by the respondent. A revealing feature of the deed of Nodi Mtoba is that title in the property was not transferred to Nodi Mtoba in her capacity as executrix (or *"keeper"*) of her deceased's husband's estate. Objectively considered, Nodi Mtoba held title in her name. This observation forestalls the assertion by Ndileka Mtoba that the property falls within the estate of her deceased father.

[15] A further observation from the respondent's answering affidavit emanates from the certified Will of Nodi Mtoba which has been attached thereto. The Will did not, in respect of the property, confer upon the respondent a right of retention or a servitude, nor did it do so in favour of Ndileka Mtoba in her personal capacity.

[16] In my view the contention regarding the vested property in the estate posited on the abstract theory, and the further contention that Ndileka Mtoba and by extension the respondent, has a right of permanent occupation does not raise a genuine or *bona fide* dispute of fact. These contentions are mischievous and obfuscatory in the extreme and efforts to seek clarity during oral argument were regrettably not met with any constructive assistance other than repetition. The undisputed facts when

applied to the evidentiary requisites in *Chetty v Naidoo* taken together with the best evidence do not disentitle the applicant to the relief it was granted.

[17] In the light of the above finding it is unnecessary to consider the issue of non-joinder of the Master and the executor of Nodi Mtoba's estate. No clear evidence was tendered as proof that an executor was appointed nor was any indication given as to which office of the Master in the Eastern Cape has the estate been reported and registered. In any event the issue raised implicates the administration of the relevant estate and does not, on the undisputed facts, affect the merits of the eviction.

[18] In *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 (SCA) at paragraphs [16]-[17], and quoting only where relevant, the following is stated in seeking leave to appeal:

> *"… leave to appeal … must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) … makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard…An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*

[19] The application for leave to appeal does not withstand the appropriate test.

COSTS

[20] The opposition to the main application had no prospect of success and for reasons already dealt with in this judgment neither did the application for

leave to appeal. In argument I was informed from the bar by applicant's counsel that the respondent was forewarned soon after delivery of the application for leave to appeal that in the event of the application being persisted with the applicant would seek a punitive costs order against the respondent. This disclosure was not disputed in reply.

[21] Furthermore, I take heed of the applicant's undisputed plea that it is being frustrated in its endeavours to reclaim its property and that it presently suffers ongoing and severe financial prejudice having to bear the burden of servicing monthly repayment of the mortgage bond for the purchase of the property together with insurance premiums in sundry amounting to some R24092.22.

[22] In the circumstances I make the following order:

The application for leave to appeal is dismissed with costs, such costs to be paid by the respondent as between attorney and client.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: C. D. Kotze
Instructed by Sityana Brittan Inc, c/o Huxtable Attorneys, Makhanda / Grahamstown (Ref: Mr Huxtable), Tel: 046-622 2961

For the Respondent: M. Tshiki, Tshiki & Sons Inc., (Ref Mr. M. Tshiki), Tel: 076 118 8459, c/o Mgangatho Attorneys, Makhanda / Grahamstown, Tel: 046-622 2688

Date heard: 02 March 2022

Date delivered: 08 March 2022