

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

Case No: 2193/2013

In matter between:

<u>SEBOTSA KEDIBONE ROSEY</u>	1 st Plaintiff
<u>JOYCE KELEBOGILE DAVIDS</u>	2 nd Plaintiff
<u>PULANE ALINAH MATUTU</u>	3 rd Plaintiff
<u>SUSAN NKAKI</u>	4 th Plaintiff

And

<u>TSHEPO HUMPHREY SEMPPE</u>	1 st Defendant
<u>TUMELO PATGAVIAN COANGAE</u>	2 nd Defendant
<u>KEDIBONE ROSEY COANGAE</u>	3 RD Defendant
<u>THE REGISTRAR OF DEEDS</u>	4 th Defendant

JUDGMENT BY: MOLEMELA, JP

DELIVERED ON: 29 JANUARY 2015

- [1] This matter concerns a dispute between members of a family about the ownership of a house that the second and third

defendant sold to the first defendant. The relief sought by the plaintiff is an order declaring the deed of sale entered into between the first defendant, as the purchaser, and the second and third defendants as sellers, invalid and setting it aside. In addition the plaintiffs seek an order compelling the Registrar of Deeds (4th defendant) to register the immovable property in question in the names of the plaintiffs. Only the first defendant is defending the matter.

- [2] It is common cause that the first plaintiff, who died before the hearing of the matter, was the mother of the first, second and third plaintiffs. She was also the mother of the 2nd and 3rd defendant's biological father, the late Mr Pule Coangae ("the deceased") who died on 2 June 2007. This means that the 2nd, 3rd and 4th plaintiffs are 2nd and 3rd defendants' aunts. On the 17th August 2007, the Master of High Court issued letters of authority to the 2nd defendant and identified both the 2nd and 3rd defendants as the intestate heirs in the deceased's estate. The assets identified as the property belonging to the estate was immovable property (the disputed property) and furniture. Purportedly acting on the strength of the letters of authority, the 2nd and 3rd defendant sold the disputed property to the 1st defendant on the 3rd September 2008. It is not disputed that the Master of the High Court subsequently addressed letters to the 2nd defendant. In the first letter, dated 9 June 2008, the 2nd defendant was instructed to return the letters of authority to the Master. In the second letter, dated 11 November 2008, he (the second defendant)

was advised that the letters of authority issued on 17 August 2008 had been withdrawn.

- [3] The main issues that are to be decided in this matter are whether the Master's letter dated 9 June 2008 constituted a withdrawal of the letters of the authority as averred by the Assistant Master. The second issue is whether the letter in question had come to the attention of the 2nd defendant before the date of signature of the deed of sale in terms of which the disputed property was sold to the 1st defendant. The third issue is whether the 1st defendant knew that the second defendant was not entitled to sell the property in question to him.
- [4] The 2nd plaintiff, namely Ms Joyce Davids testified that the disputed property was a family home that had actually belonged to her parents but was registered in the name of the late Pule Coangae (the deceased) due to the custom of primogeniture as he was the male child. His brother late Pule Coangae passed away in June 2007. The family assumed that the deceased had died intestate. In accordance with the customs practiced by her family, the deceased's property was, after his death, not tampered with at all for a period of a year. In June 2008 furniture that used to belong to the deceased was moved outside so that his room could be cleaned. While the cleaning was in progress, her sister, the third plaintiff called her and told her that she had found a sealed envelope under the deceased's mattress. She (i.e the second plaintiff) opened the envelope and

discovered that the envelope contained a Will. In terms of the Will the deceased had bequeathed all his property to the plaintiffs.

- [5] After reading the Will, she and her sisters decided to go to ABSA Bank since ABSA Trust Ltd was the nominated executor in terms of the Will. ABSA Bank referred them to the office of the Master. The Master informed them that letters of authority had already been issued to the second defendant. The Master undertook to withdraw the letters of authority.
- [6] She testified further that she knew the first defendant. During June 2008 the first defendant had made, an attendance at the disputed home he was there to view the house as he, had learned that it was for sale. She (2nd plaintiff) informed him that the property was not for sale and offered to show him the contents of the will, which he declined. During September 2007 the second defendant returned to the property and informed her that he had purchased the property from the second and third defendant.
- [7] The 3rd plaintiff also testified and corroborated the 2nd plaintiff in material respects. Ms du Pisanie, the Acting Assistant Master of the High Court was also called as a witness. She testified that two different files had been opened at the Master's Office related to the estate of the deceased. The first file was opened on 17 August 2007 and letters of authority were issued to 2nd defendant on the same day. The

second file was opened at the Master's Office on 20 November 2007. She testified that when the second file was opened, the Master's Office had been unaware that another file had already been opened. When the Master's Office discovered that two files had been opened and that the deceased had apparently left a Will, they issued a letter dated 9 June 2008 to the 2nd defendant. The letter read as follow:

"I refer to the above matter and would like to bring to your attention that you have to furnish us with the Original letter of Authority which was issued on 17 August 2007. The reason is that there is a Will which was drawn by testator which determines the heirs. Kindly provide us with that letter within a period of 14 days. Should you not avail yourself the letter will be declared invalid and further use will be an offence."

- [8] She testified that the Master's Office received no response from the 2nd defendant and proceeded to direct another letter to him on 11 November 2008. This letter read as follows:

"My letter dated 8 June 2008 refers. See attached letter for your reminder. Please be advised that since I have not received any response from yourselves the letters of Authority issued to you on 17 August 2008 have been withdrawn. Note that any further use thereof will be unlawful and that you and your sister are not the lawful heirs (owners) of 2991 Mothibi Street, Phelindaba, Bloemfontein and the furniture."

- [9] Under cross-examination she testified that even though the first letter did not expressly state that the letters of authority were withdrawn, this is what the letter implied. She could not explain why, if that was the case, the Master had months

later written another letter stating that the letters of authority were withdrawn on account of the 2nd defendant's failure to respond to the first letter.

[10] The first defendant testified that during September 2008, his friend informed him that the disputed property was for sale and that an attorney by the name of Thoabala was the agent in charge of the sale of the property in question. He then went to Mr Thoabala's office, who duly furnished him with the address of the disputed property so that he could go and view it. He went to the disputed property and found that the main house was locked. There was a shack on the premises and the occupant of the shack informed him that the owner of the house was not present. He could not access the disputed property and thus only inspected its exterior. He knew that the house was a four-roomed house and was satisfied with its condition as well as its location. He decided to buy it.

[11] He went back to Mr Thoabala and informed him of his decision. Mr Thoabala drafted the necessary documents and then asked him to deposit the purchase price of R100 000.00 into his trust account. He obliged. He met the 2nd and 3rd defendants for the first time at Mr Thoabala's office on the day he went to sign the deed of sale. The disputed property was subsequently transferred into his name. He received the title-deed in October 2008. He subsequently went to the disputed property to inform its occupants that he was the new owner. The tenant that he found at the premises

referred him to the second plaintiff. The second plaintiff was surprised when he showed her the title-deed. That was the first time he learnt that there was a dispute about that property. He denied having had any discussion with the 2nd plaintiff about the property in question in June 2008. He was adamant that he only had a discussion with the second plaintiff after the property had already been registered in his name and that after September 2008. He maintained that when he bought the house he did not know that the 2nd and 3rd defendant were not entitled to sell the house.

[12] The second defendant, namely Tumelo Coangae testified that he had lived with both his parents at the disputed property before their divorce. According to him, none of the plaintiffs had ever resided at the disputed property. After his parents' divorce, his mother and his sister left their home. He continued living there with his father (the deceased) until his father's death. After his late father's funeral, the 3rd plaintiff chased him out of the house. He went to the Municipality to enquire about the ownership of the disputed property. He was told that it was registered in his father's name. After the deceased's estate had been reported at the Master's office, letters of authority were issued to him. He had discussions with the family and eventually had discussions with the 2nd defendant. He then sold the house to him.

[13] He testified that after the letters of authority had been issued, did not receive any correspondence from the Master. He

pointed out that he could not have received such letters as he did not reside at the disputed property since the third plaintiff had “chased him away” after his father’s funeral.

[14] He testified that did not know that his father had left a valid Will. He conceded that during July 2008 there was an altercation between him and the plaintiffs and the police escorted him to the disputed premises. He however denied having been shown any Will at that stage. He, however, conceded that the police had told him that the disputed property belonged to his grandmother and not to his father. He subsequently went to make enquiries at the Municipality’s office at hostel no 1. The officials confirmed to him that according to their records, his father and mother;s names were reflected as the owners.

[15] He vehemently denied knowing that in terms of the Will the disputed property was bequeathed to the plaintiffs. He was adamant that he did not receive any letters from the Master. He later admitted that by the time he was introduced to the1st defendant, a police officer had already told him that the deceased had left a Will. He however did not know that he was not entitled to sell the house.

[16] During re-examination he was asked whether he knew what a Will was. He answered in the affirmative and went on to explain that his understanding was that a Will was a document that sets out who the registered owner of the property is.

[17] The 3rd defendant was also called as a witness and corroborated the evidence of the 2nd defendant in all material respects. Like the 2nd defendant, she denied having received any correspondence from the Master. She also testified that she was at no stage aware that her late father had left a valid Will. She also maintained that she did not know that the 2nd defendant and she were not entitled to sell the disputed property. On the contrary, she was under the impression that they were entitled to do so by virtue of the letters of authority. Neither was she told that she and 2nd defendant were not the rightful heirs to the deceased estate. The 2nd and 3rd defendant's mother, Sarah Kgabele was also called as a witness. She testified that none of the plaintiffs had ever lived at the disputed property and denied that the property was a "family home". She and the deceased were married in community of property. The disputed property was an asset belonging to the joint estate. After their divorce she never received her half share of the joint estate.

[18] Her evidence regarding the matrimonial property regime that governed regime of her marriage to the deceased was not challenged. Her evidence that she was entitled to half of the deceased's estate and that she had not received her half share after the divorce was also not challenged.

[19] The approach to be followed where two mutually exclusive versions have been presented was eloquently set out in the case of **Stellenbosch Farmers Wineries v Martell et Cie &**

Others 2003 (1) SA 11 where the court stated as follows:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”

- [20] There were no serious self-contradictions in the versions presented by both parties. None of the witnesses left me with a clear impression that they were not telling the truth. As the matter falls to be decided mainly on the basis of the probabilities, an analysis and evaluation of the probability or improbability of each party’s version on the disputed facts is necessary.

[21] It is not disputed that at the time of the deceased's death, the disputed property was registered in his name. Although the plaintiffs assert that the disputed property was a "family home", it is evident from their testimony that for a period of a year before the discovery of the Will they did not assert their entitlement to the property despite having been informed that the deceased's assets, including the disputed property, would be inherited by his children.

[22] It is not disputed that the deceased lived with his son, i.e the 2nd defendant in the disputed property until his death. The deceased apparently made a Will in terms of which he bequeathed all his property to his mother and siblings and left nothing to his own children. At the time of the deceased's death the disputed property was registered in the name of the deceased. It was on the strength of this fact and the fact that the next of kin affidavit reflected that he had two children that the Master of the High Court, not being aware of the existence of the will, identified the deceased's children as his intestate heirs and went on to issue the letters of authority to one of them. The plaintiffs' own version is that at the time of issuance of that letter of authority, no one knew that the deceased had left a valid will. The letters of authority were thus not issued on the basis of fraud or any misrepresentation on the part of the defendants.

[23] I now turn to the issue pertaining to the second defendant's knowledge about the Master's letter dated the 9th June 2007. The probabilities are that he did not receive this letter as he

was no longer residing at the disputed property at the time that letter was sent. I am fortified in this view by the fact that this aspect of the 2nd defendant's evidence was not challenged.

[24] Mrs du Pisanies evidence did not really take the plaintiffs case any further. She was not the author of the letters in question and has no knowledge as to how the letters were dispatched, i.e. whether by registered or ordinary mail. In the absence of proof that the letter was sent by registered post and came to the attention of the 1st defendant, the plaintiffs have thus failed to prove, on a balance of probabilities, that the letter dated 9 June 2008 did come to the 2nd defendant's attention. The interpretation that the Assistant Master sought to give the letter sent out by the office on 9 June 2008 is therefore of no relevance. In my view, if the 2nd defendant did not receive the letter in question, it can then be accepted that he did not know that he had to return the original back to Master or that he was no longer entitled to take charge of the assets of his late father's estate.

[25] I now turn to deal with the question whether the 2nd and 3rd defendant knew that the plaintiffs had any rights to the disputed property in terms of the Will. The evidence does not suggest that he knew that the plaintiffs had existing rights by virtue of the Will. The 2nd defendant came across as an unsophisticated person. During cross-examination it became clear to me that he struggled to understand the whole concept of a Will and its implications. When pressed further

on this matter his response was that a document that was shown to him at the municipal offices reflecting his parents' names as owners of the property was a Will.

[26] He was steadfast in his belief that he was entitled to take charge of the property for two reasons, firstly because the documents at the Municipal offices reflected his father and mother as the owners of the property, and secondly because the Master had, subsequent to the plaintiffs' assertions, identified him and his sister as the deceased's heirs, simultaneously issuing letters of authority to him.

[27] It must be borne in mind that the letters of authority were issued to him after the 2nd plaintiff had allegedly chased him out of the house on the ground that the house did not belong to his father. The issuance of the letters of authority, notwithstanding the 2nd plaintiff's assertions, evidently led him to believe that such assertions were baseless. Considering that he had not received anything from the Master to suggest that the plaintiffs were the rightful heirs in respect of the disputed property, the 2nd defendant's belief was reasonable. This reasonable belief negates any form of fraud on the part of the 2nd defendant.

[28] Mr Mopeli, on behalf of the plaintiffs, argued that it could be inferred from the second defendant's concession (to the effect that the police had mentioned to him that the disputed property did not belong to his father but to his grandmother) that he knew that he was not entitled to sell the property,

hence his decision not defend the matter. I disagree with this contention as the drawing of such an inference is not supported by the facts of the case. It is trite that an inference sought to be drawn is drawn if it is consistent with the proven facts and if such proven facts exclude every reasonable inference. No plausible evidence suggesting knowledge of the existence of third party's rights was adduced against the third defendant. I find that she too did not act fraudulently in any manner.

[29] In as far as the seller is concerned, I am of the view that the plaintiffs failed to show that the first defendant knew about the existence of any dispute pertaining to the ownership of the house or pertaining to the plaintiffs' rights thereto before the date of signature of the deed of sale is plausible. Logic dictates that if he did not know of the existence of any dispute, he would probably not have known about their alleged lack of authority to sell. The involvement of a conveyancer in the transaction seemingly also gave the first defendant the impression that the transaction was above board and that there were no legal impediments.

[30] The property was transferred into the 2nd defendant's name on 23 October 2008. By the time the Master issued a letter dated 11 November 2008 advising about the withdrawal of the letters of authority, the deed of sale had already been entered into and the property had already been transferred into the 1st defendant's name. Even if I was wrong in finding that the 2nd and 3rd defendant did not know of any legal

impediments disentitling them to sell the house to the 2nd defendant, the plaintiffs have still failed to show that the 1st defendant, as the purchaser, knew about the existence of such a dispute. There is therefore no basis for finding that the first defendant is deemed to have been complicit in the 2nd and 3rd defendant's alleged fraud. I am satisfied that the first defendant falls into the category of an "innocent transferee". I would therefore not be inclined to set the transfer aside. See **Kazazis v Georghuades & Others 1979 (3) SA 886 at 893(T); Cussons & Another v Kroon 2001(4) SA 833 (SCA) para 9.**

[31] I find that the plaintiffs have not proven their case against the 1st defendant on a balance of probabilities. They are therefore not entitled to any of the relief they are seeking. There is no reason to deviate from the ordinary rule that costs should follow the result.

[32] I therefore grant the following order:

1. The plaintiffs' action is dismissed.
2. The plaintiffs are directed to jointly and severally pay the costs of the first defendant, the one paying the other to be absolved.

M.B.MOLEMELA, JP

On behalf of the Plaintiffs: Mr M F Mopeli

Instructed by: Honey and Partners

On behalf of the First Defendant: Mr M Moholo

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