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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

.....	
DATE	SIGNATURE

Case No: 22/1716

In the matter between:

N[...] C[...] M[...]

Applicant

and

P[...] M[...] M[...]

First Respondent

K[...] A[...] M[...]

Second Respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

JUDGMENT

BARNES AJ

Introduction

[1] The Applicant and the First Respondent were married in community of property in 2004. There are divorce proceedings currently pending between them.

[2] The Second Respondent is the First Respondent's mother.

[3] The application pertains to an immovable property described as Erf 7[...] M[...] Extension 1[...], situated in Gauteng ("**the Property**").

[4] The Property was purchased by the First and Second Respondents in 2000 and is owned jointly by them.

[5] The Applicant seeks orders declaring that she and the First Respondent are the true and lawful owners of the Property and transferring the Second Respondent's share of the Property to herself.

[6] The relief sought by the Applicant is framed in her Notice of Motion in the following terms:

"1. That pending the finalisation of divorce proceedings under case no: 1730/2020 instituted by the Applicant against the First Respondent, for inter alia an order that the Applicant and First Respondent be declared the true and lawful owners of the immovable property described as Erf 7[...] M[...] Extension 1[...] Township, Registration Division I.Q, The Province of Gauteng in Extent 423 as will appear from General Plan S G no. 2606/1999 and held by Certificate of Registration Title no. T55168/1999 and for an order that the mentioned property be transferred into the names of the Applicant and the First Respondent.

2. That the Third Respondent be and is hereby directed to endorse its records so as to reflect the terms of the order as set out in paragraph 1."

[7] In her founding affidavit, the Applicant states that the application is one for "interim interdictory" relief and that "*the object of the application is to preserve the integrity of the aforementioned property pending the divorce proceedings, for the*

declaratory order declaring the Applicant and the First Respondent as the true and lawful owners of the aforementioned property with further ancillary relief that the property be transferred back into our names.”

[8] The Applicant’s characterisation of the application is fundamentally incorrect. The application is not one for interim interdictory relief at all. No interdict is sought, whether interim or otherwise. Nor is the application one to “preserve the integrity of the Property” whether pending the divorce proceedings or at all.

[9] Instead, what is sought is final relief declaring the Applicant and the First Respondent to be the lawful owners of the Property and transferring the Second Respondent’s 50% share of the Property to the Applicant.

The Merits

[10] The Applicant seeks her relief on the basis of the following averments made in her Founding Affidavit:

- a. During or about 2000, the Second Respondent loaned the First Respondent the sum of R40 000.00 towards the purchase of the Property.
- b. A term and condition of the loan was that the “*Second Respondent would be included in the title deed*”.
- c. The First Respondent repaid the loan to the Second Respondent in full and with interest.
- d. Subsequent to the re-payment of the loan, it was agreed that the Second Respondent’s name would be removed from the title deed and replaced with the Applicant’s name.
- e. The Applicant and the First Respondent gave instructions to Baloyi Attorneys to attend to the “amendment” of the title deed, but for some inexplicable reason this was not done.

[11] The Applicant then makes the following averments in her founding affidavit, without further substantiation:

- a. *“I submit that I am entitled to the half share of the Property by virtue of my marriage with the First Respondent.”* and
- b. *“The Second Respondent has no claim in the property.”*

[12] In their answering affidavit, the First and Second Respondents aver that they took out a joint home loan with Nedbank in the year 2000 and that the Property was registered in both their names. They aver further that the joint home loan was later transferred from Nedbank to Standard Bank under the same terms and conditions. These averments are not denied by the Applicant.

[13] As far as the loan from the Second Respondent to the First Respondent is concerned, the respondents contend that the sum of R 40 000.00 was lent and advanced from the Second Respondent to the First Respondent not as a contribution to the purchase price of the Property but for the purchase of a caravan by the First Respondent. The Respondents deny that it was a term and condition of the loan that the Second Respondent be “included in the title deed”.

[14] The First Respondent contends that he and the Applicant approached Baloyi Attorneys with the intention of “adding” the Applicant to the title deed (as opposed to removing the Second Respondent’s name from the title deed) but this was never followed through.

[15] It is apparent from the above that the Applicant’s factual averments pertaining to the loan are disputed by the Respondents. Even if they were not disputed, the Applicants factual averments, on their own terms, disclose no basis in law for her claim to 50% of the Property. Even if it was a term and condition of the loan agreement that the Second Respondent’s name would “*be added to the title deed*” it does not follow that consequent upon the re-payment of the loan, the Second Respondent would lose ownership of her share of the Property.

[16] The Applicant apparently fails to understand or appreciate the nature of the transfer of ownership in law.

[17] As Mr Gwala, counsel for the respondents, correctly submitted, it is now trite that the abstract theory applies to the passing of ownership of property in our law. In terms of this theory there are two requirements for the passing of ownership: delivery (which in the case of immovable property is effected by registration of transfer in the deeds office) and a real agreement between the parties. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and an intention of the transferee to become the owner of the property.¹

[18] There is no suggestion in this case that there was any defect in the real agreement between the First and Second Respondents. Both parties were legally competent to acquire the Property after securing the joint bond from the bank. The Property was accordingly validly transferred to the First and Second Respondents and is currently owned by them in equal half shares. The conclusion of a loan agreement, as pleaded by the Applicant, even if accepted as correct, has no impact on the First and Second Respondent's ownership of the property.

[19] Moreover, the Applicant has failed to put up any written agreement, signed by the parties, which would meet the requirements of the Alienation of Land Act 68 of 1981. This, in my view, is also fatal to the application. In the absence of any written deed of alienation in relation to the Second Respondent's share of the property, I cannot find that there is a basis to declare that that share is owned by the Applicant.

[20] The fact that the Applicant is married to the First Respondent in community of property quite clearly does not entitle her to a half share of the Property as she appears to contend in her founding affidavit. What the marriage entitles her to, at most, is half of the First Respondent's half share in the Property, that is, a 25% share of the Property.

¹ See in this regard *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA), especially at para 22 thereof.

[21] In the result there is no basis for the relief sought by the Applicant and the application stands to be dismissed with costs.

[22] In the circumstances, I make the following order:

Order

1. The Application is dismissed with costs.

**BARNES AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Heard: 12 February 2024

Judgment: 9 July 2024

Appearances:

Applicant:

Adv W Ndlovu

Instructed by Peter Zwane Attorneys

Respondent:

Adv M Gwala

Instructed by Baloyi Incorporated Attorneys