

SOUTH AFRICA / JUDGMENT

Mokumo v Semosa and Others (2023/054043) [2024] ZAGPPHC 1392 (19 December 2024)

[2024] ZAGPPHC 1392

COURT

North Gauteng High Court, Pretoria

BEFORE

R Ramawele

CASE / FILE NUMBER

2023/054043

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 2023-054043

(1) REPORTABLE: NO

(2)

OF INTEREST TO THE JUDGES: NO

(3)

REVISED.

DATE:

19/12/24

SIGNATURE:

In

the matter between:

MOSIBUDI
NURSE MOKUMO
APPLICANT
and
RAMAILA
FRANK SEMOSA
FIRST RESPONDENT
NTHABISENG
PHILLIP RAMASELELE
SECOND RESPONDENT
RIKA
LOTIE BHUDA
THIRD RESPONDENT
ETIENNE
CHAMPION
FOURTH RESONDENT

JUDGMENT

Ramawele AJ

Introduction

[1] This is an application whereof the Applicant seeks the following relief:

[1.1] An order setting aside the sale of immovable property ERF 8[...], QUARTZ STREET, NELLMAPIUS, EXTENSION 7 to the Second and Third Respondents.

[1.2] The sale agreements that led to the transfer of the immovable property referred to in prayer 1 to the Second and Third Respondents be declared null and void.

[1.3] The Fifth Respondent is directed to transfer the property to the Applicant.

Facts

[2] The Applicant and the First Respondent ("the parties") were never married but lived together as husband and wife since 3 February

1984. Out of this union six children were born and one of them has since passed away. All the other children are now adults.

[3] During the subsistence of the union, the parties acquired an RDP (Reconstruction and Development Programme) house. On 10 December 2012 the Metropolitan City of Tshwane transferred the immovable property into the names of the parties. The parties then became the joint owners of immovable property.

[4] The parties separated from each other in March 2021.

- [5] After the death of one of the parties' children, namely, Mapula Lucy Semosa, the Applicant moved out of the RDP house and went and lived at her deceased daughter's house together with the deceased daughter's children.
- [6] One of the parties' sons, Phonkie Moxe Semosa moved into the RDP house during 2014 but later moved out when he found work in Soshanguve. The other son Nemest Meshack Semosa then later moved into the house in 2019. For reasons not important for the determination of the issues herein, the two sons subsequently moved out of the property.
- [7] During August 2021 the Applicant came to Pretoria to address the First Respondent's habit of forbidding his children from staying in the RDP house. Upon her arrival, the Applicant found the Second Respondent in the RDP house who informed her that he had purchased the immovable property from the First Respondent and that the property now belonged to him.
- [8] Upon further inquiry, the Applicant discovered that the property was in fact transferred into the name of the Second Respondent on 5 July
2021. There is also a power of attorney to pass transfer dated 23 June 2021, purportedly signed by the Applicant given to the conveyancer when the Applicant was no longer living with the First Respondent. The Applicant denies that she ever signed such a power of attorney and alleges that it is fraudulent.
- [9] Only the Second Respondent opposes this application, and he was represented by Mketsu & Associates, but the application later proceeded without the attorney's appearance. I return to this issue below.
- [10] Although the purchase agreement makes provision for the signature of both parties and witnesses, there is no corresponding witness' signature with the signature purporting to be that of the Applicant. I must add that the purchasers also do not have corresponding witness' signatures to their signatures. Nothing really turns on this issue and I do not intend to pursue it further.
- [11] In reply, the Applicant states that the purchase price was paid directly to the First Respondent and that conceivably, the Second Respondent ought to have known that he was dealing with one party only.

Application for postponement

- [12] At the hearing of the application, Adv Phanduka appeared on behalf of the First Respondent and informed the court that the Second Respondent's attorney, Mr Mketsu, who was acting pro bono on behalf of the Second Respondent, was ill. Upon further inquiry, Adv Phanduka informed the court that Mr Mketsu only called him at or about 09H15 that morning to request a postponement. Mr Mketsu did not know that Adv Phanduka would be appearing in court but had assumed that Adv Phanduka might be appearing. The Applicant opposed the application for a postponement.

- [13] Having heard the parties I was of the view that the application for a postponement had no merit and stood the matter down until 12h00 hoping that some sanity might prevail, and more facts might be brought forward in respect of the matter. At twelve o'clock there was no appearance on behalf of the Second Respondent, not even Adv Phanduka bothered to attend court. However, I have taken the facts as contained in the Second Respondent's answering affidavit as well as his Heads of argument into account in arriving at my conclusion.
- [14] During her submissions, Adv Ramela (for the Applicant) conceded that the Second Respondent was initially a bona fide purchaser but that he ceased being a bona fide purchaser after being informed in August 2021 that the Applicant was the joint owner of the immovable property. Apparently, the First Respondent sold the property to another person. This third person, so argues Adv Ramela is the real bona fide purchaser.
- [15] This third person who purchased the property is unknown and not much is said about this person in the application. Accordingly, this person has not been served with the papers.

Analysis

- [16] This case is about the rights of a joint owner whose property was sold without her knowledge or consent and the rights a bona fide purchaser, the Second and Third Respondents or any other party that may have purchased the immovable property from the Second Respondent.
- [17] According to the Applicant she had no knowledge of the sale of property and that the signature on the power of attorney to transfer was forged.
- [18] Although served with this application, the seller of the property, the First Respondent who is also the Applicant's ex-partner, has elected not to participate in these proceedings.
- [19] The question arises whether the Applicant is entitled to the relief that she seeks.

The law

- [20] It is not in dispute that the primary house of the Applicant has been transferred into the name of the Second and Third Respondents, and possibly a third person or party.
- [21] The material facts in this application are that when the immovable property was sold or when the power of attorney to transfer was allegedly signed by the Applicant, the parties were no longer living together and there was also acrimony between the parties. Such circumstances lend credence to the Applicant's version that she was not aware that her property was sold or that she had not consented to such sale of the property.

- [22] I have doubts that the Second Respondent did not know that the Applicant, although being the joint owner of the property, was not a party to the sale agreement. In the circumstances leading to the signing of the purchase agreement, one would reasonably expect that the Second Respondent would have realized that the co-owner of the property was not a party to the negotiations. I therefore have my reservations whether the concession made by Counsel for the Applicant that the Second Respondent is a bona fide purchaser was properly made.
- [23] Be that as it may, even if I am wrong that the Second Respondent is not a bona fide purchaser, the conclusion that I have arrived at is still the same.
- [24] Of importance is the fact that if there is a defect in the real agreement, no transfer of ownership will take place. See: *Legator Mckenna Inc and Another v Shea and Others*[1] where the court stated that "Although the abstract theory does not require a valid underlying contract e.g sale, ownership will not pass-despite registration of transfer-if there is a defect in the real agreement"[2].
- [25] The Court in *Legator* thus confirmed that the abstract theory of ownership also applies in the case of transfer of immovable property by holding that "in view of this body of authority I believe that the time has come for this Court to add its stamp of approval to the viewpoint that the abstract theory applies to the immovable property"[3].
- [26] As I have indicated above, the probabilities are overwhelmingly in favour of the Applicant's version that she did not sign the power of attorney to transfer the immovable property. The parties were no longer living together and the First Respondent had obtained a protection order against his own children to force them out of the house. One can hardly expect that under these circumstances, the Applicant and the First Respondent would come together and negotiate the selling of the house.
- [27] In any event, the Applicant alleges that she has never received her portion of the proceeds of the sale of the property, and notwithstanding such allegations, the First Respondent has decided not to participate in these proceedings and put his version across.
- [28] It is also so that the mere fact that the property was registered in the name of the Second Respondent or any other person or entity, does not solidify the validity of the transfer. In the case of *Meintjies No v Coetzer and Others*[4] the court stated that "in any event, the mere registration does not afford proof of ownership"[5].
- [29] In *Nedbank Ltd v Mendelow and Another NNO*[6] the court stated that "However, if the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass"[7].

- [30] The evidence is overwhelming that there was fraud committed by the First Respondent in selling the immovable property. The sale agreement is accordingly tainted by fraud and cannot be allowed to stand. However, since this is joint property, the order that I propose to make is for the transfer of the property into the names of both the Applicant and the First Respondent. The Applicant is not entitled to have the immovable property registered in her name only because she is a joint owner and not a sole owner of the property.
- [31] What the parties do about the immovable property is not for this court to decide. Similarly, how the First Respondent would account to the Second and Third Respondents is for him alone to grapple with. The First Respondent made his bed and must lie in it.
- [32] In my view, where a property which is jointly owned by two parties and the other party sells the property without the knowledge or consent of the other party, ownership will not pass to the purchaser.

Order

In the result I make the following order:

- [1] The sale of immovable property ERF 8[...], QUARTZ STREET, NELLMAPIUS, EXTENSION 7 to the Second and Third Respondents or any other third party is declared invalid and set aside.
- [2] The sale agreements that led to the transfer of the immovable property, being ERF 8[...], QUARTZ STREET, NELLMAPIUS, EXTENSION 7 to the Second and Third Respondents and any other third party is hereby declared null and void.
- [3] The Fifth Respondent is directed to transfer the immovable property to wit ERF 8[...], QUARTZ STREET, NELLMAPIUS, EXTENSION 7 into the names of both the Applicant and the First Respondent.
- [4] No order as to costs.

RATHAGA RAMAWELE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of hearing: 26 November 2024

Date of judgement: 19 December 2024

Appearances:

For the Applicant: Boipelo Ramela instructed by Jenkins Attorneys INC

- [1] 2010 (1) SA 35 (SCA)
- [2] Id paragraph [22]
- [4] 2010 (5) SA 186 (SCA)

[5] Id paragraph [13]

[6] 2013 (6) SA 130 (SCA)

[7] Id paragraph [14]

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