

/SG

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 26/05/2009
CASE NO: 25351/2008

REPORTABLE

In the matter between:

FELANI RICHARD MTHIMUNYE	1 ST APPLICANT
SAMUEL MTHIMUNYE	2 ND APPLICANT
ANNA MAHLANGU (BORN MTHIMUNYE)	3 RD APPLICANT

And

SIBONGILE ELLE NYEMBE	1 ST RESPONDENT
MANTOA FRANCINA RANTSHO	2 ND RESPONDENT
DEEDS REGISTRY OFFICE	3 RD RESPONDENT

JUDGMENT

LEGODI, J

Introduction

1. In this application the three applicants ask for relief as follows:

"1. Declaring the registration of immovable property situated at 1181 Section D, Mamelodi West in the first respondent's name invalid and void.

2. *Declaring the sale of the said immovable property by the first respondent to the second respondent invalid.*
3. *Declaring the said immovable property be re-registered in the applicant's name as the title holder thereof on behalf of the other ...*
4. *Costs.*
5. *Further and or alternative relief."*

Background

2. The three applicants are siblings. They had a brother by the names of Charles Mthimunya (hereinafter referred to as the deceased) who passed away on 5 April 2003.
3. At the time of the deceased death, he was married to the first respondent. A parent of the applicants and the deceased owned a house described as Erf 1181 Section D, Mamelodi West (hereinafter referred to as the house).

4. After the death of the parent, aforesaid, the siblings met at the office of Mamelodi Town Council to discuss how they should deal with the house since the parent died intestate. It was then decided that the deceased should take care of the house on behalf of all the siblings.

Subsequent to the agreement, which was endorsed by the municipality on 23 February 1989, a certificate of Registered Rights of Leasehold was issued to the deceased on 23 December 1992.

5. In a letter of 19 April 2005, addressed to the first respondent by the applicants, the first respondent was reminded that the deceased did not own the house, but rather that he was a caretaker of the house on behalf of all his siblings. The letter was prompted by the rent bill account which was issued in the names of the first respondent.
6. On 23 January 2008 a deed of transfer in respect of the house was issued in favour of the second respondent that is, the house was transferred into the names of the second

respondent. This was after the second respondent had purchased the said house from the first respondent.

7. The applicants now seek to undo the agreement between the first respondent and second respondent as it appears from prayers 1 to 3 quoted earlier in paragraph 1 of this judgment.
8. When this matter was argued before me, I requested the parties to prepare full heads of argument on whether the second respondent was a *bona fide* purchaser and if so, whether the applicants should be entitled to the relief sought in terms of their prayers. The other issue which was raised by counsel on behalf of the second respondent was that the application should be dismissed for non-joinder.

Discussions, Submissions and Findings

9. I find it necessary to immediately deal with the issue of non-joinder. The issue was raised in the respondent's heads of argument. It was also argued before me. The suggestion was that the municipal should have been joined to the proceedings or as I understood the submissions the

municipality should have been made aware of the proceedings. None of the parties referred me to the notice entitled "NOTICE TO THIRD PARTY" which now form part of the papers.

Notice to Third Party

10. In the heading of the notice, the municipality is cited as a third party.
11. Municipality acknowledged receipt of the notice on 24 October 2008. It looks like this notice was accompanied by the notice of motion and other papers in the present proceedings. The municipality did not respond to the notice served upon it on 24 October 2008.
12. This notice should be found to be sufficient for the purpose of alerting the municipality to the proceedings and if it elected not to respond thereto, one should be entitled to assume that the municipality was prepared to abide by the decision of the court.

13. Coming back to the applicants' prayers, the applicants in the supplementary heads of argument, and under a paragraph titled "RIGHTS OF PURCHASER" state as follows:

"The applicants submit that the second respondent bought the immovable property bona fide."

14. Having said this and having cited some authorities dealing with remedies available to an innocent party to a fraud transaction counsel for the applicants concluded as follows:

"It is submitted that the bona fide purchaser can claim for repayment of the purchase price or sue extempto rescission, restitution and damages from the seller."

Based on this submission, it is submitted that the applicants should be entitled to the relief sought.

15. An innocent party to an agreement induced by fraud or tainted with fraud has an election to make. He or she can decide either to cancel the contract or to enforce it.

16. In the instant case, there has already been an enforcement of the agreement. The property in question has already been transferred into the names of the second respondent and in all probabilities the first respondent has already received the purchase price.
17. The real issue as I see it, is whether the applicants have established a cause of action against the second respondent. No allegation is made against the second respondent that at any time before the registration of the property into his name, was he aware that the first respondent may not have been entitled to sell the house or that she may not have been the owner.
18. Similarly, the second respondent raised no defence that he was not aware that the first respondent may not have been entitled to sell the house in question. All what he avers is that the house is registered in his names.
19. Regarding the cause of action against the second respondent, the fact that the house might be belonging to the family members of the applicants and that therefore, the first

respondent was not entitled to sell the house, cannot in my view, serve to establish a cause of action against the second respondent in the absence of any knowledge by the second respondent to this effect.

20. I am mindful of the fact that joint ownership of family property has evolved as a culture or custom in our society. Such practice has become an institution which has for many years played and continues to play a very important role in family matters.
21. The modernised way of distributing wealth in a family and in the form of a will, continues to be resisted by the larger part of our society and sometimes understandably so. There is always a desire to keep a family unit intact, by not suggesting that some members are or were more loved than the others.
22. Siblings in a family should see themselves as a unit extending that family where their parents left off. For example, a property like a house left by parents, is something seen as a place where all children of the

deceased parents should come together to celebrate or discuss family matters. If one or more of the siblings have no place of their own to stay, such a sibling or siblings would be allowed to take occupation of the deceased parents' home, but not as his or hers. He or she will take care of it and at the same time enjoying the use of the house. In the present case, the deceased sibling, Charles Mthimunya was allowed to make use of the house and at the same time to keep it on behalf of every sibling. Such an arrangement is not strange amongst the majority members of our society. I should not be understood to be making a final finding against the first respondent in this regard. I am just mentioning it, because the first respondent decided not to file any opposing affidavit.

23. However, the real issue as I said, is whether the applicants have made out a case for the relief sought against the second respondent. I am not satisfied that the applicants' averments in the founding affidavit disclose a cause of action against the second respondent. Whilst a concession has been made by counsel on behalf of the applicants, and in particular to the effect that the second respondent is a *bona*

fide purchaser, I am not inclined to dismiss the application on the basis of this concession. I am of the view that it would be appropriate not to make an order in this regard. This would have the effect of entitling the applicants either to supplement their prayers or to bring the application afresh. The applicants could also elect to sue the first respondent for damages.

24. Consequently an order is made as follows:

24.1 No order is made in regard to prayers 1 to 3 of the applicants' notice of motion.

24.2 The applicants ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

M F LEGODI
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 30/03/2009
For the Applicants: Adv AH Boshielo
Instructed by: Mapulana Maponya Inc, Pretoria
For the Respondents: Adv LM Moloisane
Instructed by: Pule Incorporated, Pretoria
Date of Judgment: 26/05/2009