

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2458/2012

In the matter between:

ANNA TSELENG MABUSA

Applicant

and

TEKO DAVID MABUSA

First Respondent

ANTON OLIVE NOORDMAN N.O.

Second Respondent

LEHLOHONOLO PATRICK DICHABA

Third Respondent

THE REGISTRAR OF DEEDS

Fourth Respondent

HEARD ON:

20 SEPTEMBER 2012

JUDGMENT:

LEKALE, J

DELIVERED ON:

11 OCTOBER 2012

INTRODUCTION AND BACKGROUND

[1] This is an opposed application for an order, effectively, interdicting the fourth respondent from transferring the property known as Erf 4518, Heidedal Extension 10, Bloemfontein (property) to the third respondent or any other person or entity pending the final determination of, *inter alia*, proceedings, which the applicant intends to institute, for the declaration of the Deed

of Sale entered into between the second and third respondents as null and void.

- [2] The applicant and the first respondent were married to each other in community of property until the 19th March 2008 when the marriage was dissolved in terms of a court order which, *inter alia*, directed that the joint estate be divided between them.
- [3] The property herein forms part of their joint estate and the applicant occupies the same together with the minor child born of their marriage.
- [4] The parties were unable to liquidate and divide the estate on their own and the first respondent, eventually, applied successfully to the magistrate's court for regional division for the appointment of the second respondent to receive and liquidate the joint estate on the 28th November 2011.
- [5] On the 8th February 2012 the second respondent caused the

property to be sold by public auction and the third respondent's bid of R319 000,00 was accepted ahead of the applicant's offer of R200 000,00 as the highest bid.

- [6] On the 20th February 2012 the second respondent accepted the third respondent's offer after affording the applicant a vain opportunity to beat the third respondent's offer.
- [7] The applicant felt aggrieved by the state of affairs and launched the present proceedings on the 13th June 2012 on an urgent basis. On the 14th June 2012 the matter was postponed with the second respondent undertaking not to transfer the property pending finalisation of the application.
- [8] The second respondent, thereafter, delivered opposing papers and on the 26th July 2012 leave was granted for the parties to deliver supplementary papers as, *inter alia*, the position of the second respondent in the proceedings was not clear and it was, further, not apparent if the first and third respondents were opposing the application. There is no appearance for the fourth

respondent and no relief is sought against that office.

ISSUES IN DISPUTE

[9] The respondents, effectively, raise a preliminary point of non-joinder of the auctioneer and, further, dispute that the applicant is entitled to the relief she seeks on the basis that she has not shown a *prima facie* right to the relief in question.

CONTENTIONS FOR THE APPLICANT

[10] In the founding affidavit the applicant relies on a contract allegedly concluded between herself and the first respondent for the sale of the latter's half share in the property.

[11] In the supplementary affidavit the applicant relies on her constitutional rights to adequate housing and against arbitrary deprivation of property by contending that the appointment of the second respondent as a receiver and liquidator violates the same.

[12] In the heads of argument and oral submissions Mr Le Roux, for

the applicant, contends at length that the Deed of Sale in respect of the third respondent's offer is invalid because it is not properly signed and that there exists clear evidence of bias on the part of the second respondent insofar as he accepted instructions from the first and the third respondents to oppose the application.

CONTENTIONS FOR THE RESPONDENTS

[13] The respondents contend, *in limine*, that the auctioneer has a direct and substantial interest in the matter and is, as such, a necessary party who should have been joined in the proceedings.

[14] It is, further, maintained by the respondents that the contract of sale on which the applicant relies as giving her the right or entitlement to the property was not signed by the applicant and, as such, is not a Deed of Alienation required and contemplated by the Alienation of Land Act.

[15] The respondents' case is, further, that the provisions of section

45(bis) of Deeds Registries Act, No 47 of 1937 are not available to the applicant because of, *inter alia*, want of such a written sale agreement.

[16] In conclusion it is contended for the respondents that the relevant constitutional rights of the applicant have not been violated in any manner whatsoever insofar as the cases relied upon by the applicant apply to sales in execution of primary residences and not insolvency or liquidation auctions or sales facilitated by a receiver and liquidator of joint estates.

[17] Mr Gilliland, for the respondents, submits that the relief sought has not been thought through insofar as neither the applicant nor the court can compel the first respondent to sell his undivided share in the property to the applicant.

APPLICABLE LAW

[18] It is correct, as effectively submitted for the respondents, that the legal rule is that any person who has a direct and substantial interest in any order the court might make, should

be joined in the proceedings, as a necessary party, unless he has waived his right to be so joined. (See **STANDARD BANK OF SOUTH AFRICA LTD v SWARTLAND MUNICIPALITY AND OTHERS** 2011 (5) SA 257 (SCA) at 259 F – G.)

[19] A mere financial interest in the outcome of litigation does not give a party the right to be joined in legal proceedings or put differently, it does not constitute a direct and substantial interest in the results of the decision. The interest contemplated is one in the right which is the subject matter of the litigation in question. (See **HENRI VILJOEN (PTY) LTD v AWERBUCH BROTHERS** 1953 (2) SA 151 (OPD) at 169 H.)

[20] In the present application, as correctly submitted by the parties, the applicant must establish a *prima facie* right which she seeks to protect, a well-grounded apprehension of irreparable harm, a balance of convenience in favour of the granting of the relief she seeks as well as the absence of any other satisfactory remedy. (See **SETLOGELO v SETLOGELO** 1914 AD 221.)

- [21] The *prima facie* right contemplated in interdictory remedies is the right in the relief sought. In other words the applicant for interdictory relief should have an interest in the subject matter of the interdict which interest may be financial or any other legal interest. (See **CABINET OF THE TRANSITIONAL GOVERNMENT FOR THE TERRITORY OF SOUTH WEST AFRICA v EINS** 1988 (3) SA 369 (A) at 388 – 389 and **JACOBS EN 'N ANDER v WAKS EN ANDERE** 1992 (1) SA 521 (A) at 533 J – 534 E.)
- [22] Legislative provisions and rules of court which allow sales in execution of residential properties to be authorised without judicial oversight are unconstitutional in that they violate judgment debtors' constitutional rights to housing. (See **JAFTHA v SCHOEMAN AND OTHERS; VAN ROOYEN v STOLTZ AND OTHERS** 2005 (2) SA 140 (CC) and **GUNDWANA v STEKO DEVELOPMENT AND OTHERS** 2011 (3) SA 608 (CC).)
- [23] A court of divorce, inclusive of regional courts, has the power to

appoint a receiver and liquidator to collect, realise and divide the estate. (See section 2(1) of Divorce Act, No 70 of 1979 and **GILLINGHAM v GILLINGHAM** 1904 TS 609.)

- [24] As correctly pointed out by Mr Le Roux the courts or receivers and liquidators are allowed a wide equitable discretion to achieve a result which is both fair to the parties and sensible in the circumstances of each case when liquidating and dividing the estate or a partnership practice. (See **VAN ONSELEN NO v KGENGWENYANE** 1997 (2) SA 423 (BSC) at 429 F – H.)

NON-JOINDER

- [25] I am not persuaded that the auctioneer is a necessary party who should be joined in the present proceedings regard being had to the fact that his interest in the matter is purely financial insofar as it is limited to the commission payable to him in line with the conditions of sale concluded with the third respondent.
- [26] Even if I am wrong in the foregoing finding, I am satisfied that a formal joinder is not necessary regard being had to the fact

that the auctioneer deposed to an affidavit confirming and supporting the respondents' case. He is, thus, fully aware of the proceedings and had an opportunity to make common cause with the respondents. (See **VAN ONSELEN NO v KGENGWENYANE**, *supra*, at 425 C – D.)

PRIMA FACIE RIGHT

[27] The parties are in agreement that the applicant is obliged to prove, as one of the requirements for the relief she seeks, a *prima facie* right to the interdict insofar as she seeks an interim relief.

[28] The question is, therefore, whether or not she has an interest in the subject matter of the relief in question. The question may be posed as follows: Does the totality of the evidence before the court show that the applicant might be affected substantially by the transfer of the property to the third respondent. Alternatively the question is: Should the applicant obtain a final relief at the trial on the facts presently before the court. (See **GOOL v MINISTER OF JUSTICE AND ANOTHER** 1955 (2) SA

682 (C) at 688.)

[29] In the founding affidavit the applicant relies on alleged Deed of Sale concluded between herself and the first respondent in respect of the property in question. In the supplementary affidavit she effectively relies on her constitutional right to adequate housing and/or right against arbitrary eviction in her claim to the relief sought.

[30] The respondents, effectively, deny the existence of a Deed of Sale between the applicant and the first respondent and, further, dispute that the applicant's constitutional rights are implicated by the sale of the property to the third respondent and the appointment of the second respondent to receive, liquidate and distribute the joint estate.

[31] I am satisfied that the court order appointing the second respondent as receiver and liquidator effectively vests the relevant joint estate in the second respondent.

[32] I am, further, persuaded by the material before me that the applicant effectively supported the appointment of the second respondent insofar as she deposed to the effect that she did not oppose the appointment because she, *inter alia*, also wanted the estate to be divided and finalised.

[33] It is, further, clear that no valid Deed of Sale exists between the applicant and the first respondent insofar as it is not disputed by the applicant that only the first respondent signed the relevant document. This fact was common cause between the applicant and the first respondent as early as the date on which the second respondent was appointed to receive and liquidate.

[34] I am, further, convinced, as correctly submitted for the respondents, that the Constitutional Court decisions relied upon by the applicant in her contentions that her constitutional rights to adequate housing and against arbitrary eviction are violated, with respect, are irrelevant to the issue insofar as they deal with sales of residential property in execution of court judgments. In the present matter the sale by public auction was authorised by

the court which appointed the second respondent to, *inter alia*, sell by public auction as opposed to authorisation by court registrars and clerks of court which take place without judicial oversight.

[35] I may mention that after the appointment of the second respondent to receive, liquidate and distribute the joint estate, the applicant and the first respondent were divested of the joint estate and their only interest in the same became pure financial in nature. The said appointment came as a last measure to ensure fair division after the parties had failed to attain the same on their own.

[36] The applicant intends to assail the sale of the property to the third respondent on the ground of alleged invalidity. I am, however, not persuaded, on the facts, that such a claim enjoys reasonable prospects of success regard being had to the fact that the second respondent is the authorised seller, as correctly submitted by Mr Gilliland, and neither the applicant nor the first respondent is a necessary party to such a sale.

[37] The applicant is, further, intent on having the court order appointing the second respondent interfered with on the basis that it violates her constitutional rights. For reasons set out in paragraph [34] above I am not persuaded that such a relief is available to the applicant on the facts before me.

[38] The applicant also wishes to have the second respondent removed from office on the grounds of lack of objectivity or neutrality. I am, however, not convinced that this claim enjoys reasonable prospects of success. In this regard it should be noted that the source of the applicant's grief is the non-acceptance of her offer by the second respondent. It is, however, common cause between the parties that the second respondent kept the applicant informed of the arrangements pertaining to the public auction and, further, allowed her a second opportunity to make an offer for the property well after the auction date and before the third respondent's offer was accepted. The deadline was communicated to the applicant and her attorney. Not only the interests of the applicant were at

stake when the best offer was accepted. The first respondent's interests were also part of the equation. The role played by the second respondent in opposing the present application is, in my view, not relevant to the issue herein in the light of the fact that it was exhibited after the fact of acceptance of third respondent's offer. It is, in my view, doubtful that an inference of bias may fairly and properly be drawn from such a role regard being had to the fact that both the applicant and the first respondent stood to benefit equally from the net proceeds of the sale.

[39] On the facts before the court, the applicant is, in my view, not likely to obtain a final relief at the trial.

APPREHENSION OF IRREPARABLE HARM

[40] Even if I am wrong in the finding relating to a *prima facie* right, I am not persuaded, on the facts, that there exists a reasonable apprehension of irreparable harm on the part of the applicant.

[41] It is contended for the applicant that if the property is sold, she

would lose her house and she would not be able to buy another house of the same value.

[42] It is, in my view, worth noting that the applicant does not have sole claim to the house and is entitled to a half share of the same. I am, further, satisfied, as correctly submitted by Mr Gilliland, that to be entitled to an exclusive claim to the property the applicant needs the first respondent's consent.

[43] In my judgment, if the applicant is successful in any of the proceedings she intends to institute, it would not be impossible to reverse the transfer of the property to the third respondent. In this regard it may only be pointed out that Mr Le Roux correctly noted that in the Constitutional Court decisions referred to above, the Court effectively reversed the transfers involved.

BALANCE OF CONVENIENCE

[44] In the light of the above findings I am not convinced that the balance of convenience is in favour of the granting of the order

requested by the applicant.

AVAILABILITY OF OTHER SATISFACTORY REMEDIES

[45] As pointed out in paragraph [43] above the applicant may still secure an order reversing the transfer if she is eventually successful in any of the claims she intends to lodge in respect of the property.

COSTS

[46] On the 14th June 2012 and the 26th July 2012 when the matter was postponed the question of costs stood over for determination at a later stage.

[47] Mr Gilliland specifically asks for costs against the applicant inclusive of the reserved costs.

[48] On behalf of the applicant, Mr Le Roux points out that the applicant will simply not be able to pay the costs.

[49] I am, however, not persuaded that there exists cause, either in

law or equity, for a departure from the general practice regarding costs.

ORDER

[50] In consequence the application is dismissed with costs including reserved costs.

L. J. LEKALE, J

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