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

CASE NO: 049996/2022

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED. YES/~~NO~~

DATE: **13 August 2024**

SIGNATURE

In the matter between:

R[...] N[...] S[]

Applicant

and

M[...] S[...] S[]

1st Respondent

MASHALA JOSEPH LAPANE

2nd Respondent

MOLOKO MASHALA

3rd Respondent

SIZEKA SILVIA DLEPU

4th Respondent

NEDBANK (PTY) LTD

5th Respondent

REGISTRAR OF DEEDS PRETORIA

6th Respondent

JUDGMENT

MAKUME J:

INTRODUCTION

- [1] In this matter the Applicant seeks an order directing the sixth Respondent to cancel the deed of transfer which is registered in favour of the fourth Respondent over certain immovable property situated at 2[...] T[...] Extension [...], Tembisa (The property).
- [2] To achieve this Applicant says in her heads of argument that she seeks an order to declare that by virtue of her marriage to the first Respondent which marriage was dissolved she automatically became half-share owner of the property.
- [3] The fourth Respondent who is the current title deed holder over the property has not only filed an affidavit dealing with the merits but has raised two points in *limine*. The first being that the Applicant has failed to join the Masters Office. The second being that the Applicant has no *local standi* to bring this application.

BACKGROUND FACTS

- [4] The background facts leading to this litigation are straightforward and uncomplicated. The facts commence with the registration of the property from Ekurhuleni Municipality into the name of one M[...] K[...] E[...] S[...] (The Deceased) who was married to the first Respondent.
- [5] M[...] K[...] E[...] S[...] (The Deceased) passed away in the year 2007. Thereafter the first Respondent married the Applicant in 2010 which marriage was dissolved by the divorce court which ordered division of the joint estate.

- [6] After the divorce the First Respondent in his capacity as the Executor in the estate of his former late wife sold the property to the second and third Respondents who in turn sold the property to the fourth Respondent.
- [7] In the year 2021 the Applicant brought an application seeking a declaration that she be declared owner of the property. The fourth Respondent says in his answering affidavit that the application was withdrawn. It was after the fourth Respondent had instituted eviction proceedings in the Tembisa Magistrate Court that the Applicant then resuscitated this application.
- [8] The eviction application has been stayed pending the outcome of this application. In the meantime the fourth Respondent is saddled with having to meet and pay bond instalment at Nedbank in respect of the property.
- [9] The Applicant is in occupation of the property and is not making any payment of such occupation.

POINTS IN LIMINE LOCUS STANDI

- [10] It is trite law that a point in limine is typically a question of law raised at the beginning of the hearing of a matter before any evidence is led which point may if successful dispose of the dispute or bring the proceedings instituted to a conclusion. This point in *limine* is in my view closely linked to the merits of the application and will thus in dealing with it refer to the merits.

WHAT ARE THE ISSUES IN THIS MATTER

- [11] Did the property in question ever belong to the joint estate of the deceased M[...] K[...] E[...] and the first Respondent. In short when

M[...] K[...] E[...] passed on, did the first Respondent inherit the property, if not, why not.

[12] the second issue is whether the Applicant by virtue of her marriage to the first Respondent became entitled to any asset if any that was owned by the deceased and the first Respondent.

[13] Thirdly the property in question has undergone what is called double sales is it legally feasible to reverse the transfer from the fourth Respondent to the estate of the deceased.

DID THE PROPERTY IN QUESTION BELONG TO THE JOINT ESTATE OF THE DECEASED AND THE FIRST RESPONDENT

[14] It is trite law that in motion proceedings the notice of motion and the affidavit make up for pleadings and evidence. Hence it is imperative that a litigant's founding affidavit must contain all evidence necessary to establish such a litigant's case or contention. In this matter the applicant says that the deceased and the first Respondent were married in community of property and by virtue of that *ex lege* the first Respondent and the deceased jointly owned the property. The Applicant refers to a document which she says is marked annexure A being the marriage certificate of the deceased and the first Respondent the truth is that Annexure A is the marriage certificate of the Applicant and the first Respondent. Her allegation of a marriage in community of property between the deceased and first Respondent is not supported by any evidence. The Applicant concedes to this in paragraph 17 of her founding affidavit she says the following:

“In any event the true state of affairs and facts in law being that the first Respondent was at the relevant time a co-owner from the date of marriage is not reflected on any documentation.”

- [15] In her replying affidavit the Applicant says that the deceased and the first Respondent got married in the year 2005 at Centurion. She attaches no proof of that when in fact in her founding affidavit she did not mention the year and place of marriage. She must fall and stand by her founding affidavit and not introduce new evidence in reply.
- [16] The Deeds search document attached to the founding affidavit indicates that the deceased acquired the property in the year 2003. This would be prior to the “alleged marriage” in the year 2005. In the absence of any other information this court is unable to find in favour of the Applicant that the deceased and the first Respondent were ever married in community of property. In the result the property never became part of “any joint estate” It at all times remained the sole asset of the deceased.
- [17] Having found as above this serves to respond to the second question namely that the marriage in community of property between the Applicant and the first Respondent never acquired the property left by the deceased it is all speculation. The first Respondent is still alive he has kept quiet not because he agrees with what is alleged by the Applicant.
- [18] The Applicant has no *locus standi* as she has no interest in the property

THE PROPERTY HAS UNDERGONE DOUBLE SALES

- [19] It is common cause that the property was sold first to the second Respondent in the year 2018 and in the year 2020 second Respondent sold the property to the fourth Respondent.
- [20] The learned writer Kerr in Principles of Law of Contract 6th Edition page 673 as well as in the matter of **Gugu and Another v Zongwana and Others 2013 LOJ 31018 (ECN)** at paragraph 32 it was held as follows:

“ In the case of double sales other than those in which one party has an option in the lease, if transfer is in fact passed to C and C is *bona fide*, he is entitled to retain the property and B is left with an action for damages against A the seller. However if C knew of B’s rights when he bought or when he took transfer then B can claim against C transfer from C to himself or he can claim against A and seek cancellation of the transfer to C and transfer from A to himself.

[21] a matter similar to the facts in this matter was heard in this court by Aucamp AJ on the 22 July 2024. It is the matter of **Kelvin Twoboy Mashazi vs Mabalangaye Paul Mukuma and Other Case 17373/2021 (GJ)**. At paragraph 8 of the judgment the court said the following:

“The critical question accordingly is whether the 2nd to the 5th Respondents at the time of having concluded the second sale agreement with the first Respondent and the subsequent registration of the transfer of ownership thereof giving effect to the said sale were aware of the pre-existing sale between the Applicant and the first Respondent in 2010.”

[22] Having identified the issue the court in Mashazi (supra) concluded as follows:

“As I am unable to find that the Applicant has disclosed A cause of action in support of the relief claimed, the failure in this regard is dispositive of the entire matter and I need not make any findings in relation to the issue of prescription.”

[23] The Applicant says that when she and the first Respondent divorced the court ordered a division of joint estate and that after that she and the first Respondent sourced a valuation of the property so that it be

sold and she gets her share. If that is the case then her claim lies against the first Respondent for payment of her half share of what she is able to prove comprised the joint estate.

[24] In the result this application must fail, and I make the following order:

24.1 The Application is dismissed.

24.2 The Applicant is directed to pay the cost of the fourth Respondent such cost to be taxed on scale B as provided in Rule 67 A of the Uniform Rules of court.

DATED at JOHANNESBURG this the 13 day of August 2024.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	31 July 2024
DATE OF JUDGMENT	:	13 August 2024
FOR APPLICANT	:	Adv Mputle
INSTRUCTED BY	:	Melford-Monwa Attorneys
FOR 4 th RESPONDENT	:	Adv Mohlala
INSTRUCTED BY	:	Ngoetjana Attorneys