

SOUTH AFRICA / JUDGMENT

Menyatso v Skosana and Others (5498/2019) [2020] ZAFSHC 254 (19 November 2020)

[2020] ZAFSHC 254**COURT**

Free State High Court, Bloemfontein

BEFORE

Daniso

CASE / FILE NUMBER

5498/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN****Case****number: 5498/2019****In****the matter between:**

MATHOTSE
RUTH MENYATSO
Applicant
And
PRINCE
POGISHO SKOSANA
1st
Respondent
MASECHABA
ELIZABETH SKOSANA
2nd
Respondent
MANGAUNG
METROPOLITAN MUNICIPALITY
3rd
Respondent
HEARD

ON:

20 AUGUST 2020

JUDGMENT

BY: DANISO, J

DELIVERED ON: 19 NOVEMBER 2020

- [1] In this matter the applicant seeks an order to compel the respondents to sign the transfer documents relating to the property house number 10141 Mangaung Location, Bloemfontein and that the Registrar of this court be authorised to sign the transfer documents in the event that the respondents fail to do so.
- [2] The summary of the background facts is the following: On 10 October 2007 the applicant and the first respondent concluded a written sale agreement[1] (the contract) in terms of which the applicant purchased an immovable property from the first respondent on the following terms;-
- [3] At the time of the conclusion of the contract the property was not registered in the name of the first respondent. The property was /is situated in the township and at that time it was subject to the apartheid Regulations[2] which prohibited Africans from owning land in the townships. The occupiers were merely issued with occupational permits. The permit holder in relation to this property was the second respondent, a former spouse of the first respondent.[3]
- [4] On 28 January 2013 the property was registered in the name of the second respondent in terms of section 5 of the Conversion of Certain Rights into Leasehold or Ownership Act.[4] The first respondent ultimately died on 18 January 2016 [5] without having obtained transfer of the property nor having passed transfer to the applicant.
- [5] The application is opposed by the second respondent only. In her answering affidavit the second respondent raised at least four points in limine that: this court lacks jurisdiction to entertain the matter, the claim has prescribed, the written contract which is a subject of this matter is invalid for want of compliance with section 15(2) of the Matrimonial Property Act 1984 and also the non-joinder of the executor of the first respondent's deceased estate.
- [6] The applicant also launched an application for the condonation for the late filing of her replying affidavit. The application is opposed by the second respondent.
- [7] Due to the age of the issue which is a subject of this matter and the fact that the points in limine overlap with the merits and have the potential of disposing of the matter if upheld I ruled that the points in limine and the applicant's condonation application must be argued simultaneously with the merits.
- [8] I find it apposite to first deal with the applicant's application for condonation for the late filing of the replying affidavit.

The condonation application

- [9] It was common cause that the applicant's replying affidavit was filed approximately five days late after the expiry of the time limits provided for in the court rules.
- [10] In her request for condonation the applicant avers that the replying affidavit was due on 09 February 2020 but filed on 16 February 2020. The reasons for the default are set out in paragraph 4 to 14 of her affidavit wherein she inexplicably explains that during the period 09 March 2020 to 13 March 2020 she was away in Johannesburg attending a medical assessment relating to the injuries she sustained in a motor vehicle accident as a result she could not attend to the replying affidavit.
- [11] The delay of five days is indeed not extreme, however, the applicant is still required to give an explanation of her delay with sufficient particularity to enable the court to assess how it came about. In this matter the applicant's explanation for the delay is nonsensical. The applicant has made no attempt to explain the relevance of her unavailability on 09 March 2020 to 13 March 2020 whereas the replying affidavit was due on 09 February 2020. It does end there, except to state that no prejudice can be suffered by the second respondent, the applicant fails to substantiate that conclusion with the grounds upon which she believes that the second respondent will not be prejudiced by her ineptitude. The reasons for the delay and prejudice on the other party are some of the factors that the court takes into consideration when considering whether to apply its discretion in favour of an applicant to grant the requested condonation. The prospects of success on the merits of the application is also a factor to be considered. Good merits can make up for the applicant's ineptitude. In casu in her opposition of the application the second respondent raised points in limine which if upheld has a potential of disposing of the matter. The applicant's response in that regard is simply dismissive. In her answering affidavit and also on the argument by her counsel the contention is merely that the points in limine are "baseless, unfounded and lack merits..."[6]. The applicant's failure to challenge or respond to the applicant's points in limine casts doubt on the applicant's prospects of success on the merits. The absence of a good cause for the delay and also of strong merits renders the condonation of the replying affidavit pointless.
- [12] The applicant has neglected her duties as a litigant. I'm not persuaded that I should come to her assistance and grant her the indulgence she seeks. The application for condonation is accordingly dismissed.
- [13] I now turn to consider the points in limine raised by the second respondent.

Jurisdiction

- [14] It was the second respondent's case the application must be dismissed with costs as only a magistrates' court is clothed with the jurisdiction to adjudicate over this matter. In support of this averment Mr Peyper sought reliance on the provisions section 24(2) and 24 (3) of the Alienation of Land Act 68 of 1981 ("The Act") which provide thus; -

“A court within whose area of jurisdiction land sold under a contract is situated, may, on the application of the purchaser who, by reason of the fact that any person failed to sign a document relating to the transfer of or the payment of transfer duty in respect of such land, is unable to obtain transfer of such land, order the deputy sheriff or messenger of the court concerned, as the case may be, to sign on behalf of any such person any such document, subject to such conditions as the court may determine”.[7] And

“A magistrates’ court shall, notwithstanding the value of the land or claim concerned, have jurisdiction to grant any relief

contemplated in subsection (1) or (2).” [8]

[15] On the other side Mr Khokho counsel for the applicant contended that the second respondent’s submissions in this regard are incorrect and bad in law. While it is indeed correct that magistrates’ courts may adjudicate over applications to compel

transfer of land he however argued that a litigant is not compelled to litigate in the lower court as magistrates’ court can never have jurisdiction over matters that a high court does not have jurisdiction, it’s actually the other way round. A high court has inherent jurisdiction while a magistrates’ court is a creature of statute. The choice of court is only relevant in respect of costs in that in the event that the applicant is awarded costs the court may order that the said costs should be paid at the magistrates’ court scale.

[16] I’m in agreement with the applicant’s contention. The fact that a magistrates’ court has jurisdiction does not bar a litigant from litigating in the high court except that “a litigant instituting proceedings in the High Court when he or she ought to have proceeded in a lower court will be mulcted with in costs so far as such litigant will, if successful in his or her claim, be awarded costs only on the scale applicable in the forum he or she ought to have chosen” (LAWSA Vol 3 Part 2 Second Edition at paragraph 299) cited with approval in *Levin v Corrigan* (45456/17) ZAGPJHC 68 at paragraph 21 decided on 16 April 2020. The provisions of section 24 (1) and 24 (3) of the Act do not confer the magistrates’ court with exclusive jurisdiction to deal with matters involving the Act, they instead extending the magistrates’ court jurisdiction to adjudicate even matters that are ordinarily beyond their jurisdiction. I therefore hold that the second respondent’s objection in this regard is unfounded and is accordingly dismissed.

Prescription

[17] It was argued by Mr Peyper that the application is out of time in that section 24 (1) of the Act requires a purchaser who requires the rectification of a contract to institute such proceedings within a period of two years from the date upon which the contract was concluded. The contract which is a subject of this dispute was allegedly concluded in 2007 over thirteen years ago. The application

must therefore be dismissed with costs.

- [18] It was Mr Khokho's contention that Mr Peyper has wrongly interpreted the provisions of section 24 (1). The applicant is not seeking an order for rectification of a contract therefore section 24 (1) has no bearing on this matter.
- [19] Mr Khokho is quiet correct. Section 24 (1) of the Act only applies to applications for rectification of contracts which do not comply with the formalities as laid down in sections 5 and 6 of the said Act relating to the language and description of the property respectively. There is no merit to this objection, it is also dismissed.

Contract invalidity

- [20] The second respondent contends that the contract upon which the applicant relies is invalid due to the fact that it was concluded in the absence of the second respondent's written consent as a spouse of the first respondent. The contract does not comply with the provisions of section 15(2) of the Matrimonial Property Act
1984. The applicant is also not entitled to take transfer of the property as there is no rates clearance certificate for the local authority and the transfer duty receipt or exemption is also not available. The transfer documents need to be prepared by a duly admitted and practicing conveyancer.
- [21] The applicant's response was that the second respondent was at all material times aware of the contract and she even gave her blessings. At no stage did she dispute its veracity either in its form or on the basis of non-compliance with the provisions of the Matrimonial Property Act 1984.
- [22] I'm of the view that having regard to the facts of this matter, the second respondent's assertions are unnecessary. Ex facie the disputed contract involves only the first respondent and the applicant. It is also an undisputed fact that when the contract was concluded on 10 October 2007 the first and the second respondent were no longer married having divorced on 15 August 1996 approximately ten years before the contract was concluded. The provisions of section 15(2) of the Matrimonial Property Act 1984 are thus not applicable in this matter.
- [23] The validity of a contract can only be challenged by one or both parties to the contract, the seller and /or the purchaser. The seller is deceased, in that regard the correct person to challenge the validity of the contract would be the executor. (*Gross & Others v Pentz*
- [1996] ZASZA 78; [1996] ZASCA 78; 1996 (4) SA 617 (A) at 623 B -625 E). The second respondent was not a party to this contract she is thus not entitled to dispute its validity. For the same reasons, I find it unnecessary to deal with the remainder of the second respondent's objections in this regard. This point in limine is also dismissed.

Non-joinder

[24] It was submitted by Mr Peyper for the applicant that the first respondent in this matter is deceased. The executor of the deceased

estate has a direct interest and substantial interest in the subject matter of the litigation. The executor should have been joined as a party to these proceedings.

[25] Mr Khokho was adamant that it was not necessary to join the executor of the first respondent's deceased estate. Bearing in mind that in matters relating to legal proceedings on behalf of or against a deceased estate the proper person to act in such instances is the executor, I specifically asked Mr Khokho whether it would be conceivable for the court to grant an order against a dead litigant. His response was that no order is being sought against the first respondent which is quiet peculiar considering the fact that in terms of the contract relied upon by the applicant the first respondent was the seller of the property.

[26] The application has not been elegantly set out. There are no valid grounds set out as to why these proceedings have been instituted

against all three respondents. As I have already indicated, the first respondent is deceased. The second and the third respondents were not involved in the sale agreement which is a subject of this application. I'm inclined to agree with the second respondent's

contention that the applicant's non-joinder of the executor of the estate of the first respondent is an anomaly. The point in limine is accordingly upheld.

[27] Taking into consideration the fact that the applicant was resolute that it was not necessary to join the executor of the first

respondent's deceased estate I see no reason to stay the proceedings for that purpose. No such order was requested and since

the court cannot make an order against an incorrect party the application fails to be dismissed in toto.

[28] There is no reason why the ordinary rule of costs following the result should not apply.

[29] For the above reasons, the following orders are made;

(1) The application for an order to compel the respondents to sign the transfer documents relating to the property house number 10141 Mangaung Location, Bloemfontein is dismissed.

(2) The applicant to pay the costs of the application.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. N.D. Khokho

Instructed by: Fixane Attorneys

BLOEMFONTEIN

Attorney on behalf of 2nd Respondent: Mr. P. Peyper

Peyper Lessing Attorneys

- [1] Annexure “RM1” of the applicant’s founding affidavit.
- [2] Regulations Governing the Control and Supervision of an Urban Black Residential Area (GN R1036)
- [3] Annexure “MES5” is a copy of the said permit.
- [4] Act 81 of 1998 enacted on 01 January 1989 to cure the anomaly of depriving Africans of land ownership in respect of the properties they occupied. It repealed the Regulations R1036 by abolishing the permit system and conferred full ownership rights to the occupants.
- [5] Annexure “MES9” is a copy of his death certificate.
- [6] Paragraph 5 of the applicant’s affidavit.
- [7] s24(2).
- [8] s24(3).

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