

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 5131/2011

In the matter between:

REALOBOHA INNOCENTIA LESHORO

Applicant

and

NEDBANK LIMITED

First respondent

BALIBALI TAKALANI

Second Respondent

CORAM: MONALEDI, AJ

HEARD ON: 28 NOVEMBER 2013

DELIVERED ON: 20 MARCH 2014

MONALEDI. AJ:

[1] On 23 November 2011 the Applicant herein filed an application wherein the following orders are sought:

“1. That the judgment granted in default against the defendant in the main action and in terms of which, the immovable property belonging to the Applicant herein is to be sold on auction, be rescinded and set aside;

2. That the transactions in terms of which the immovable property was;

2.1 firstly, sold to a Mr. Eric Herbert Muniz by the late Ntshilane Lydia Leshoro and financed by Brusson Finance CC; and,

2.2 secondly, sold to the Defendant, in the main action and the Second Respondent herein, by the said Mr Eric Herbert Muniz and or Brusson Finance CC; be and are hereby declared

unlawful , thus, null and void ab initio and of no force and effect;

3. That any warrant and or post judgment execution steps, aimed at carrying the said judgment into execution, be stayed pending the outcome of this application;
4. That the Respondents jointly and severally, the one paying the other one to be absolved, be ordered to pay costs hereof;
5. Further and or alternative relief."

[2] The history of the matter as set out in the founding affidavit is that the applicant is the daughter of the deceased, Ntshilane Lydia Leshoro (the "Deceased") and executrix in the deceased estate of her mother. She also claims to be the only surviving heir of the estate of her mother and pre-deceased father.

[3] She alleges that her mother apparently entered into a number of written agreements in respect of the immovable property situated at 1[...] C[...] Road, D[...] W[...], which resulted in the property being transferred into the name of Eric Herbert Muniz. It was subsequently sold to the second respondent who secured a loan from the first respondent and a bond was registered over the property in favour of the first respondent.

[4] The second respondent failed to make timeous payments in terms of the bond agreement which led to a summons being issued and judgment by default entered against her in favour of the first respondent. The property in question is occupied by the applicant, hence her interest in the rescission of the judgment by default.

[5] The first respondent opposed the application. No notice to oppose was delivered by the second respondent. The essential points of contention raised by the first respondent are as follows:

The question of the *locus standi* of the applicant;

Whether she is entitled to rescission;

If rescission is refused, whether the court may grant the remaining relief, regarding the declaration of invalidity and the wording of such an order, if it is to be granted.

The success of the application hinges on the point of the *locus standi* of the applicant.

[6] The court will consider the matter regarding the *locus standi* herein of the applicant. It is noteworthy that the Applicant dealt with this matter in the replying affidavit but failed to fully address the issue in the heads

of argument.

[7] In **Mars Incorporated v Candy World (Pty) Ltd** 1991 (1) SA 567 (A) it was held that the general rule is for the party instituting proceedings to allege and prove that he or she has *locus standi*, the onus of establishing that issue rests upon the applicant.

[8] A person intending to institute or defend legal proceedings must have a direct and substantial interest in the right which is the subject matter of the litigation (**Jacobs & 'n Ander v Waks & Andere** 1992 (1) SA 521 (A) at 534A-E). *Locus standi* concerns the “sufficiency and directness of a litigant’s interest in proceedings which warrants his or her title to prosecute the claim asserted” (Held in **Sandton Civic Precinct (Pty) Ltd v City of JHB & Another** 2009 (1) SA 317 (SCA)).

[9] That is in totality the nature of the interest the applicant was required to show in order to show her right to come to court seeking the relief she sought in this case.

[10] The applicant apparently lodged the application in her personal capacity. This is evident from the application and the fact that she does not state that she is acting herein in her capacity as executrix. She then states in paragraph 1.2 of the founding affidavit that she founds her “authority” on the assertion that she is the executrix of the deceased’s estate, the only heir of the estate and the occupant of the property in question.

[11] The court will deliberate each of these aspects.

[12] In respect of the interest of the applicant as an occupant in the outcome of an application for rescission, the court cannot find any direct and substantial interest. It is a possibility that once the property is sold in execution, the applicant may have to contend with an application for eviction. An occupant have protection against an unlawful eviction, but does not enjoy an unfettered right to occupy the property.

[13] The question regarding the position of the applicant as an heir to the estate of the deceased and thus having an interest in the matter may be addressed as follows.

[14] The applicant was “duly authorised to take control of the assets of the Estate of the late Ntshilane Lydia Leshoro...as reflected in the inventory filed with me...” according to the Letters of Authority (Annexure “RIL1” of the founding affidavit).

[15] Section 18(3) of the Administration of Estates Act, 1965 (Act No. 66 of 1965) provides that:

“If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed.”

[16] The amount determined under Government Notice R.1318 in Government Gazette 25456 of 19 September 2003 was R125 000,00.

[17] The inventory provided to the Master included furniture, a motor vehicle, cash and a policy all to the value of R37 034,97. This amount is significantly lower than the amount determined and as a result the authority to take control, liquidate and distribute the assets.

[18] It is not in contention that the agreements leading to the alienation of the property may be suspect and that the offending agreements were entered into and concluded in 2006. It is further not in dispute that the deceased passed away on 17 April 2008 where-after the authorisation was issued. It is significant that the immovable property was not listed. The only inference was that the property did not form part of the estate of the deceased as the transactions were already concluded and the property transferred. Only after the decision of this court in **Ditshego and Others v Brusson Finance (PTY) Ltd and Others** under Case number 5144/2009 was delivered on 22 July 2010, did the applicant institute proceedings herein.

[19] In Wille's Principles of South African Law 9th ed, at p 673, under the heading "Title of Beneficiaries", the following is said:

"However, in the light of the modern system of administration of estates that replaced the common law system of universal succession, the right of the beneficiaries to inherit is no longer absolute nor an assured one: If the deceased estate, after confirmation of the liquidation and distribution account, is found to be insolvent, none of the beneficiaries will obtain any property or assets at all... In any event, an heir cannot vindicate from a third person property which the heir alleges forms part of the deceased estate; only the executor has that power... The modern position is therefore that a beneficiary has merely a personal right, *jus in personam ad rem acquirendam*, against the executor and does not acquire ownership by virtue of a will."

[20] In **Booyesen and Others v Boovsen and Others** (29558-10) 2012 (2) SA 38 (GSJ) (25 March 2011) it was held as follows:

"In regard to the legal status of both the deceased estate and the executor, the deceased estate is not a separate persona, but the executor is such person for the purposes of the estate and in whom the assets and the liabilities temporarily reside in a representative capacity. The executor only, has locus standi to sue or to be sued."

[21] The effect of this was stated in **Parkies and Others v Parkies and Others** (1650-07) [2010] ZAECHMHC 3 (14 January 2010) that heirs at no stage become the owners of the estate property but acquire a right to inherit from the estate after being declared as heirs. What they have is merely a hope that they may

inherit.

[22] It was stated by the first respondent that to grant the application would mean that the property would form part of the deceased estate. The value being, in excess of R125 000,00, would mean that the Master of the High Court, was not entitled to make an appointment in terms of section 18(3) of the Administration of Estates Act of 1965, Act 66 of 1965.

[23] Although the applicant may under different circumstances have had a real interest in the matter as potential heir in the deceased's estate, the court finds that is not the case here.

[24] Lastly the Applicant asserted that she is the executrix of the deceased estate. In view of what was said herein, this is inaccurate as she was only appointed as the representative of the Master of the High Court.

[25] In **Jacobs v Baumann N.O.** 2009 (5) SA 432 (SCA) it was held that:

"The rule in our law is that the only proper person to litigate on behalf of a deceased's estate, in the vindication of its assets, is its executor (my emphasis) even to the exclusion of the beneficiaries in the estate."

[26] Having regards to the terms of section 18(3) and the letter of authority issued by the Master, there is no doubt that the applicant does not have the authority to institute the present action even if she acted in a representative capacity for and on behalf of the estate.

[27] The court finds that the applicant does not have locus standi to institute the application herein.

[28] Although it may not be necessary to consider the aspect if she is entitled to make an application for rescission in view of her lack of *locus standi*, the court finds further that she is not entitled to bring an application for rescission as she is not a party to the initial proceedings as envisaged in Rule 42 or under the common law.

[29] Lastly the court considered the submissions by the first respondent in relation to declaration of the transfer to be void. The court will not consider the notion as other parties affected thereby is not before the court as was the case in the Ditshego matter. The court therefore cannot grant the relief, even if the court can make the orders suggested by the first respondent to safeguard its interests.

[30] As a result the following order is made:

1. The application is dismissed in respect of prayers 1, 2 and 3;

2. The Applicant is ordered to pay the costs of the first respondent.

S. MONALEDI, AJ

On behalf of applicant: Grimbeek Attorneys

c/o Grimbeek Attorneys 61 Keilner Street Westdene BLOEMFONTEIN

On behalf of first respondent: Cliff Dekker Hofmeyer

c/o Webbers Attorneys 96 Charles Street BLOEMFONTEIN