

SOUTH AFRICA / JUDGMENT

Mills NO v Hoosen (A5007/07)

[2008] ZAGPHC 439; 2010 (2) SA 316 (W) (19 December 2008)

[2008] ZAGPHC 439

COURT

High Courts - Gauteng

BEFORE

T M Masipa, P Boruchowitz, C G Lamont

CASE / FILE NUMBER

A5007/07

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A5007/07

DATE:19/12/2008

In the matter between:

GERHARDUS PHILLIPPUS MILLS N.O..... Appellant

.....(Respondent a quo)

and

ZAHEEDA HOOSEN.....Respondent

.....(Applicant a quo)

J U D G M E N T

MASIPA, J:

- [1] This is an appeal with leave of the court a quo against the judgment of Gildenhuys J handed down on 11 December 2006, declaring an Agreement of Sale pertaining to certain immovable property to be valid and binding.

- [2] The principal issue is whether the agreement complies with the provisions of the Alienation of Land Act 68 of 1981 (the Act). The appellant claims that the agreement is null and void due to non-compliance with section 2(1) of the Act, which 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.”

- [3] The relevant facts are not in dispute and can be briefly stated. The appellant is Gerhardus Phillippus Mills the executor of the deceased estate of the late Anna Johanna Catharina Smith. One of the assets in that estate is an immovable property known as Erf 959, Mayfair, situated at No. 107, 5th Avenue, Mayfair, Johannesburg. In terms of a written power of attorney executed on 13 January 2005 the appellant appointed one

André Kitshoff as his agent to administer and liquidate the deceased estate.

- [4] Acting under the power of attorney Kitshoff appointed Cahi Auctioneers (Cahi) to sell the property by public auction. On 11 July 2006 and prior to the property being put up for auction the respondent, Zaheeda Hoosen, signed a written offer to purchase the property for R370 000. The offer was directed to:

“CAHi Auctioneers of Plot 23 Tygervally, Pretoria, the auctioneers/agents

duly instructed thereto by: (Seller)

ANDRE KITSHOFF

the Provisional Trustee / Liquidator of / the Executor

DECEASED ESTATE ANNA JOHANNA CATHARINA SMITH”

- [5] The respondent's offer was rejected and on 18 July 2006, the property was put up for auction where it was knocked down to the highest bidder for R545 000. The respondent, who was present at the auction, had only bid R430 000. The successful bidder repudiated the sale and the second highest bidder was approached to buy the property but declined to do so. The respondent was then approached and indicated that she was prepared to buy the property at the price bid.
- [6] A decision was then taken, presumably by Cahi and Kitshoff, to accept the respondent's bid. Appropriate amendments were effected to the original offer to purchase the property to reflect the purchase price as being R430 000 and the inclusion of a provision that the respondent pay a deposit of R45
000. The agreement, as amended, was thereafter signed by Kitshoff and the respondent whose signatures were witnessed by the auctioneer. On 19 July 2006 the respondent received a letter of confirmation from Cahi that her offer had been accepted.

- [7] The appellant thereafter repudiated the agreement and indicated that he had received and accepted an offer of R550 000 from a third party for the property. The respondent did not accept the repudiation and applied for an order declaring the agreement of sale to be valid and for an order that the appellant was obliged to pass transfer of the property to her.
- [8] The appellant contends that the agreement does not comply with section 2(1) of the Act as the true seller of the property (the appellant in his capacity as executor of the deceased estate) is not identified or identifiable by admissible evidence. On the face of the agreement Kitshoff as the purported executor is reflected as the seller and there is nothing to indicate that he accepted the offer in a representative capacity.
- [9] The court a quo held that there had been compliance with section 2(1) of the Act. It reasoned as follows: Although Kitshoff had erroneously signed the agreement as executor of the deceased estate and had not indicated that he was the agent of the appellant this was not fatal to the validity of the agreement as Kitshoff in fact had the appellant's written authority to sign the agreement. Under the power of attorney Kitshoff was given the power to liquidate the estate and to deal with it in accordance with the provisions of the relevant legislation pertaining to deceased estates. Implicit therein was the power to dispose of the assets of the estate and to sign any or all required documentation. Moreover, it was apparent from the agreement that the seller was intended to be the deceased estate and not Kitshoff personally.
- [10] Counsel for the respondent submitted that the identification of an incorrect person as the executor was of no importance as it was clear from the agreement that the true seller was the deceased estate. Alternatively it was submitted that if one read the agreement of sale together with the power of attorney it was clear that the appellant was the seller and not Kitshoff.
- [11] It is appropriate to first deal with the respondent's contention that the seller is the deceased estate and that the identification of the incorrect person as the executor was of no importance. This submission necessitates an analysis of the legal nature of a deceased estate and the functions of an executor.
- [12] It has long been recognised in our case law that a deceased estate has no legal personality and consists of an aggregate of assets and obligations.¹ The estate vests in the executor in the sense that dominium of the assets passes to him and he alone has the power to deal with the totality of the estate's rights and obligations.² Under the provisions of the Administration of Estates Act 66 of 1965 the executor is required to administer and distribute the estate according to law and under letters of executorship granted by the Master of the Supreme Court. As the executor alone has the power to deal with the assets of the estate it follows that the executor must be party to the sale of any immovable property belonging to the estate.³ The case of *Tabethe and Others v Mtetwa, NO and Others*⁴ is particularly instructive. This case concerned the provisions of section 1 of Act 71 of 1969 (the precursor to section 2(1) of the Act) and is authority for the proposition that in order to avoid invalidity a deed of sale in respect of estate property must be signed by the duly appointed executor or an agent on the

executor's behalf under the terms of a written authority. The respondent's contention that it matters not whether the agreement of sale was signed by the appellant or Kitshoff is thus without merit. The deceased estate per se cannot be regarded as the seller of the property.

- [13] It is well established that in order to comply with the provisions of section 2(1) of the Act the essential terms of the sale including the identity of the parties (that is of the principals) must appear ex facie the written document embodying the sale. If evidence dehors the agreement is necessary to establish the identity of the seller the agreement is invalid.⁵ The section does not permit an undisclosed or unidentified principal to be a party to the sale. Thus when an agreement is signed by an agent with nothing to indicate that he was signing as agent of the seller the agreement of sale would be invalid. In *Grossman v Baruch and Another*⁶ an agent accepted an offer without indicating that he was signing as agent of the seller. As the identity of the seller did not appear ex facie the deed and evidence to identify the true seller was inadmissible the deed of sale was held to be invalid and could not sustain a cause of action.
- [14] Where an agent purports to act on behalf of one of the parties to the agreement, the existence or fact of the agency may be proved by evidence dehors the actual document constituting the agreement. There is also authority for the proposition that where it is clear from the agreement who the true seller or purchaser is, the fact that the agent has not qualified his signature does not render the document invalid.⁷
- [15] In the light of the above authorities it follows that the appellant as executor of the estate and true seller of the property should have been identified in the sale agreement. Although Kitshoff was authorised to enter into and sign the agreement of sale on behalf of the appellant he did not disclose the fact of such agency. He was obliged to qualify his signature with reference

to his principal's name and to indicate that he was signing qua agent. As recourse to parol evidence is necessary in order to establish the identity of the true seller the agreement of sale does not comply with the provisions of section 2(1) of the Act and is invalid.

- [16] The respondent's alternative argument that a reading of the agreement together with the power of attorney makes it clear that the appellant is the seller cannot be sustained. It is trite that one cannot have regard to an extraneous document to determine the material terms of the sale agreement or to identify the parties thereto unless the extraneous document is incorporated by reference therein. The principle of incorporation by reference has been recognised and applied in regard to contracts for the sale of land.⁸ In the instant case the power of attorney is not referred to in the sale agreement or incorporated by reference therein and accordingly

reference cannot be had to that document in order to identify the true seller in terms of the agreement of sale.

- [17] For these reasons I hold that the agreement of sale is null and void due to non-compliance with section 2(1) of the Act. It follows that the appeal must succeed.

[18] The following order is made:

The appeal is upheld with costs including the costs of two counsel.

The order of the court a quo is set aside and the following order is substituted:

“The application is dismissed with costs.”

T M MASIPA

JUDGE OF THE HIGH COURT

I agree:

P BORUCHOWITZ

C G LAMONT

COUNSEL FOR THE APPELLANTA J HORWITZ SC

.....E LIEBENBERG

INSTRUCTED BY.....J L VAN DER WALT

COUNSEL FOR THE RESPONDENT.....M NOWITZ

INSTRUCTED BY.....SCHINDLERS ATTORNEYS

DATE OF HEARING.....21 APRIL 2008

DATE OF JUDGMENT.....19 DECEMBER 2008

1 Commissioner for Inland Revenue v Emary, NO 1961 (2) SA 620 (A) at 624C; Clarkson NO v Gelb and Others 1981 (1) SA 288 (W) at 293C-D; S A General Electric Co (Pty) Ltd v Sharfman and Others NNO 1981 (1) SA 592 (W) at 597H in fin to 598A.

2 Krige and Others v Scoble and Others 1912 TPD 814 at 819; Minister of the Interior v Confidence Property Trust (Pty) Ltd 1956 (2) SA 365 (A) at 382H; Du Toit v Vermeulen 1972 (3) SA 848 (A) at 856B; S A General Electric Co supra at 598A. Also see 31 LAWSA (First Re-Issue) para 184.

3 See in this regard Krige’s case supra at 819.

4 1978 (1) SA 80 (D) at 84C-D.

5 Mineworkers’ Union v Cooks 1959 (1) SA 709 (W) at 712B-C.

6 1978 (4) SA 340 (W).

7 Hamdulay v Smith NO and Others 1984 (3) SA 308 (C) at B-C and cases there cited.

8 Coronel v Kaufman 1920 TPD 207 at 209 and 210; Van Wyk v Rottcher’s Saw Mills (Pty) Ltd 1948

(1) SA 983 (A) at 990-991.

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