

SOUTH AFRICA / JUDGMENT

Mafrika v Magongwa (28553/2016) [2016] ZAGPPHC 647 (29 July 2016) [2016] ZAGPPHC 647

COURT

North Gauteng High Court, Pretoria

BEFORE

N.P. Mali

CASE / FILE NUMBER

28553/2016

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

DATE: 29 JULY 2016

CASE NO: 28553/2016

In the matter between:

SIMON MAFRIKA 1st APPLICANT

BETTIE MAFRIKA 2nd APPLICANT

and

NTSOPILALANA JOHANNES MAGONGWA 1st RESPONDENT

NOMADLAZI BEAUTY MAGONGWA 2nd RESPONDENT

THE REGISTRAR OF DEEDS PRETORIA 3rd RESPONDENT

J U D G M E N T

MALI J

- [1] The applicants who are married in community of property instituted an application for the transfer of immovable property by the first and the second respondent. The first and the second respondent are married in community of property. The immovable property is described in the deeds office as [Erf 7., Rabie Ridge Township], registration division IR, Gauteng (measuring 315 square metres and held in terms of title deed no T6...]/1995) (" the property").
- [2] The third respondent is a party to the action by virtue of the relief sought by the applicants. The first respondent does not oppose the application.
- [3] The applicants' case is that they purchased the property from the first respondent during August 2005. It is not in dispute that on 16 August 2005 the first applicant made a payment of R86000.00 to the first respondent and that on 25 August 2005 the first applicant and the second respondent signed the affidavit. The affidavit was intended to perfect the agreement of sale. The

applicants' further basis of the agreement of sale is the Power of Attorney to pass transfer signed by the first and the second respondent.

- [4] The second respondent is opposing the application and has raised a point in limine. She has also filed a counterclaim for the eviction of the applicants and unlawful occupiers of the property.

POINT IN LIMINE

- [5] The complaint is that the agreement of sale relied upon by the applicants does not comply with the conditions of Alienation of Land Act No 68 of 1981 ("the Act"). Section 2 of the Act provides;

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

- [6] As alluded above the applicant's case is based on the Power of Attorney to pass transfer. It is not in dispute that the first and second respondent signed a power of attorney to effect transfer. The second respondent does not deny that it is indeed her

signature that is appended in the power of attorney. She however states that she cannot remember signing the power of attorney. It is apposite to refer to following clause contained in the power of attorney;

"We, the undersigned, Ntsopilana Johannes Magongwa Identity Number. and Nomadlazi Beauty Magongwa Identity Number. Married in community of property to each other (the Transferors) hereby nominate, constitute and appoint:

CHRIS NORTHWELL MATHEBULA

with power of substitution to be the true and lawful Attorneys and Agents of the Transferors in the name , place and stead of the Transferors to appear before the REGISTRAR OF DEEDS at PRETORIA and then and there to declare that the Transferors did on 14 August 2007, truly and lawfully sell to (own emphasis):

SIMON MAFRIKA [Identity Number 49...]"

- [7] Although the Power of attorney authorises the representative of the respondents to transfer the property sold by the first and the second respondent in the past tense, being 14 August 2007, the hurdle is that it is not signed by the purchaser and the seller.
- [8] The second respondent's submission is that she never signed the deed of sale albeit the first respondent signed same. It is further submitted that there is a dispute about the signature in the Power of Attorney. It is not clearly stated what the dispute is about, neither it is stated that she is not the bearer of the signature in the Power of Attorney.
- [9] It is not in dispute that the second respondent further signed an affidavit titled "AFFIDAVIT Transfer of- [ERF 7..] RABIE RIDGE TOWNSHIP' The predicament pertaining to the affidavit is that it is not commissioned and also not signed by the witnesses. Counsel for the second respondent submitted that even if the signature in the affidavit is hers because of it is non-compliant it should be disregarded. Again the second respondent is non-committal about her signature, she does not state unequivocally that she did not append her signature.
- [10] In fact the second respondent's response to the above is the following;
- "I recall the First Respondent coming to my house in Limpopo several times. I did not however sign a deed of alienation and at all times refused to sell my property. I note Annexures "MAF16" to "MAF19", I do not recall signing those documents. Further as is clear from these documents is that there are no witnesses who signed the document and no commissioner of oaths that verified it was indeed myself who signed same".
- [11] Furthermore there are glaring similarities in the signature denied by the second respondent appended in the power of attorney with the signature appended to her two affidavits at page 88 and 108 of the paginated papers. Counsel for the second respondent could not take further the submissions regarding the similarities of the signature alluded above. He only stated that the second respondent is a pensioner and not wealthy to employ the services of a hand writing expert.
- [12] Counsel for the applicant further submitted that the second respondent's signature appended in the power of attorney supports the submission that there was intention and decision to sell the property. It is opportunistic of her to dispute the sale of the property relying on non- commissioned affidavits bearing her signature.

- [13] It is upon the above submissions that it has been submitted on behalf of the applicants that the provisions of section 2(1) of the Act must be read with sections 15 (2)(a) and 15
- (9) (a) of the Matrimonial Property Act, 88 of 1984 ("the Matrimonial Property Act";)
- [14] In terms of section 15(2)(a) of the Matrimonial Property Act a spouse who is married in community of property shall not without the written consent of the other spouse "alienate, mortgage, burden with a servitude or confer any real right in any immovable property forming part of the joint estate."
- [15] However, section 15(9(a) of the Matrimonial Property Act provides that:
- "(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-
- (a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection
- (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;"
- [16] These provisions seek to regulate marriages in community of property after the abolition of marital power [1]. They are intended to protect a bona fide third party who enters into a transaction with a person who is married in community of property if the third party does not know, and cannot reasonably be expected to know that the person's spouse had to consent to the transaction or that the necessary consent was not obtained.
- [17] For a purchaser, for his or her interest to trump those of innocent spouse, must prove that he or she did not know and could not have reasonably know and could not have known that the consent of the innocent spouse was lacking. If this is proved, then the innocent spouse is deemed to have consented and his or her remedy for any loss suffered as a result is an adjustment in his or her favour when (and if) the joint estate is divided.
- [18] The question is whether in the present matter the facts support the above provisions. The undisputed sequence of events is that the deed of sale was first signed by the applicants, and by the first respondent who at the time was residing in Gauteng. He then took the deed of sale to the second respondent to Limpopo in their other residence. Subsequent to that, the Power of Attorney referred to above was signed by both respondents. From the above the applicants could not have known that the first respondent
- did not have the consent of the second respondent.
- [19] Above, I have alluded to the second respondent's unsatisfactory explanation which rather suggests her opportunism. This is because o at paragraph 28. 3 ,28.4 ,28.5 and 28.6 of the second respondent's answering affidavit she states the following

"28.3 My husband and I are rural people and the Applicants are wealthy urban people. I respectfully submit that the Applicants unduly influenced my husband to accept an amount of R86000. 00 having him think that same was fair value for the property.

28.4 I attach hereto as Annexure "NBM2" a valuation conducted by my attorney of record produced by Lightstone. I pause to mention that this valuation report, is a comprehensive report that helps determine the fair market value of residential property in South Africa.

28.5 In terms of the report the estimated value of the property is R470 000.00 while the expected high value of the property is R630 000.00.

28.6 I am advised that since the Applicants made payment of R86000. 00 to my husband in terms of unenforceable, invalid and void contract, my husband is required to tender repayments of the amount to the Applicant ""

[20] Some of the above submissions made by the second respondents are just brave and bald statements. The first respondent, her husband who is supposedly influenced by wealthy urban people does not oppose the application. Secondly the issue of the valuation of the property disregards the undisputed fact that the payment of the property was made on 16 August 2005, eleven years ago. The valuation which appears to be the trigger of opportunism was made on 15 July 2015.

[21] Furthermore the second respondent did not dispute the first applicant's submission at page 15 of the paginated record, paragraph

10. The submission is as follows:

"10.1 On or about, our attorney of record, (sic) Mr Ntewukeni contacted the 1st Respondent and he informed him that as far as he was concerned he signed all the documents for us as he has travelled to Gauteng two times to sign the transfer documents and further that we have been to his homestead and his wife signed the documents and therefore they were not prepared to sign any further documents."

[22] From the above it is apparent that according to the first respondent he and his wife had completed the process to effect the transfer of the property. Therefore the applicants could not have reasonably known that the first respondent did not have consent from the second respondent to alienate the property. Furthermore the second respondent had at no time challenged the validity of the deed of alienation.

[23] Having regard to the above it is deemed that the second respondent have consented to the alienation of the property. The applicants who are bona fide third parties are entitled to the protection afforded by section 15 (9) (a) of the Matrimonial Property Act, therefore the deed of alienation is accepted as valid. The point in limine must fail.

[24] In the result I make the following order;

24.1 The agreement of sale between the applicants and first and the second respondents is valid and enforceable;

24.2 The first and second respondents are compelled to do all things necessary to comply with the agreement and to sign all the documents necessary in order to give effect of the transfer of the property in the names of the first and second applicant.

24.3 In the event that the first and second respondents fail to take the necessary steps referred to in paragraph 23.2 above, the Sheriff of the above court is authorized to sign any documents and to take such steps on behalf of the applicants as may be necessary to give effect to this order.

24.4 The first and second respondents are prohibited from alienating, disposing of and transferring the property to any third party.

24.5 The second respondent is ordered to pay costs including costs of counsel.

N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicants: Adv. H. H. Cowley

Instructed by: N C NTEWUKENI ATTORNEYS

Counsel for the second respondent: Adv. Y van Aartsen

Instructed by: N O A KINSTLER

Date of Hearing: 20 April 2016

Date of Judgment: 29 July 2016

[1] Matrimonial Property Act 88 of 1984, s 11.

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