



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

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

Case number: 1230/2016

In the matter between:

N. S. N.

Plaintiff

and

N. R. N.O.

Defendant

HEARD ON: 2, 3 and 8 MARCH 2017

JUDGMENT BY: REINDERS, J

DELIVERED ON: 15 JUNE 2017

- [1] The Plaintiff is N. S. N. (Ms N.). The Defendant is N. R. N.O. (Mr R.), cited in his capacity as duly appointed Executor in the Estate of the late Mr N. P. L. ("the deceased"). The matter was heard on

2 March 2017, and Heads of Argument were filed as requested by counsel on 3 and 8 March 2017 respectively.

- [2] The background facts to the dispute are largely common cause. Ms N. and the deceased were married in community of property. Divorce proceedings were instituted by Ms N. on 22 October 1999. On 2 August 2001 a final decree of divorce was granted, incorporating a Deed of Settlement (annexed to the pleadings as Annexure “P2”) entered into between the parties. This action pivots around the consequences arising from the said Deed of Settlement, in particular the clauses pertaining to the division of the joint estate regarding the immovable property. These read as follows:

“2.1 **Immovable Property**

- 2.1.1 The Plaintiff agrees to purchase the Defendant’s share of the property, Erf [...], Heidedal, commonly known as [...] K. S., B., Heidedal.
- 2.1.2 As the property was valued in the amount of R 130 000,00 the Defendant’s share is R 65 000,00.
- 2.1.3 The Plaintiff will apply for a State Guarantee, and on approval and finalisation thereof will pay the Defendant an amount of R 65 000,00; where
- 2.1.4 Should the Plaintiff be unsuccessful in her application for a State Guarantee, the property will be sold and the dividend be shared.

- 2.1.5 Upon payment to the Defendant of his half share in the immovable property situated at [...] K. S., Heidedal, the said immovable property will become the sole and exclusive property of the Plaintiff.
- 2.1.6 The Plaintiff will be liable for the transfer fees in having the property transferred to her name.
- 2.1.7 The parties hereto agree that the Defendant is liable for the outstanding water and electricity account. The parties agree further that they are jointly liable for the outstanding amount in rates and taxes.”

It is common cause that the Erf number in clause 2.1.1 was incorrect due to a typing error and is in fact Erf [...] (“the property”).

- [3] Ms N. prayed for a declaratory order entitling her to payment of the entire purchase price of the property held in trust at Krohn Attorneys. During the trial amended relief was sought to the effect that Ms N. tendered payment of the amount of R 43 202,01. The calculation of the said amount will be dealt with more fully in par [12] below. In the result she prays for a declaratory order that she be entitled to payment of the entire purchase price held in trust at Krohn Attorneys less the amount of R 43 202,01 as tendered.
- [4] Defendant opposes the relief sought by Ms N. and in a counterclaim moves for payment in the amount of R 340 000.00 plus interest thereon.
- [5] In addition to the background facts alluded to in par [2] above, Ms N. testified that she applied for a Government Guarantee in respect

of the property on or about 24 April 2001 and/or 6 May 2001. Shortly after the granting of the decree of divorce on 2 August 2001, she obtained same. She could not recall the exact date hereof. Hereafter attempts by herself and her attorneys of record to make payment to the deceased of the R65 000.00, albeit in the transfer process, were futile at that stage. Even though being represented at that time, no application to compel the deceased to sign transfer documentation was ever lodged. On or about 30 August 2006 she paid the outstanding rates (R 13 548,77), sanitation (R 7 736.66) and water (R 11 155.26) totalling the amount of R 32 440,69, in respect of the property (Annexure "A" p15). She also made renovations to the property during 2006. Shortly hereafter she got information that the deceased was at a tavern in K. Street and again tried to arrange with the deceased to effect payment of R 65 000.00 as she was unable to obtain the title deed to the property. He agreed to sign the necessary documentation but it never came to fruition. As she had suffered both physical and emotional abuse at the hands of the deceased during their marriage, she was afraid of approaching him. During cross examination by Mrs Khooe on behalf of the Defendant, Ms N. conceded that, even though armed with a court order, the court was never engaged in any way whatsoever in enforcing the terms of the Deed of Settlement. She never effected any payment to the deceased before he passed away on 10 November 2008 (seven years after the final decree of divorce was granted). To this day no such payment was effected.

- [6] The Defendant bases its defence and counterclaim thereupon that Ms N. did not obtain a Government Guarantee as provided for in

clause 2.1.3 of the Settlement Agreement. The evidence-in-chief and cross-examination of Mr R. primarily centred around this aspect. He testified that he was appointed as executor of the deceased on 21 January 2015. He was a party to the sale of the property to one Mr and Mrs Liphoko and was in contact with Krohn Attorneys throughout the entire process. It was agreed between Ms Lebata and Mr R. that the property could be sold, and he confirmed in a letter dated 7 January 2016 that the proceeds of the sale will be shared according to the Deed of Settlement. Mr R. disputed that Ms N. was successful in obtaining a Government Guarantee, and as is evident from a letter by himself addressed to Krohn Attorneys on 7 January 2016, Ms N. failed to comply with clause 2.1.3 of the Deed of Settlement. He concluded that it is expected that the proceeds of the sale of the property be shared equally as is envisaged in clause 2.1.4 thereof.

- [7] There is no dispute between the parties regarding the interpretation of the Deed of Settlement. Mr Tsangarakis appearing on behalf of Ms N., referred me to ***Ex parte Spinazze and Another N.N.O. 1985 (3) SA 650 (A)***. This matter dealt with the registration of an antenuptial contract and it was held that where the validity of same is in question, the contract remains valid *inter partes*. Furthermore, if one of the parties to the contract has died, the contract would be operative as between the estate of the deceased party and the surviving party and would determine, *inter partes*, their property rights. Indeed the Settlement Agreement *in casu* is operative between Ms N. and the Defendant.
- [8] It was further contended in his heads of argument that clause 2.1.5 of the Settlement Agreement “clearly provides” that the property

will become the sole and exclusive property of the Plaintiff **upon payment** (my emphasis) to the Defendant of his half share in the immovable property. I am in agreement with this submission.

[9] The Settlement Agreement which was made an order of court did not *inter partes* make Ms N. the owner of the property. To become the owner of the property in terms of the Deed of Settlement she had to:

1. obtain a State Guarantee;
2. pay the deceased his half share in the property; and
3. have the property "transferred to her name".

[10] Mr Tsangarakis placed reliance on the full bench decision in ***Corporate Liquidators (Pty) Ltd and Another v Wiggill and Others*** 2007 (2) SA 520 (T) in respect of the vesting of dominium. The court held that, where parties to divorce proceedings agree that each party are to receive a particular property upon divorce, dominium of the properties vested immediately in the spouses and registration of transfer was not a prerequisite for vesting of same. In *in casu* however there is a court which specifically stipulates the terms of the contract between the parties as alluded to in par [9] above.

[11] Assuming that Ms N. obtained a State Guarantee, the R 65 000,00 was never paid to the deceased, nor was his name removed to make her the sole owner of the property. The short and the long of the matter is therefore that she did not become the sole owner thereof. It is nor here nor there to aver that the deceased did

not want to accept payment. The mere fact that she had challenges in having the deceased sign the transfer documentation does not relieve her of the obligations in terms of the Settlement Agreement. Had Ms N. been serious to become the sole owner of the property, I would reasonably have expected of her to persist in consulting with an attorney and to have the property properly transferred into her name. In all probability had she done so, she would have had to pay the R 65 000,00, albeit through the conveyancer, within a **reasonable** time. This never happened. The deceased passed on in 2008. Even after his death years passed and yet she did not consult with an attorney to attend to registration of the property in her name. It does not suffice to now tender payment of the R 65 000.00 (less the expenses paid by her as alluded to in par [3] above) almost sixteen years later in an attempt to make the contract *perfecta*. In my view the Plaintiff had the onus to prove upon a preponderance of probabilities that she has complied with her obligations and have executed the contract. For the reasons stated above I cannot conclude that she had done so and for that reason I cannot make the declarator as sought in the summons.

- [12] The counterclaim seeks and order dividing the purchase price which has been held in trust with Krohn Attorneys. In paragraph 6.1 of the counterclaim it is averred that the property was sold for an amount of R 614 662.38, and in paragraph 6.2 the averment is made that the Defendant is entitled to R 340 000.00 being half of the amount referred to in par 6.1. The amount in par 6.1 appears to be the nett balance of the purchase price according to the Defendant. I do not know how the amount of R 340 000.00 is calculated. It is definitely not half of the amount in par 6.1. The final

account by Krohn Attorneys (Exhibit “A” at page 31) reflects the selling price as R 680 000.00, and the balance held in trust as R 614 661.69. Defendant is not entitled on the evidence before me to more than half of the amount held in trust. I do not need to speculate as to the difference in the purchase price as reflected and the amount held in trust, but the counterclaim as it stands, cannot succeed.

[13] No relief was sought by Ms N. in respect of the alleged renovations to the property in the amount of R 395 635.00, and quite correctly so. The only evidence before me is a document titled “Alterations at Erf [...] K. str bloemside For Ms N.S. N.” dated 19 January 2016 (Exhibit “A” p 18-27). The alleged renovations were made in 2006. I do not know if the values assigned to items reflect the value of same as on 2006 or 2016, or with how much it improved the value of the property. I can therefore not make such a calculation or take it into account.

[14] It appears to be common cause however that Ms N. paid the arrears rates, sanitation and water on the property in the amount of R 32 440,69. In terms of clause 2.1.7 of the Deed of Settlement the deceased is liable for the outstanding water and electricity and the parties are jointly liable for the outstanding rates and taxes in respect of the property. Ms N. paid an amount of R 11 155.26 in respect of the water, and R21 285.43 in respect of the rates and sanitation, of which she was only obliged to pay half (R10 642.72). The amount tendered by Ms N. is thus the balance of R 65 000.00 less the amount of R 21 797.98 which the deceased was contractually obliged to pay. I have already indicated that I cannot

grant the amended relief as sought by Ms N.. I am however taking the amount of R 21 797.98 into account in granting the order in par [14.1] below.

[15] The Plaintiff's claim cannot succeed and is dismissed. The Defendant's counterclaim cannot be granted as requested and is thus also not successful as it stands. In my discretion I am of the view that each party be liable for his/her own costs.

[16] Accordingly the following orders are issued:

14.1 An amount of R 21 797.98 of the proceeds held in trust by Krohn Attorneys in respect of the property known as [...] K. S., Bloemside, Heidedal is to be paid to the Plaintiff whereafter the remainder of the nett proceeds are to be shared equally between the Plaintiff and the Defendant.

14.2 Each party to pay its own costs.

C REINDERS, J

On behalf of Plaintiff: Adv S. Tsangarakis
 Instructed by:
 Symington & De Kok
 Bloemfontein

On behalf of Defendant: Adv. N.J. Khooe
 Instructed by:
 R. Attorneys
 Bloemfontein