

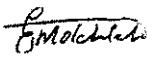
THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 54350/2014

28/3/2017

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: NO	
(1)	OF INTEREST TO OTHERS JUDGES: NO
(2)	REVISED
28 March 2017	
DATE	SIGNATURE

In the matter between:

TINTSWALO LIZZT NOVELA

APPLICANT

AND

JOHANNA HLONGWANE

FIRST RESPONDENT

SOLOMON MSANA MASHIANE

SECOND RESPONDENT

THOLO ITUMELENG CONSTANCE

THIRD RESPONDENT

REGISTRAR OF DEEDA PRETORIA

FOURTH RESPONDENT

HEARD: 25 AUGUST 2016

DELIVERED: 28 MARCH 2017

JUDGMENT

Molahlehi J

Introduction

- [1] This is an application in terms of which the applicant seeks an order declaring that the second and third respondents (the respondents) are in breach of the deed of sale involving the sale of the immovable property, ERF 196 Makhulo in Tembisa.
- [2] The applicant further seeks an order declaring her son to be the beneficiary from the estate of the late, Mr Dion Hlongwnane (the deceased) by virtue of being his son.
- [3] The applicant seeks an order to have the registration of the above property in the Deeds office to be declared fraudulent and unlawful for the reasons set out below.
- [4] The applicant instituted these proceedings on behalf of her son, as guardian and herself in her capacity as surviving spouse of the deceased. She claims to have been married to the deceased in terms of customary law.

Background facts

- [5] The issue between the parties in this matter arose after the death of the deceased on 3 November 2000. At the time of his death, the

deceased's estate consisted of only one property which is the subject-matter of the current dispute.

- [6] It is common cause that the first respondent was appointed executrix of the deceased's estate.
- [7] The applicant instituted proceedings initially in the magistrate court against the first respondent. She contended in those proceedings that the first respondent was in breach of an oral agreement in terms of which she (the first respondent) was supposed to have paid her the amount of R22 000.00, apparently being part of the inheritance.
- [8] The magistrate court found in her favour and ordered the first respondent to pay the amount in question with interest and costs.
- [9] The applicant contended that before she could execute the magistrate's court order, an oral agreement was reached between her and the respondents that she should not proceed with that process. The agreement was based on the understanding that the respondents would buy the property for the amount of R50 000, 00 out of which the judgment debt would be settled.
- [10] The applicant contends that despite the failure to pay the purchase price the respondents proceeded to have the property register in their names. This is, as it would appear to be, the cause of action in both

the present and the previous proceedings before the High Court. In the present proceedings, the applicant has added the allegation that the respondents fraudulently registered the property in their names despite not having paid the full purchase price.

[11] In the previous proceedings before the High Court the applicant contended that:

"13 It was agreed at this meeting that the 1st Respondent will sell the property to the 2nd and 3rd Respondents for the amount of R50 000,00 (sic) I will be entitled to payment of the amount of R22 000,00 plus interest, plus costs, which amounted to R37 000,00.

14. The 1st respondent then signed the transfer documents in respect of the property ERF 196 Makhulong Section, Tembisa transferring the property to the 2nd and 3rd Respondents.

15. The 2nd and 3rd Respondents, however, failed to pay the amount of R50 000, 00 as per the agreement despite the fact that the property was registered in the 2nd and 3rd Respondents by the 4th Respondent, the Respondent of deeds.

16. The conduct of 2nd and 3rd Respondents had resulted in severe prejudice by me consequently in that I was unable to recover the amount of money owed to me by the 1st Respondent.

17 The 2nd and 3rd Respondents conducted breach of the sale agreement by failing to pay the purchase price and with therefore not entitled to the transfer."

Preliminary points

[12] The respondents in opposing the applicant's application raised preliminary points relating *res judicata*, misjoinder and *locus standi*. The issue of *locu standi* relates to instituting the proceedings in relation to her and her son. In relation to the misjoinder point, the respondents contended in this respect that the applicant has failed to provide a basis why they were made part of these proceedings. They contend in this regard that the purchase agreement of the property was with the first respondent, as the executrix of the late estate of the deceased. And as concerning *locus standi* in relation to the son they contended that the applicant failed to have a *curator ad litem* appointed to represent the him.

[13] In as far as the points raised by the respondents are concerned, I am of the view that the key point upon which this matter turns on is *res judicata*. In this respect, the respondent contended that the issues raised in these proceedings were adjudicated by Nkosi AJ under case number 55459/2011. The applicant's application in those proceedings was dismissed with costs.

Principles governing *res judicata*

[14] It is trite that the doctrine of *res judicata* is founded on the public policy that requires finality on issues in dispute in litigation. It is a defence for a litigant faced with continued litigation of the same matter, concerning same issues and involving the same parties. The enquiry into whether the defence of *res judicata* is sustainable is not whether the judgment is right or wrong but whether there is a previous judgment which concerned the same parties and whether the issues raised in the current litigation were resolved in the judgment.

[15] In my view, the applicant in the present matter in seeking to circumvent the defence of *res judicata*, specifically as concerning the issue of whether she qualified to inherit from the deceased estate. She now, in what appears to be an afterthought, following what was

raised by the respondents in their heads of argument in the previous matter, alleges that she was married to the deceased in terms of customary law.

- [16] The allegation that the applicant was married to the deceased in terms of customary marriage is not substantiated. This is raised to found *locus standi* of the applicant in as far as her claim to inherit from the late estate of the deceased is concerned. The allegation is however not substantiated in that there is no confirmatory affidavit nor any other documentary prove in that regard. In any case, if indeed the applicant was married to the deceased as alleged, then naturally that would have been raised in the papers in the first proceedings. She raised those allegations in light of the arguments which were raised by the respondents in their heads of argument. In the previous case, the respondents contended in their heads of argument that although she claimed to be the beneficiary of the late estate of the deceased she attached the death certificate which indicated that the deceased was not married at the time of his death.

- [17] It is common cause that the parties under case number 55459/2011 are the same as those cited in the present matter. The subject matter and the nature of the applicant's claim in both matters are in

substance the same. In both matters, the central issue has to do with the same property of the deceased. In the previous matter, the case of the applicant was based on the alleged breach of contract by the first respondent.

[18] In the present matter the applicant in her notice of motion seeks to have the registration of the property into the names of the respondents declared to be fraudulent because it was registered in their names before the full purchase price was paid.

[19] In my view, regard being had to the totality of the facts in both matters there is no doubt that the current matter is *res judicata*. For this reason, alone applicant's application stands to fail.

The merits

[20] In my view, the case of the applicant would stand to fail even if the above conclusion was, for whatever reason, to be found to be wrong. The case of the applicant stands to fail also on the basis of the dispute of facts. In this respect, as alluded to earlier, the case of the applicant is that the respondents were not entitled to have the property register in their names because they, at the time it was registered in their names failed to pay the purchase price in full.

[21] The respondents, on the other hand, contended that they had paid the purchase price in full at the time they took ownership of the property in the form of having registered in their names.

[22] It is thus clear from the above that there is a dispute of fact, which in my view, is genuine and ought to have been foreseen by the applicant. Considering the facts contained in the applicant's affidavit which are admitted by the respondent, and in applying the rule in *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹ I am bound to accept the version of the respondents which means applicant's case stands to fail. In fact, the version of the respondents that, they had already paid the full purchase price at the time the property was registered in their names. is supported by what is stated by the applicant in her founding affidavit in the earlier case which was heard under case number 55459/2011. In the present matter, she stated in her founding affidavit that she obtained the information about the sale of the property in the amount of R50 000, 00 from the first respondent's daughter. In the same breath, she stated that she was aware of the sale property.

¹ 1984(3) SA623 (AD).

[23] As alluded to earlier the applicant's application stands to fail. I agree with the respondents that on the facts and circumstances of this case costs should be awarded on a punitive scale.

Order

[24] In the premises the applicant's application is dismissed with costs on attorney and own client scale.



E Molahlehi

Judge of the High Court:

Johannesburg.

APPEARANCE:

APPLICANT: Botha Massyn & Thobejane Associated Attorneys.

RESPONDENT: Maile & Associates Attorneys.