



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	YES
Circulate to Magistrates:	NO

Case No. : A260/2017

In the matter between:-

ELIZABETH VERMEULEN N.O

Appellant

(In her capacity as executrix in the estate of the
late Ramosioane Andrew Rammile, Estate number:2134/2001)

and

MPHO MAGDELINE RAMMILE

1st Respondent

THE REGISTRAR OF DEEDS BLOEMFONTEIN 2nd Respondent

THE MANGAUNG METROPOLITAN MUNICIPALITY 3rd Respondent

**THE MEC FOR CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS,
FREE STATE PROVINCE**

4th Respondent

**THE MEC FOR HUMAN SETTLEMENTS,
FREE STATE PROVINCE**

5th Respondent

THE MASTER OF THE FREE STATE

HIGH COURT, BLOEMFONTEIN6th Respondent

CORAM: DAFFUE, J *et* MBHELE, J *et* VAN RHYN,AJ

HEARD: 7 MAY 2018

JUDGMENT BY J P DAFFUE

DELIVERED: 10 MAY 2018

I INTRODUCTION

- [1] The daughter of a deceased person and only heir of his estate on the one hand and the executrix of the deceased's estate on the other hand are at loggerheads about the only asset in the estate, to wit the daughter's ancestral home which she occupies and have been occupying with her father (before his death) and siblings. The executrix believed that she had the right to sell the immovable property, which she did, in order to obtain funds to make good the alleged cash shortfall in the estate. Her ultimate goal is to transfer the property to the purchasers in order to wind up the estate. The 1st respondent has a different approach and consequently vehemently opposed the relief sought by appellant as will be shown *infra*. The deceased passed on as long ago as 7 July 2001 and due to several factors, not all relevant to this appeal, his estate has still not been finalised.

- [2] On 28 July 2016 appellant obtained *interim* relief on an urgent and *ex parte* basis in terms whereof 1st respondent was prohibited from selling the immovable property registered in her name pending the outcome of an application for cancellation of the registration of the property in her name as well as further relief set out in more detail *infra*.
- [3] On 22 September 2016 the matter was eventually heard by Ebrahim J on an opposed basis. The learned judge discharged the rule *nisi*, the costs of the application to be paid by the appellant *de bonis propriis*. No reasons were provided and none were requested in terms of rule 49 of the Uniform Rules of Court. The presiding judge's views are to an extent evident from her reactions to the oral arguments and questioning of counsel.
- [4] Appellant's application for leave to appeal was considered by Mhlambi J in the absence of Ebrahim J. On 18 July 2017 he granted leave to appeal to the full bench.

II THE PARTIES

- [5] Ms Elizabeth Vermeulen in her capacity as executrix in the estate late Ramosioane Andrew Rammile is the appellant. She was the unsuccessful applicant in the court *a quo*. At all relevant times she was an admitted attorney in the employ of Kramer Weihmann and Joubert Attorneys ("KWJ"), Bloemfontein. Adv W Groenewald appeared for her in this court as well as the court *a quo*.

- [6] Ms Mpho Magdaline Ramille is the 1st respondent in the appeal and she was also cited as such in the court *a quo*. She was at all times represented by Adv L Mfazi. Her present attorney is Mr V Morobane of Morobane Inc.
- [7] The Registrar of Deeds, the Mangaung Metropolitan Municipality (“the Municipality”), the MEC for Co-operative Governance and Traditional Affairs, the MEC for Human Settlements and the Master of the High Court were cited as 3rd to 6th respondents respectively, but they did not oppose the application and did not play any role in the hearing before the court *a quo* or on appeal.

III **A CONCISE HISTORY OF RELEVANT EVENTS**

- [8] The following facts are either common cause or could not be disputed by appellant:

8.1 1st respondent and her siblings together with their father stayed at Erf [...], Mangaung (Extension 6), district Bloemfontein (“the property”). As a consequence of marriage and employment her siblings moved out of the ancestral house and eventually only she and one brother, Patric, were left behind;

8.2 After Patric’s death in 1998, her father consulted an attorney, Mr A C Horn, who prepared a will which her father signed and executed on 4 March 1998;

- 8.3 1st respondent's father married again and relocated to his new wife's home in Thaba Nchu, she being Morakane Jeaneatt Rammile ("the surviving spouse");
- 8.4 During her father's lifetime 1st respondent effected several improvements to the property, including the building of a toilet and bathroom, insofar as she knew that she would inherit the property;
- 8.5 1st respondent's father (herein later to be referred to as "the deceased") passed away on 7 July 2001 where after Letters of Authority were issued by the Master to Mr A C Horn, the attorney appointed in the will of the deceased; Mr Horn was appointed as the Master's representative in the joint estate of the deceased and his surviving spouse with whom he was married in community of property, the legal consequences of which were that the surviving spouse became entitled to one half share of the estate (the property herein);
- 8.6 1st respondent and Mr Horn approached officials of the 3rd respondent on his advice, but Mr Horn passed away hereafter;
- 8.7 KWJ took over the estate file and 1st respondent provided a written special power of attorney during March 2007; firstly Ms De Villiers of the firm handled the affairs and thereafter the appellant;

- 8.8 Letters of Authority in terms of s 18(3) of the Administration of Estates Act, 66 of 1965 were initially issued to 1st respondent on 3 March 2008 and on 10 September 2008 Letters of Executorship were issued to her;
- 8.9 After some negotiations between the attorneys for 1st respondent and the surviving spouse a Deed of Sale was concluded on 26 September 2008 in terms whereof 1st respondent purchased the surviving spouse's one half undivided share in the property for R90 000.00;
- 8.10 This transaction, which was subject to the suspensive condition that a loan be granted to the purchaser, was not proceeded with although it appears from an internal note dated 26 August 2011 – some three years later - relied on by appellant, that the loan was indeed granted, but 1st respondent failed to sign the mortgage bond documents;
- 8.11 Prior to the sale mentioned *infra* 1st respondent instructed Kolokome and partners – clearly not attorneys – to communicate with appellant as there were indications that she was not satisfied with the intended sale; however Mr Kolokome indicated in writing that his client decided not to contest the sale, an aspect disputed by 1st respondent;
- 8.12 During 2012 several letters were sent to and fro between KWJ and Majola Attorneys now acting for 1st respondent, indicating clearly that 1st respondent in her capacity as executrix had terminated the mandate of KWJ to act on

her behalf – this also appears from the written termination of mandate of July 2012;

8.13 Meanwhile, on 25 April 2012, the property was sold for the amount of R284 070.00 to Mr and Mrs Serengoane on instructions of appellant; the sale taking place presumably in terms of s 47 of the Administration of Estates Act, 66 of 1965, but it is doubtful if there was compliance with the provisions of the section, an aspect to be dealt with briefly *infra*;

8.14 1st respondent's refusal to sign the transfer documents led to a complaint by appellant to the Master who directed 1st respondent to sign the required documents;

8.15 1st respondent's failure to comply apparently caused the Master to remove her as executrix – there is no proof hereof or that she could have become aware thereof prior to institution of the application, but it is evident that appellant was appointed as executrix on 24 October 2013;

8.16 On 7 August 2014 appellant entered into a Deed of Sale with the Municipality in terms whereof she in her capacity as executrix purchased the property for the amount of R10 146.00, apparently in terms of a decision taken on 12 September 2012, but her counsel could not tell us who negotiated the alleged purchase price; steps were taken

by the Municipality's attorneys to transfer the property in the names of the deceased estate and surviving spouse;

8.17 Simultaneously with the above intended transfer appellant, through the conveyancing department of KWJ tried to effect transfer of the property in the names of Mr and Mrs Serengoane, only to discover that the property was already transferred in the name of 1st respondent;

8.18 It appeared from an investigation undertaken on behalf of appellant that the property was transferred on 26 February 2016 to 1st respondent in terms of a declaration made by the Director-General of the Free State Province in terms of s 4(1)(b) of the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 ("the Conversion Act");

8.19 KWJ's investigation confirmed that the Director-General and/or his personnel were *inter alia* in possession of the deceased's death certificate, his will, Letters of Executorship in favour of 1st respondent, as well as her identity document and her affidavit;

8.20 I would have expected the Municipality and the Departments of Co-operative Governance and Traditional Affairs and Human Settlements to explain their intimate knowledge of events leading to the transfer of the property to 1st respondent, but there was a deafening silence from them.

IV THE RELIEF SOUGHT IN THE COURT A QUO

- [9] Save for the *interim* relief sought and obtained as mentioned *supra*, appellant sought cancellation of registration of the property, to wit Erf [...] (Mangaung (Extension 6), district Bloemfontein, in the name of 1st respondent as well as an order that the 2nd respondent, the Registrar of Deeds, be authorised to transfer the property to the Estate late Ramosioane Andrew Rammile and surviving spouse, Morakane Jeaneatt Rammile, alternatively to the Municipality. A punitive costs order was also sought.
- [10] As stated *supra* the application was eventually dismissed, although leave to appeal was granted.

V THE GROUNDS OF APPEAL

- [11] Appellant relies on mainly five grounds of appeal, to wit that the court *a quo* erred (a) in not taking into consideration that 1st respondent was not entitled to obtain transfer of the property into her name; (b) in not taking into consideration that 1st respondent was no longer an executrix of her father's estate, presumably at the stage when the property was transferred into her name, as she was substituted by appellant; (c) in not taking into account that the Deed of Sale between 1st respondent and the surviving spouse lapsed as the suspensive condition was not fulfilled; (d)

in not taking into consideration that 1st respondent – even on her version – does not know how she obtained full ownership and (e) in granting a punitive costs order *de bonis propriis* against appellant.

VI EVALUATION OF THE ARGUMENTS

1st, 2nd and 4th grounds of appeal

[12] These three grounds as summarised *supra* will be dealt with simultaneously. It needs to be established whether the court *a quo* was wrong in failing to find that 1st respondent was not entitled to transfer of the property in her name. I wish to emphasise that Mr Groenewald steered away in his heads of argument as well as his oral submissions from the underlying and relevant principles and procedures of the Conversion Act. However, he submitted that the crux of the appeal was whether the property was rightfully transferred to 1st respondent.

[13] I mentioned certain relevant conveyancing principles in *M.J. v M.V Moloao*, case no 4027/2016, an unreported judgment of the Free State High Court, delivered on 30 November 2017 and for ease of reference I quote the relevant passages:

“[18] There must be a causa for registration of immovable property into the transferee’s name. It may inter alia be a sale, a donation, an exchange, an inheritance or in terms of legislation.

[19] During the years of apartheid black people could not own immovable property in the majority of areas in South Africa which areas

were reserved for people of the so-called white group only. However, urban black people were under certain conditions given the right to occupy land in areas allocated to them. They received so-called site permits.

[20] Since 1984 black people could receive leasehold rights in respect of properties occupied by them in urban areas. Leasehold rights were granted to occupants in possession of site permits issued to them. I refer to the Black Communities Development Act, 62 of 1984. This Act was amended by Act 4 of 1986 to provide for full ownership rights. Applicant has not made out a case as to which legislation applies in casu and for that reason I have decided to mention Acts which might be applicable.

[21] On 1 January 1989 the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 ("the Conversion Act") was promulgated to provide for the conversion of certain rights of occupation into leasehold or ownership. I do not intend to discuss the Act in any detail, but wish to reiterate the following. The legislature regarded the Black Communities Development Act as the principal Act for purposes of interpreting and applying the Conversion Act. In terms of s 2(1) of the Conversion Act the Director-General of a particular province shall conduct inquiries in respect of affected sites within that province in order to determine who shall be granted rights of leasehold, or where sites are situated in formalised townships for which township registers have been opened, ownership with regard to such sites.

[22] In terms of s 5, and in the event of a declaration having been made by the Director-General, he/she shall lodge such declaration and every deed and other document necessary for registration of the right of leasehold if s 4(1)(a) is applicable. If s 4(1)(b) applies, the Director-General shall lodge his/her declaration and a deed of transfer with the registrar concerned. It is interesting to note that s 17(1) and (2) of the Deeds Registry Act, 47 of 1937 ("the Deeds Act") shall not apply in

respect of transfer of ownership in terms of the Conversion Act. See: s 5(1A)(g). I shall explain the effect of s 17 of the Deeds Act *infra*. It also appears as if s 14 of the Deeds Act mentioned *infra* may also not be applicable if s 2(3) of the Conversion Act is correctly understood. The provincial administrations must carry out the processes contained in the Conversion Act. However, it is not necessary to decide the issue in the light of the evidence and submissions presented to the court.

[23]

[24]

[25] Registration of immovable property which would upon transfer thereof form part of a joint estate shall be registered in the name of the husband and the wife, unless that transfer takes place only in the name of a partnership and the husband or wife is involved herein only in the capacity of partner in that partnership. See s 17 of the Deeds Act. Section 14 of the Deeds Act provides for deeds to follow the sequence of their relative causes. This means that transfer of land shall follow the sequence of the successive transactions in pursuance of which they are made, save in certain exceptional cases..... Sections 14 and 17 must be regarded as the default position, but as mentioned *supra*, the Conversion Act apparently provides for exceptions.”

- [14] Although appellant attached Deed of Transfer no TE 2539/2016 in favour of 1st respondent to her founding affidavit, she did not mention the Conversion Act in her affidavit and did not alert the urgent court which she approached *ex parte* that this was not the usual transfer between private persons or between corporate bodies or the State and private persons. The transfer was effected in terms of a particular Act, the Conversion Act and it followed, not upon a sale, exchange, donation or inheritance (in the usual sense) which would have triggered for example s 14 of the Deeds Act, but a declaration by the Director-General in terms of s 4(1)(b) of the Conversion Act. If this was dealt with

in the founding affidavit, the urgent court would have been alerted to the fact that the Conversion Act provides for an appeal procedure and most probably would not have granted relief in the first place.

[15] Contrary to her version Mr Groenewald argued that 1st respondent fraudulently arranged with the Departments of Co-operative Governance and Traditional Leaders and Human Settlements to have the property transferred into her name only, whilst she at all times accepted that she was entitled to transfer of one half undivided share in terms of the will. On the information obtained it appears as if she went to the Departments as late as 2015 and after the appointment of appellant as executrix. He also relied upon the fact that on her own version she never had the intention to become owner of the whole property. Therefore, based on the abstract theory of transfer confirmed in judgments of the Supreme Court of Appeal such as *Legator McKenna v Shea* 2010(1) SA 35 (SCA) at 44F and *Quartermark Investments v Mkhwanazi* 2014 (3) SA 96 (SCA) at para [24], no real agreement existed and the transfer should be declared a nullity and cancelled.

[16] I doubt whether the established principles stated in *Legator* and *Quartermark* can be applied *in casu*. We are not dealing with transfer of ownership in immovable property in the general sense of the word. *In casu* there is no underlying agreement, but a declaration by a senior official in the Free State Province – its Director-General – granting ownership to 1st respondent. The Conversion Act cannot be sidestepped in the process of

adjudicating the appellant's alleged right to cancellation of the Deed of Transfer. The signing of the Deed of Transfer was done by Mr Van Niekerk, an employee in the office of the particular Departments following a declaration by the Director-General. A process was followed in accordance with the Conversion Act and to name one aspect, the documents were not and did not have to be prepared by a conveyancer as is the case with other documents filed for registration in the Deeds Registry. See also: *Kuzwayo v Estate late Masilela* (28/10) [2010] ZASCA 167 (1 December 2010) at paragraph [28].

- [17] Mr Mfazi argued that the principle set out in *Schlessinger v Schlessinger* 1979 (4) SA 342(W) at 348E – 349B is relevant. Appellant had a duty of good faith to disclose all facts which might, not necessarily would, affect the court's discretion whether or not to grant relief. He argued that Ebrahim J who eventually discharged the rule *nisi* upheld the Constitution and particularly s 25(1) thereof dealing with the right to property. This appears from her questions and remarks during argument. She *inter alia* alluded to the following pertaining to 1st respondent's version:

"..... my ancestral home....., this is where my father did all his customary and spiritual rituals ceremonies and I want to safeguard this property....."

Mr Mfazi is correct that the rule *nisi* could and possibly should have been discharged solely because appellant failed to present all relevant facts to the urgent court.

[18] I am of the view that appellant has failed to make out a case based on the merits. The Director-General did not file an affidavit and as appellant elected not to launch a review application, this court does not know what were the reasons for the declaration in terms of s 4(1)(b) of the Conversion Act. See again *Kuzwayo supra* at paragraph [30]. In any event, the Conversion Act makes provision for an appeal procedure and that being the case, appellant who presented her case based on interdict procedure, failed to show that she did not have any other satisfactory remedy. Mr Van Niekerk, who signed the Deed of Transfer on behalf of the aforesaid Departments, duly authorised in terms of a Delegation of Ministerial Powers, acting on behalf of the Municipality as is recorded in the first preamble of the Deed of Transfer, advised KWJ that the complaint would be referred to his legal department. Appellant was not prepared to follow that sensible route.

[19] An issue is made that 1st respondent failed to inform the authorities that she was not an executrix of the estate in 2015 when she allegedly influenced the Departments to transfer the property in her name. Firstly, there is no proof that she knew by then that she had been substituted by appellant and secondly, her position of executrix was on probabilities immaterial to the granting of ownership to her. The deceased was entitled to ownership in terms of the Conversion Act, but his death made transfer to his estate unnecessary and consequently a direct transfer to the deceased's heir, the 1st respondent, was in principle authorised in accordance with s 2(3)(b) of the Conversion Act. I reiterate that as a result of s 5(1A)(g) of the

Conversion Act ss 17(1) and (2) of the Deeds Act do not apply as mentioned *supra*; therefore transfer to the deceased's estate and his surviving spouse was not required unlike what the case would be in the default position.

[20] Mr Groenewald was not aware of the *Molao* decision of the Free State Court and did not study the decision of the Supreme Court of Appeal in *Kuzwayo supra*. If he was aware of these judgments and took proper cognisance of the Conversion Act, he would probably not be inclined to argue that the Deed of Transfer no TE 2539/2016 in favour of 1st respondent should be cancelled. He submitted repeatedly that the court should go further and order the “retransfer” of the property. It must be emphasised that this is not a review application and that we were not provided with reasons for the Director-General's declaration.

[21] The court is entitled to cancel a Deed of Transfer as provided for in s 6(1) of the Deeds Registries Act, 47 of 1937 – see also *Kuzwayo supra*, but s 6(2) provides that upon such cancellation “the deed under which the land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.” No “retransfer” takes place and the property can also not be transferred to a third party as appellant intended *ex facie* the notice of motion and the rule *nisi* issued. In terms hereof appellant only asked in the alternative that the property be transferred to the Municipality.

[22] My evaluation *supra* must lead to the conclusion that appellant's grounds of appeal have no merit. I also wish to add that I find it

unbelievable that appellant could have proceeded with her action over all these years, well-knowing that a conflict of interest existed from as early as at least the beginning of 2012. The mere fact that 1st respondent consulted another person and indicated her unwillingness to proceed with the public auction of the property should have caused appellant to see the flashing red lights. There is no indication that 1st respondent as the only heir (and executrix at the time) approved the intended sale in writing as required by s 47 of the Administration of Estates Act, 66 of 1965. In any event, the written termination of mandate followed soon after the auction was held.

3rd ground of appeal – suspensive condition in Deed of Sale not met

[23] Mr Groenewald conceded that this is really a non-issue at this stage of the proceedings. Not much time will be spent on the subject and I merely wish to make it clear that it is not a foregone conclusion that the Deed of Sale between 1st respondent and the surviving spouse has lapsed as a result of the non-fulfilment of the suspensive condition. The law is clear as mentioned by Christie and Bradfield, *Christie's The Law of Contract in South Africa*, at p 151 and further. Non-fulfilment of a suspensive condition normally renders the contract void. However the wording of the particular contract must be considered and properly interpreted to establish whether the non-compliance in a particular case warrants the lapsing of the contract. *In casu* the wording of the contract is such that there is room for an argument that it was not the parties' intention that the contract would lapse if no loan was obtained within a specific time frame.

Most importantly it appears from an internal memorandum relied upon by appellant that a loan was indeed granted to 1st respondent in order to fulfil the suspensive condition, but that she merely failed to sign the bond documents. The surviving spouse has an option, either to keep 1st respondent to the contract, or to cancel it, but proper notice must be given in terms of the contract. Nothing has been done in this regard *ex facie* the documents before us and therefore the contract appears to be *in esse*, but it is not necessary to make a finding in this regard.

The appeal against the punitive costs order

[24] Appellant had no other option than to withdraw from the matter and claim her fees and expenses, but what she could not do was to press on and eventually arrange for her appointment as executrix in substitution of 1st appellant. Appellant's recalcitrant attitude, although to an extent understood if one considers the extreme delay to finalise the estate, deserves to be penalised with a punitive costs order. She and KWJ should have adhered to the termination of mandate and she should not have made herself available as executrix, well-knowing that a serious conflict of interest existed. In the process much unnecessary costs have been incurred and neither the estate (to the disadvantage of the surviving spouse also), nor 1st respondent should be penalised. The only manner in which this can be avoided is to dismiss the appeal against the punitive costs order against appellant personally. I have considered the fact that appellant was not warned that a punitive costs order might be sought or granted against her. Costs are in the discretion of the court hearing a matter and as long as the discretion is exercised on grounds upon

which a reasonable person could come to the decision arrived at, no interference should take place on appeal. The allegation that the property had to be sold on auction because of a cash shortage is without merit. The obvious route to follow if the sale between 1st respondent and the surviving spouse could not be finalised was to transfer the property into both their names. The costs would be minute at such stage. This exercise was apparently never considered. The costs caused by the auction could have been avoided. 1st respondent should never have been put in a situation where she would have lost her ancestral home to which she personally effected improvements. Appellant acted pitiless and grossly unreasonable. She was rightly ordered to pay the costs *de bonis propriis*.

VII CONCLUSION

[25] Consequently the appeal has no merits and it should be dismissed with costs.

VIII ORDER

[26] The following order is issued:

The appeal is dismissed with costs.

J. P. DAFFUE, J

I concur

MBHELE, J

I concur

Van Rhyn, AJ

On behalf of appellant: Adv W J Groenewald
Instructed by:
Kramer Weihmann & Joubert
BLOEMFONTEIN

On behalf of the 1st respondent: Adv L Mfazi
Instructed by:
Morobane Inc.
BLOEMFONTEIN