

SOUTH AFRICA / JUDGMENT

Blumberg v Blumberg and Another (2024/024590) [2024] ZAGPJHC 951 (25 September 2024)

[2024] ZAGPJHC 951

COURT

South Gauteng High Court, Johannesburg

BEFORE

JL Bhengu

CASE / FILE NUMBER

2024/024590

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

Case

No.: 2024/024590

(1)

REPORTABLE:

NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In the matter between:

DAVID
JEFFREY BLUMBERG
Applicant
and
ELAINE
BLUMBERG
First
Respondent
REGISTRAR
OF DEEDS, JOHANNESBURG N.O.
Second
Respondent

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Heard on – 21 May
2024

JUDGMENT

Bhengu AJ

- [1] This matter came before me in the unopposed motion court on 21 May 2024 when I granted an order dismissing the application. On receipt of a request for written reasons I decided to prepare a full

judgment.

Background

facts

- [2] The Applicant is a biological son of the Respondent, and he is resident in Australia. The Respondent is a seventy-year-old female

resident is South Africa, Johannesburg. Due to the Respondent's advanced age with no income, the Applicant is responsible for supporting her in respect of her general living expenses including paying for her caregiver.

- [3] The Applicant is seeking the following order in his notice of motion: -

- (1) “The First Respondent be interdicted and restrained from selling, dissipating, encumbering or in any other way dealing with the property described as ERF 1[...]... (the Immovable Property), until such time the First Respondent’s estate is distributed to the recognized as in terms of the first Respondents's last will and testament, or the balance in respect of monies lent and advanced to the First Respondent by me are paid in full.
- (2) The Second Respondent be directed to register a caveat against the immovable property to that effect...”
- [4] The Applicant alleged that there was an informal record of monies paid by him to the Respondent for her upkeep. The Applicant avers that he understood that all monies paid to his mother were lent and advanced to her and would be recovered against her estate upon her death. The Applicant was appointed executor in the Respondent’s will and testament dated 13 February 2024.
- [5] The Applicant alleged that he has reason to believe that there is a risk that his mother may disinherit him and his brother due unscrupulous and opportunistic individuals seeking to influence her to that effect. The Applicant averred that the Respondent had on occasion surrendered control of her bank cards and reward cards, as well as their associated pins to individuals who should not have access thereto. He reckoned that the fact that his mother could be induced to relinquish control and access of her finances, it would be all too easy for an opportunistic individual to empty out his mother’s account and never be seen again.
- [6] The Applicant averred that he is unable to monitor the Respondent’s financial affairs to ensure that she is not taken advantage of. The Applicant also referred this Court to several news articles evidencing several instances where vulnerable elderly people living in Johannesburg area who are in need for companionship having been influenced and coerced by criminals into signing away their wealth and property to strangers who manipulate and prey over them due to their distance with family.
- [7] The Applicant averred the following on paragraph 17 of his founding affidavit: -

“In order to protect myself, by agreement with my mother, it was decided that it would be in our best interest to formalize our financial

relationship and provide protection for all parties. On or about 13 February 2024, my mother formally acknowledged her indebtedness to me in the amount of R600,000.00, being the balance owing in respect of monies lent and advanced to her by me, for her use and benefit and for, inter alia, her monthly living expenses (the acknowledgement of debt).”

- [8] The Applicant further averred the following from paragraph 18: -

“18. In terms of the Acknowledgement of Debt, my mother agreed and irrevocably consented that the indebtedness be secured against the immovable property, for which she agreed and directed that a caveat be registered against title deed T1621/1975 in the Johannesburg Deeds Office and that such indebtedness be repaid from the proceeds of any sale of the immovable property.

19. The above notwithstanding, my mother enjoys full mental and legal capacity.
20. The purpose of this application is not to diminish my mother's ability to deal with and dispose of her assets in any manner she may deem fit. But simply to protect my ability to recoup monies lent and advanced to my mother against her estate.”
- [9] The Applicant averred that he has reason to believe that he may be entirely disinherited through a scam, inducement of fraud thereby having to incur additional costs of computing, proving and lodging a claim against the Respondent's estate when she passes away. According to the Applicant the order sought is meant to secure his rights as a creditor and to prevent his mother from unsuspectingly alienating significant assets to his prejudice. The Applicant further averred that that there would be no prejudice to the Respondent should this order be granted as he will continue to financially support her until her estate is inherited and distributed in accordance with her will.
- [10] The acknowledgment of debt relied upon by the Applicant provided as follows: -
- “...I do hereby acknowledge that I am truly and lawfully indebted and held and firmly bound to and in favour of David Jeffrey Bloomberg in the sum of R600,000.00, being the balance owing in respect of monies lent and advanced to me for my use and benefit, and for inter alia, my living expenses (the indebtedness).*

I hereby agree and irrevocably consent that the indebtedness be secured against my immovable property, Erf ..., Johannesburg (the immovable property) for which I agree and direct that a caveat be registered against Title Deed 1216/1975 in the Johannesburg Deeds Office and that such indebtedness be repaid from the proceeds of any sale of the immovable property. I further agree and consent that any further monies lent and advanced to me by David from the date of signature of this Agreement shall constitute a loan facility, with such amounts lent and advanced to me being recorded anew and separately from the indebtedness...”

- [11] The issue that the Court had to decide was whether the document referred to as the acknowledgment of debt satisfies the requirements for a valid acknowledgement of debt. If so, whether an acknowledgment of debt constitutes security over the Respondent's immovable property and whether same can be endorsed as a caveat over the Respondent's immovable property.

Analysis

- [12] An acknowledgment of debt is a contract between a debtor and a creditor whereby the debtor acknowledges the debt owed to the creditor. Ordinarily, the acknowledgment of debt would outline the value of the indebtedness, and the terms of payment as agreed to by the debtor. It is designed to help a creditor to recover the debt if the debtor defaults on the payment plan. The creditor armed with

an acknowledgment of debt will be entitled to approach court for judgment against the debtor on the strength of the acknowledgment of debt alone.

- [13] What concerns me with the document referred to as the acknowledgment of debt is the fact that there is no information on how the debt is computed and no payment terms are indicated. There is no period within which the debt is payable. A further challenge that I have is that the caveat that the Applicant sought to note over the Respondent's property is applicable until the Respondent's death where the property will be distributed amongst her heirs or until the debt is paid in full. It is clear from the averments made by the Applicant in his founding papers that the Respondent is not a person who has the means to satisfy the debt, hence his support for her upkeep and the payments for her caregiver. An expectation that the Respondent will be able to discharge her indebtedness of R600 000.00 is unrealistic. I am of the view that this acknowledgment of debt does not comply with the aforesaid requirements and therefore invalid.
- [14] Counsel for the Applicant acknowledged that if the order sought by the Applicant is granted, it will have an effect that the Respondent cannot deal with her property thereby restricting her freedom of testation and her right to deal with her property as she deems fit. He however contended that it is the Respondent who has agreed to give her property as security in lieu of financial support received from the Applicant. He equated the status of the Applicant by virtue of the acknowledgment of debt to that of bondholder whose consent is required when the mortgage property is sold. He submitted further that the order sought would also protect the Respondent from being deceived by scammers. He contended that an interdict over the Respondent is better than litigation between a mother and her child for the recovery of the money's lent and advanced.
- [15] Having found that the document signed by the Respondent is not a valid acknowledgment of debt, I further find that even if the document was a valid acknowledgment of debt, an acknowledgement of debt does not have an equal status with a Mortgage Bond, contrary to the argument by the Applicant's counsel. Section 50(2) of the Deeds Registries Act 47 of 1937 provides that a Mortgage Bond may be registered to secure an existing debt or a future debt over immovable property. There are further legal requirements in the execution and registration of a Mortgage Bond which are not applicable to an acknowledgment of debt and as such cannot be held as security over immovable property.

Legal duty of children to support their parents

- [16] I engaged counsel regarding the underlying cause of debt, which is an unusual claim for repayment of monies allegedly paid by a child to his own indigent mother for her upkeep. Counsel submitted that there is no legal duty for a child to support his parents. He submitted that support from a child to a parent can be considered as a debt, even though it's not a debt in terms of the National Credit Act. He further submitted that a child cannot be considered as a donor to support their parents. No case law was provided in this regard.

- [17] While I agree with the contention by the Applicant's counsel that there is no general legal duty for children to support their parents, I'm however mindful of case law that held that each case must be considered based on its own special circumstances. In *Oosthuizen v Stanley*[1] the appeal court stated that a parent is not entitled to claim support from a child if the parent is able to maintain herself by working. A child has a legal duty to support a parent only in circumstances where a parent can prove indigency and that the child was able to provide such support. In determining the child's duty to support a parent, the court referred to the quality and condition of the persons to be supported. The court stated that the duty to support "includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness".
- [18] Further, in *Van Vuuren v Sam*[2] Rabie JA referred to the same criterion but stressed that the support of parents must be confined to the basic needs, namely food, clothing, shelter, medicine and care in times of illness.
- [19] It is therefore not automatic that moneys expended by the Applicant for his mother's living expenses constitutes a debt that can lead to limiting her constitutional right to ownership of property guaranteed in terms of section 25(1) of our Constitution indefinitely until her death. The deeds search shows that the Respondent obtained registration of the property on 7 February 1975 and that the property is free from any bonds or encumbrances. The order seeks to interdict and restrain her from selling, dissipating, encumbering or in any way dealing with her property. I am of the view that granting this order will be against public policy. The Constitutional Court in *Wilkinson and Another v Crawford N.O. and Others*[3] discussed the right of ownership as follows:
- 'It is trite that freedom of testation is a central principle of testate succession and testators are permitted to dispose of their assets freely, except insofar as the law places restrictions on this freedom.'
- [20] The Applicant's counsel argued that the Court is not empowered to refuse to grant an order where the Respondent consents to the order. He argued that this is an agreement between the two parties and that the court cannot interfere. While I am mindful that the parties are entitled to enter into agreements freely and voluntarily, I am of the view that this case is an exception in that this acknowledgement of debt is invalid and the cause of indebtedness, in my view offends public policy.
- [21] In *Eke v Parsons*[4], the Constitutional Court held that not everything that is agreed to by the parties should be accepted by a court and made an order of court. The court held that "an order can only be one that is competent and proper".

The Respondent's state of Mind

- [22] Although the Applicant alleges that the Respondent enjoys full mental capacity, I am concerned with the allegations by the Applicant relating to the Respondent's conduct in managing her financial affairs. These included the allegations that she surrendered control

of her bank cards as well as their associated pins to individuals who should not have access thereto. The mere fact that the Applicant alleges that the Respondent could be easily induced to perform such acts that are against her best interest is contrary to the allegations that she enjoys full mental capacity. The Court is therefore not persuaded to grant the relief claimed. There are mechanisms provided by our laws to protect the interests of such individuals without diminishing their rights to ownership.

[23] It is for these reasons, that I dismissed the application with no order as to costs.

JL BHENGU

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

For the Applicant: Adv M Amojee

Instructed by: Hadar Incorporated

[1] Oosthuizen v Stanley 1938 AD 322 328 at page 328

[2] Van Vuuren v Sam 1972 (2) SA 633 (A) 642

[3] Wilkinson and Another v Crawford N.O. and Others (CCT 130/19) [2021] ZACC 8; 2021 (4) SA 323 (CC) para 69

[4] Eke v Parsons (CCT214/14) [2015] ZACC 30 para 25

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