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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO:1971/2018

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

Signature:

Date: **25 NOVEMBER 2024**

In the matter between:

**THE ESTATE OF THE LATE MAKGANYANE
ANDRONICA PHALANE.**

FIRST PLAINTIFF

MAHLOKO JEMINA MPHAHLELE N.O

SECOND PLAINTIFF

PHAHLE PHALANE

THIRD PLAINTIFF

And

**MASTER OF THE HIGH COURT
POLOKWANE**

FIRST DEFENDANT

THE DEEDS OFFICE POLOKWANE

SECOND DEFENDANT

**DEPARTMENT OF CO-OPERATIVE
GOVERNANCE HUMAN SETTLEMENTS
AND TRADITIONAL AFFAIRS**

THIRD DEFENDANT

OF LIMPOPO.

CYNTHIA JULIET PHALANE N.O.

FOURTH DEFENDANT

CYNTHIA JULIET PHALANE

FIFTH DEFENDANT

JUDGMENT

MONENE AJ

INTRODUCTION

[1] In this action proceedings the two plaintiffs, children of two now deceased parents, seek a declaratory order to the effect that an immovable property known as Erf 5[...], Lebowakgomo Zone A, District Thabamopo (“the property”) which was purchased in the mid-seventies by their vests not in the estate of their father, Gulbooi Phalane but in the estate of their mother, Makganyane Andronica Phalane.

[2] Opposing the relief sought is Cynthia Juliet Phalane in both her personal capacity as a wife to the plaintiffs’ deceased father to whom she was married after their deceased father’s divorce from their now late mother and her capacity as executrix of their father’s estate. She avers that the property forms part of her joint estate with the plaintiffs deceased father and her late husband, Gulbooi Phalane(“Gulbooi”).

[3] This action meta morphed from an application which was brought by the now late Makganyane Andonica Phalane(“Andronica”) for the relief as in casu which, which having been opposed by Cynthia Juliet Phalane (“Cynthia”), remained undetermined up to Andronica’s death. After the death of their mother, Andronica, the plaintiffs issued summons against Cynthia seeking essentially the same relief of a declarator that the property is part of their mother’s estate as opposed to that of their deceased father as executed by their stepmother, Cynthia.

[4] Upon the plaintiffs in casu applying for the two matters, that is, their late mother's application and their action be consolidated since they sought the same relief, Bresler A J ordered consolidation with the main application papers standing as combined summons and the answering affidavit thereto standing as a plea, a consequence of which was for the consolidated matters to appear before me as a trial.

THE ISSUE AND PARTIES' KEY STANCES THEREON

[5] Crisply, the issue is whether the property constitutes part of the estate of the plaintiffs' mother which estate is executed by the second plaintiff or is part of their deceased father's estate, which estate is executed by the plaintiffs' stepmother.

[6] The plaintiffs aver that in support of their case is, in the first-place, proof that their father had, when he divorced from their mother in 1976, forfeited the property to their mother and, in the second place, that in 1995 their father had expressly declared that the property belonged to their mother. In the third place they aver that their mother had been the one paying for the bond on the property while, in the fourth place, they submit that having stayed in the property for at least thirty years, their mother had become lawful owner thereof in terms of section 1 of the Prescription Act 68 of 1969.

[7] The fourth and fifth defendant contend that the property vests in the estate of the late Gulbooi Phalane because it was registered in his names only and further that the registration thereof was completed after the date of his divorce from the late Andronica Phalane in 1976. They submit that the property fell outside that which Gulbooi forfeited at divorce because the forfeiture happened before the property was registered in Gulbooi's names.

[8] Beyond the pleadings the parties led oral evidence before this court, with both plaintiffs testifying in their case and the fifth defendant giving evidence in opposition. The balance of the defendants, expectedly, did not enter the fray.

[9] I shall, post a brief outline of the background facts *infra*, return to reflect on and analyze the evidence tendered in the light of the applicable legal instruments.

BACKGROUND FACTS IN BRIEF

[10] The plaintiffs' parents Gulbooi and Andronica Phalane got married on 22 December 1969 in community of property and profit and loss.

[11] During the subsistence of their marriage they applied for a grant of a stand in Lebowakgomo after which the Department of Bantu Administration and Development South African Bantu Trust issued a Deed of Grant. That stand was to become Erf 5[...], the property at the heart of the dispute in this matter on which a "bonded" township property was already erected. That deed of grant was issued, according to patriarchal norms of the time, only in Gulbooi, the man's names.

[12] On 1 October 1976 the couple divorced and Gulbooi left the property leaving Andronica in the house raising their two children, to wit, the plaintiffs in casu. Pursuant to their divorce Gulbooi forfeited the entire joint estate.

[13] On 16 January 1977 the final registration of the property in Gulbooi's names was finalized.

[14] In the meantime Andronica continued to pay the house bond and rates fees and to stay in the house raising the two children there. The municipality house payment receipts were throughout the years, although paid by Andronica, issued in the names of Gulbooi because it was in his names that the property was registered.

[15] On 29 December 1986 Gulbooi got married to Cynthia Juliet Phalane. They newlyweds set up house in Masodi Village, Mokopane which about 130 kilometers from the property in Lebowakgomo.

[16] In April 1995 Gulbooi and Andronica agreed to formally transfer the property to Andronica with both signing transfer papers and Gulbooi making a transfer

declaration. This transfer was, owing to logistical hiccups and red tape never finalized.

[17] On 13 July 2008 Gulbooi passed away and was buried from his home with Cynthia in Masodi.

[18] After Gulbooi's estate was reported and much later on 27 November 2018 Cynthia was appointed executor of Gulbooi's estate. The estate is yet to be finalized.

[19] Uncertain about the legal status as to ownership of the property, Andronica launched the main application for a declarator, as alluded to supra, on 27 March 2018.

[20] On 29 November 2019, with her declarator application still pending, Andronica passed away.

[21] Aware that the property was listed in the inventory of their late father's estate as executed by Cynthia, the plaintiffs launched action proceedings which, as alluded to supra, were consolidated with their late mother's application resulting in this matter appearing as a trial before this court.

THE ORAL EVIDENCE LED

[22] Phaahle Petersen Phalane the third plaintiff in this matter testified that he was born of the late Matsobane Gulbooi Phalane and the late Makganyane Andronica Phalane in 1967 two years before the two could get married. He went on to tender the following evidence:

22.1 He knew that his parents had jointly purchased the property prior their 1976 divorce and knew further that the deed of grant in the property was only issued after their divorce in 1977.

22.2 He had stayed on the property with his mother from those mid-seventies to 2014 when, because he had managed to purchase his own

property, he had taken his sickly mother to come and stay with him. From 2014 his mother had rented out the house to various tenants.

22.3 He knows Cynthia as his aunt or stepmother whom his father had married after the divorce.

22.4 Cynthia had never stayed in the Lebowakgomo property.

22.5 He denied Cynthia's version that his mother had over the years stayed at the property because his father had been benevolent towards her.

22.6 His father had never stayed at the house at all.

22.7 When his father passed on, he was buried from Cynthia's home and his coffin was not taken to nor past the property.

22.8 His mother's coffin was taken to go via the property on the day of her funeral.

22.9 The property was paid for and owned by his mother for more than 30 years.

[23] Mahlaku Jermina Mphahlele, the second plaintiff in this matter took to the stand to state that she was a sibling of Phaahle Phalane and had upon her mother's death been appointed executrix of her mother's estate. Apart from confirming and corroboration his brother's entire version on how the property had been their childhood home owned by her mother over the years she stated further that:

23.1 Her mother, Andronica, solely paid the bond and rates for their home, which is the property in Lebowakgomo, for all the years up to her death. Her mother had kept receipts proving payment, copies of which were attached to the pleadings.

23.2 The receipts were passed on to her by her mother and were in her father's name only because the property had never been changed from his father's names to those of her mother.

23.3 She was shocked to discover only in 2016 that Cynthia was claiming the property as part of her late father's estate.

23.4 In recent years Cynthia had kicked out tenants from who she was collecting rent and replaced them with her own tenants from whom she was collecting rent.

[24] Cynthia Juliet Phalane testified in her defence to confirm that she indeed had married the plaintiffs' now deceased father years after his divorce from Andronica. The key take homes from her evidence were the following:

24.1 The property was not part of the property forfeited by Gulbooii to Andronica because it was acquired only after the divorce. She however confirms that the process of purchasing the property had commenced prior the divorce.

24.2 She confirmed that Andronica had occupied the property for more than thirty years but insisted that she stayed there with the permission of the owner, Gulbooii.

24.3 She insisted that Gulbooii had been the one paying for the property but could not produce proof thereof.

24.4 Whatever Andronica paid for the property was because she was some kind of tenant or paying occupant.

BRIEF ANALYSIS OF THE EVIDENCE

[25] From the evidence led the following are clearly proven without any dispute:

25.1 Andronica stayed on the property for more than 30 years.

25.2 The property was purchased by both Andronica and Gulbooi during the subsistence of their marriage and only registered post the marriage.

25.3 The bond on the property and rates were throughout the years paid solely by Andronica.

25.4 Gulbooi did try to transfer the property over to Andronica and signed declarations to that effect.

25.5 In life Gulbooi never stayed at the property nor did he show any interest at it.

25.6 At death Cynthia did not consider the property to be Gulbooi's home where it would have been necessary for customary rites purposes to have his coffin to touch base with the property.

[26] With these proven facts I am not persuaded that the defendant has mounted any case before me at all. All that I have is a widow who wants property against a typhoon of facts all militating against her claim on all the basis of a declaratory order raised by the plaintiffs.

[26] The property having been purchased during the subsistence of the marriage, at divorce it formed, in my view, part of the marital estate's assets and liabilities. Gulbooi having forfeited the entire estate at divorce cannot be said to have retained the property simply because the logistic of registration was finalized after the divorce. What further points that out to be true is the incontrovertible proof of who paid the bond on the property from the commencement of the bond up to the death of Andronica. It would offend any reasonable person's sense of justice if by a stroke of a technicality of the property having been given Gulbooi's names under patriarchal dictates of the mid-seventies, his estate was to be enriched by property which he never wanted, never showed an interest in and did not pay a cent for. The property

was never his in life and was not regarded as such by anybody even at his burial time.

[27] Furthermore, the declaration of intent to transfer of the property to Andronica by Gulbooi pursuant to an application to formally transfer the property stands as further uncontroverted evidence before this court which cannot and should not be taken lightly. When this point is assessed in the light of the fact of who paid the bond on the property, justice clearly demands that the estate of Andronica be not unfairly prejudiced at the alter of upholding technicalities over reality.

[28] Even if I be wrong on the points of divorce forfeiture and declaration on intention to transfer of the property supra, which I remain of the strong view I am not, I will still find, as I do that the late Andronica had acquired ownership of the property per acquisitive prescription in terms of section 1 of the Prescription Act 68 of 1969 (“the Act”) which provides as follows:

“Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years,”

[29] In ***Gianchandi v Registrar of Deeds, Pietermaritzburg and Others(D3519/2021) [2023] ZAKZDHC 10(14 March 2023)*** the court relied on section 1 of the Act referred to immediately supra in declaring an applicant the owner of property on the basis of open and uninterrupted period of thirty years.

[30] In casu Andronica was openly occupying the property from 1976 to 2019 when she passed away. That is a period of 43 years.

[31] Her occupation of the property was uninterrupted. It was never challenged by Gulbooi, the one person who could have. Even the attempt at challenging the open occupation of Andronica as owner by Cynthia when she first included the property in

the inventory of Gulbooi's estate in 2016 was long after 40 years and as stated supra, without any merit. Cynthia's awareness of Andronica's occupation of the property only in 1999 is of no moment in terms of the Act. Gulbooi had been aware all the time.

[32] As correctly referred to by counsel for the plaintiffs in his very helpful Heads of Argument, ***Morgenster 1711(Pty) Ltd v De Koch No and Others 2012(3) SA 59(WCC)*** counsels us that the critical requirement is encapsulated in the phrase 'possessed openly and as if he is the owner thereof which speaks to physical possession coupled with animus domini. In that regard the argument by Cynthia that at some point the house was intermittently empty is of no moment because it does not remotely suggest a diminished intention to possess openly nor interruption.

[33] I have noted and taken on board submissions by Mr Monyela on behalf of the Cynthia that her rights as a spouse of Gulbooi to the joint estate of their marriage cannot, on the strength of ***Le Roux and Another v Johannes Coetzee and Others [2022] ZA 46 at para 29("Le Roux")***, that prescription cannot extinguish a right valid in law. However, as I understand the law in that regard such a right valid in law must really be established at law and not be one speculative as in casu for Cynthia. It must first be proven that the property is conclusively part of her estate with Gulbooi before the Le Roux rationale kicks in. In casu Cynthia failed in the initial stage, that is, to prove the existence of such a valid right in law before it can be determined whether prescription is strong enough to contest such a right.

[34] Accordingly in the light of section 1 of the Act the route to a declarator in favour of Andronica's ownership of the property is comprehensively and unassailably cleared. The plaintiffs must succeed, and the fifth respondent should, in the ordinary cause, be mulcted with costs.

ORDER

[35] In the result, I make the following order:

35.1 The late Mokganyana Andronica Phalane is declared to have been the lawful owner of the immovable property known as ERF 5[...], Lebowakgomo-A township, District Thabamooopo.

35.2 The late Makganyane Andronica Phalane became entitled to the ownership of the property named in 35.1 above and to take transfer thereof prior to her death.

35.3 The said property falls within Estate Late Mokganyana Andronica Phalane with estate Number 009161/2019.

35.4 The Deeds Office in Polokwane is directed to register the title in and to the property as may be necessary for the administration of the said estate and to subsequently furnish a title deed to whomever is flowing from the execution of the said estate may become entitled thereto.

35.5 The Sherriff of the High court with the requisite jurisdiction, is authorized and directed to sign all documents necessary to give effect to the orders above which the executrix of the said estate cannot sign.

35.6 All the fourth and fifth defendants' claims regarding the property are dismissed.

35.7 The fifth defendant is ordered to pay the costs of the entire consolidated proceedings on a party and party scale including the costs of counsel on scale B.

MALOSE.S. MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard Last on : 14 August 2024

Judgement delivered on : 25 November 2024

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