

SOUTH AFRICA / JUDGMENT

Mbokane v Radebe and Others (2021/51795) [2023] ZAGPJHC 133 (7 February 2023)

[2023] ZAGPJHC 133

COURT

South Gauteng High Court, Johannesburg

BEFORE

Redman

CASE / FILE NUMBER

2021/51795

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NUMBER: 2021/51795

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

07 February 2023

In

the matter between:

MOTHLATSI
ANNA MBOKANE Applicant
and
SIPHO
EDWIN RADEBE First
Respondent
ANASTASIA
MAMOJOENTSOA RADEBE Second
Respondent
THE
REGISTRAR OF DEEDS Third
Respondent
ESTATE
LATE MAXWELL MBOKANE
(Estate
Number 006303/2016)
Fourth
Respondent
MASTER
OF THE HIGH COURT, JOHANNESBURG Fifth
Respondent
MBENGENI
ANDREW LISHIVHA Sixth
Respondent
LISHIVHA
(ANDREW) INC ATTORNEYS Seventh
Respondent

JUDGMENT

REDMAN AJ

- [1] The applicant is the Executrix of the estate of her late husband Maxwell Mbokane ("the deceased") having been appointed as such on 17 March 2016. At the time of the deceased's death, he was married to the applicant in community of property and the joint estate owned two immovable properties situated in Katlehong ("the immovable properties"). The applicant currently resides in one of these properties.
- [2] On 18 March 2016 the applicant, acting in her capacity as Executrix, signed a power of attorney appointing the sixth respondent to act as an attorney and agent on behalf of the estate. The power of attorney included the power of substitution to appoint any officer of Andrew Lishivha Incorporated (the seventh respondent) to act on the estate's behalf as well as to do all things necessary to administer, liquidate and distribute the deceased estate, to open and operate a banking account, to deal with, alienate, sell, transfer, liquidate or dispose of any immovable property registered in the name of the deceased or any rights in insurance policy and to sign all documents required to give effect thereto.

- [3] According to the applicant, during March 2020 she discovered that the immovable properties had been sold to the first and second respondents. She alleges that she did not consent to the sale of the properties and had given no permission or authorisation to the sixth and/or seventh respondents to sell the properties on behalf of the joint estate. Notwithstanding the alleged lack of consent, the properties were sold to, and transferred into the names of, the first and second respondents.
- [4] The applicant in her founding affidavit contended that there was no cognisable legal causa for the registration of the properties into the names of the first and second respondents.
- [5] The applicant seeks an order against the Registrar of Deeds to reverse the transfer of the properties to the first and second respondents or any third parties and the re-transfer the properties to her. In addition to this relief, the applicant seeks an interdict against the first and second respondents preventing them from disturbing her peaceful undisturbed possession and enjoyment of the two properties together with costs on the scale as between attorney and client.
- [6] The application is opposed by the registered owners of the properties (being the first and second respondents) and the attorneys who had acted on behalf of the applicant in giving effect to the sale and transfer of the properties (being the sixth and seventh respondents).
- [7] The answering affidavits delivered on behalf of the respondents reveal that –
- 7.1. prior to launching the application, the applicant had launched a previous application under case number 14758/20 wherein she sought the identical relief sought in this application ("the first application");
- 7.2. in the first application the first, second, sixth and seventh respondents had delivered answering affidavits;
- 7.3. shortly prior to issuing the current application, the applicant withdrew the first application. No explanation for the withdrawal was tendered.
- 7.4. During 2016 the applicant approached the seventh respondent to assist in the administration of the deceased estate;
- 7.5. After the Letters of Executorship were issued the applicant signed a power of attorney appointing the seventh respondent to deal with the matters in relation to the estate;
- 7.6. The applicant and the deceased's joint estate owned three immovable properties, including the two properties which are the subject matter of this application;
- 7.7. The deceased estate had no cash assets and the applicant accordingly wished to sell the immovable properties.

7.8. Pursuant to the applicant's instructions, the two immovable properties were put up for sale and offers to purchase were received from the first and second respondents. The applicant was consulted about the offers to purchase and advised the sixth respondent that same could be accepted.

7.9. For the transfer of the properties to proceed it was necessary for the transfer to be endorsed by the Master of the High Court in terms of s 42(2) of the Administration of Estates Act, 66 of 1965, and the written consent of all the beneficiaries of the deceased estate was required.

7.10. Three of the beneficiaries refused to give their written consent to the sale of the properties as a result of which the applicant brought an application in the High Court seeking authorisation to sign the necessary documentation to give effect to the transfer of the properties to the first and second respondents. The applicant signed the founding affidavit in support of such application and on 6 August 2019 an Order was granted by the Court authorising the applicant to sign the documentation on behalf of the deceased estate.

7.11. Pursuant to the Court Order the applicant signed the application for endorsement as well as the powers of attorney to pass transfer and all the relevant conveyancing documentation to give effect to transfer of the immovable properties to the first and second respondents.

7.12. The immovable properties were transferred to the first and second respondents.

7.13. On being advised that registration of transfer had taken place, the applicant requested that her inheritance entitlement be deposited into her account but was advised that this could not be done until she had vacated erf 156 Credi Township, Katlehong (being the property occupied by her).

[8] In her replying affidavit the applicant admitted having been consulted about the two offers to purchase made by the first and second respondents and admitted having advised the sixth respondent that he could accept same. She confirmed having instructed the seventh respondent to bring an application on her behalf to obtain authorisation to sign the transfer documents on behalf of the beneficiaries of the deceased's estate.

[9] In the face of the concessions made in the replying affidavit, it is surprising that the applicant persisted with the application. The concessions were destructive of the applicant's case.

[10] In the heads of argument delivered and in argument, the applicant appeared to abandon her claim for the retransfer of both properties. She confined her relief to an order relating solely to erf 413 (Jiyane Street) Skozana Township, Katlehong. The basis for the relief transmogrified from an alleged fraudulent and/or unauthorised transfer of the property into a claim premised on an alleged unfair or inequitable transfer of the property contrary to the provisions of inter alia s 26 of the Constitution.

- [11] In the heads of argument submitted on behalf of the applicant it was submitted that the reversal of the transfer and sale of the immovable property in which she resides would be just and equitable. It was contended that the eviction of the applicant from such property would be against public policy.
- [12] It is immediately apparent that, despite the obvious flaws in this argument, this was not the case made out by the applicant in her founding affidavit and not the basis upon which the applicant approached the Court.
- [13] In essence the applicant now contends that because the agreement relates to the sale of an immovable property in which the applicant resides, the enforcement of such contract would somehow be contrary to public policy.
- [14] Agreements concluded between private individuals are governed by the principle of *pacta sunt servanda* unless they offend public policy. Public policy is determined by reference to the values embedded in the Constitution, including those of fairness, justice and reasonableness. (See *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC)).
- [15] The fact that the property sold is a residential property occupied by the applicant does not in and of itself render the contract contrary to public policy or unenforceable. It is apparent that the applicant was not only aware of the sale of the property but consented thereto.
- [16] The change in tact adopted by the applicant in argument was not identified in any of the affidavits delivered on her behalf. The Constitutional point argued by the applicant was not pertinently raised in the affidavits and does not arise out of the established

facts.

- [17] As indicated above, prior to bringing the current application, the applicant was aware that material disputes of fact would inevitably arise and that such factual issues could not be property resolved on affidavit.
- [18] In her founding affidavit the applicant did not disclose the existence of the first application and made no reference to the previous applications brought by her to authorise her to sign the transfer documentation in respect of the properties.
- [19] It transpires that the primary allegation made by the applicant in her the founding affidavit that she only became aware of the sale agreement during March 2020 is patently false.
- [20] The applicant's conduct in bringing this application and persisting therewith despite the insurmountable hurdles warrants a punitive costs order being granted against her.
- [21] In the circumstances I make an order in the following terms:

The application is dismissed with costs on the scale as between attorney and client.

N REDMAN

Acting Judge of the High Court

Heard:

21 November 2022

Judgment

delivered: 07 February 2023

Appearances:

For Applicant: Adv

K M Molemoeng

Attorneys: Sibanda

Bukhosi Attorneys Inc.

For 1st and 2nd respondents: P M Zwane

Attorneys: Peter

Zwane Attorneys

For 6th and 7th respondents: Adv G M Young

Attorneys: Goertz

Attorneys

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