

SOUTH AFRICA / JUDGMENT

Motsielwa v Rakgokong and Another (M 491/2022) [2023] ZANWHC 86 (22 June 2023)

[2023] ZANWHC 86

COURT

North West High Court, Mafikeng

BEFORE

Gura

CASE / FILE NUMBER

M 491/2022

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Policy**IN THE HIGH COURT****OF SOUTH AFRICA****NORTH WEST****PROVINCIAL DIVISION, MAHIKENG****Case****No.: M 491/2022****Reportable:**

YES / NO

Circulate

to Judges: YES / NO

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to Magistrates: YES / NO

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to Regional Magistrates: YES / NO

In

the matter between: MAGDELINA
 SINAH MOTSIELWA
 Applicant
 and
 SAMUEL
 ITUMELENG RAKGOKONG
 1st Respondent
 ISABEL
 RAKGOKONG
 2nd Respondent
 CIVIL
 APPEAL
 GURA
 J

JUDGMENT

Introduction

[1] The applicant seeks the following relief:

1.1 that the first and second respondents (“the respondents”) be directed to co-operate with any processes and steps to be taken by the Applicant to sell the immovable property described as Section 9 L[...], Sectional Scheme number 813/2003 situated at 1[...] L[...] Street, Erf 1[...] Rustenburg, held by Deed of Transfer S[...] (“the property”), including but not

limited to granting the Applicant, the Applicant’s duly appointed agent/s and prospective purchasers access into the property

for the purpose of viewing it with the intention to sell it;

1.2 that the respondents be forthwith interdicted and restrained from denying the applicant, the applicant’s duly appointed agent/s and prospective purchasers access into the property for the purposes of viewing it with the intention to sell it;

1.3 that in the event that the respondents and/or those acting under their instruction fail to comply with the above orders, any member of the South African Police Service be authorised to accompany the applicant, the applicant’s duly appointed agent/s and/or prospective purchasers to the property to ensure that they gain access to the property for the purposes of viewing it with the intention to sell it; and

1.4 that the respondents be ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved, on the attorney and client scale.

The applicant’s version

- [2] During or about 29 June 2007, the Respondents and the Applicant purchased the property from its erstwhile owners and transfer of the property from the names of the erstwhile owners to the names of the Applicant and the Respondents was finalized on or about 31 October 2017.
- [3] When the applicant and the respondents purchased the property, they had a verbal agreement that the respondents would reside on the property and pay for all costs associated with the property, such as the monthly repayment of the home loan, levies, municipal rates and taxes, costs of repairs and insurance (“costs associated with the property”), and that the applicant would not be liable for any of the said costs. The reason that the applicant purchased the property with the respondents was so that the respondents could benefit from the applicant’s good credit rating, which then enabled them to obtain finance in order to pay the purchase price of the property. The applicant did not, at that stage, have any intention of residing on the property.
- [4] As a result of applicant’s good credit rating, the respondents were able to obtain a home loan from ABSA Bank, with the applicant also recorded therein as a co-debtor, which enabled them to purchase the property. The property was registered in the names of the applicant and the respondents.
- [5] From the date of transfer of the property into the names of the applicant and the respondents, the respondents have resided on the property but have constantly struggled to pay the costs associated with the property, particularly the repayment of the home loan to ABSA Bank, the payment of levies to the body corporate tasked with managing the sectional title in which the property is situated
- (“the body corporate”) and the municipal rates.
- [6] As a result of the failure by the respondents to repay the home loan, ABSA Bank instituted foreclosure proceedings against the applicant and the respondents, which culminated in an application for default judgment during or about October 2020 (“the foreclosure proceedings”). In order to avoid the sale of the property in execution, the applicant and the respondents agreed that due to the fact that the respondents were unable to pay the costs associated with the property, it would be best that the respondents sell their half share in the property to the applicant.
- [7] On 13 November 2020, at Rustenburg, a written Agreement of Purchase and Sale of Immovable Property (“the sale agreement”) was concluded between the applicant and the respondents, in terms of which the respondents agreed to sell their half share in the property to the applicant. The said agreement is Annexure FA6 to the founding affidavit. In terms of the sale agreement, the respondents undertook, immediately upon being requested to do so, to sign all documents required to be signed in connection with the transfer, the cancellation of all bonds at present registered over the property and registration of all bonds to be registered in terms of the sale agreement.

[8] In addition to the sale agreement, the respondents also executed two special powers of attorney on 15 November 2020 in which they:

8.1 authorised their appointed agents to sign documents on their behalf for their half share in the property to be transferred to the applicant; and

8.2 authorised their appointed agents to, in their name, place and stead, appear at the office of the REGISTRAR OF DEEDS, PRETORIA, or any other competent official in the Republic of South Africa to pass transfer of their half share in the property to the applicant.

[9] On the basis of the sale agreement and the powers of attorney, the applicant, through her attorneys, successfully negotiated a settlement with ABSA Bank that would ensure that the property does not get sold in execution. In terms of the settlement agreement, the applicant would pay a monthly amount of R7 000.00 to ABSA Bank, effective from 1 December 2020.

[10] The Applicant has fulfilled all her obligations to ABSA Bank in terms of the settlement agreement and has also complied with the terms of the sale agreement as they related to her. The applicant has therefore acquired all the rights previously held by the respondents over the property by virtue of their half share, despite the fact that transfer of the respondents' half share to the applicant has not yet taken place.

[11] As the holder of all ownership rights over the property, the applicant set out to sell the property and for that purpose appointed an estate agent to assist with the sale of the property. The respondents have refused to give the applicant's duly appointed agent access to the property for the purposes of viewing it with the intention to sell it.

[12] A valid and binding sale agreement was concluded between the applicant and the respondents in terms of which the respondents sold their half share in the property to the applicant. The applicant has complied with all her obligations in terms of the sale agreement. To date, the respondents have not taken any steps to have the sale agreement declared invalid or set aside. It therefore remains valid and binding between the parties.

The respondents' case

[13] The two respondents are husband and wife. The second respondent is the first daughter of the late Mr Isaac Mante Motsielwa and the applicant. The respondents' understanding is that the property in question is owned jointly by the applicant and the two respondents. The applicant's involvement in this matter was that she wanted to help the respondents.

[14] On or about June 2007 the respondents wanted to purchase immovable property for residential purposes but they did not qualify for a loan because of the level of their salaries. The two then approached the applicant for assistance so that they could get a home loan. Their mother agreed to assist and the respondents did not doubt her bonafides in this regard because they knew that she had her own house at Tsitsing village.

- [15] The three then approached Eezybond Bond Originals which assisted them to complete the necessary forms. This was on 11 June 2007 when they signed these forms. The first respondent signed and the applicant, whilst the second respond and the applicant signed the forms as co-applicants to a home loan application. On 29 June 2007, the two respondents, assisted by Eezybond Properties, signed an offer to purchase the property in question. It was agreed between the three that the bond is repaid by the respondents. At that stage the applicant was employed as an educator in the department of education. If the applicant was a co-owner of this property as she alleges, there would be no reason why she should not be contributing financially towards repayment of the bond. The respondents would not have agreed to that given their financial circumstances.
- [16] The applicant misrepresented her marital status as unmarried when the trio applied for a home loan. The reason for this, she said, was that the property should not be perceived as part of her joint estate with her husband. Through the involvement of the applicant, the respondents managed to obtain a home loan from ABSA Bank. The respondents admit that for five months they did not pay their instalments due because they were unemployed. It was in sequel to their default in payment that ABSA applied for default

judgment.

Only after this application for default judgment did applicant make payments towards the home loan of this property.

- [17] Both respondents are now gainfully employed and they have started making payments. The first is working at Steel Trading, In August 2021 the first respondent negotiated with the local municipality of Rustenburg to reduce their rates and taxes debt. In September 2021 the municipality reduced their debt to R11 356-53. When the summons were issued and served on the applicant and the respondents they were in arrears of R49 586-34 and that was on 12 April 2019. On 4 June 2020 the arrears were now amounting to R 27 166-65.
- [18] On 4 November 2020 the applicant informed the respondents that she was able to settle the outstanding debt at ABSA provided that the respondents sell the property to her, and once she has bought the property, the respondents can later decide whether they still wanted to buy the property from her or not. The respondents were not prepared to sell this property to their mother because this was their only family home. They suggested to the applicant that she should only pay the arrears on the property in order to save it from the auction. They promised to refund her money if she settled the arrears as at that time. The first respondent informed the applicant that he had prospective tenants to this property and that they could use their rental payment to pay ABSA home loan. The prospective lessee was prepared to occupy the property at the beginning of January 2021.
- [19] The applicant wanted to be the sole owner of the property, something which the respondents did not want to agree to. The applicant then informed them that she would secure a meeting with her attorney for the three of them to meet the attorney. That meeting

with the attorney however never took place but on 13 November 2020 she brought a document and insisted that the respondents have to sign if they wanted her to save the house from being auctioned. Without reading that document, both respondents signed it. This document is annexure FA6 to the founding affidavit. On the last page of annexure FA6, the respondents aver that the applicant signed as the purchaser of the property. She (applicant) further signed as witnesses for both purchaser and seller. The applicant's children whose names appear as witnesses to this agreement were not present when, annexure FA6 was signed. The respondents never sold this property to the applicant.

[20] The respondents submit that all the applicant is up to is to enrich herself unduly. Since 2007 the respondents have been paying for the property. The applicant contributed nothing towards the payment of the ABSA home loan except for the amount of arrears from November

2020. There was no agreement by the respondents that they shall be liable for costs associated with the property as averred by applicant. ABSA is still debiting the first respondent's bank account in payment of the home loan. Therefore, the respondents are still the owners of this property.

Points in limine

[21] The respondents have raised two points in limine to wit non - joinder of ABSA and a material dispute of fact. I deal first with non-joinder. The test for joinder is whether or not a party who

seeks, to be joined has a direct and substantial interest in the subject matter of the application, that is, a legal interest in the subject matter which may be affected prejudicially by the judgment of the Court.[1] The real question is whether ABSA will be prejudicially affected by a judgment as sought by the applicant. Currently there is a bond registered in the Deeds Office over this property in favour of ABSA. This bond will never be cancelled unless ABSA has been paid in full what it is owed on this property being the loan which it advanced to the applicant and the respondents plus interest. It is my view therefore that the judgment in this case will never prejudicially affect the rights of ABSA when it is implemented. The respondents' submission to the contrary is misplaced.

[22] The second point in limine is what the respondents termed 'there are issues in dispute which cannot be disposed of by way of application proceedings'.

A real, genuine and bona fide dispute of fact can only exist where the Court is satisfied that the party who purports to raise the dispute of fact has seriously and unambiguously addressed the facts to be disputed.[2] When I deal with the merits of the application infra it will become clear whether or not there is a genuine and bona fide dispute of fact taking into account that the court has "to apply a robust common sense approach"

Analysis

of the whole merits of the application

[23] On 13 November 2020 at Rustenburg a written Agreement of Purchase and Sale of Immovable property (annexure FA6) was concluded between the applicant and the respondents. In terms of the sale agreement, the respondents freely and voluntarily agreed to sell their half share in the property to the applicant. The rationale behind this sale agreement was to save this property from execution. The property would have been sold there and then by ABSA in execution but for the intervention of the applicant. As regards the respondents, they were helpless, they had no plan to save the property from the auctioneer's

hammer. The respondents aver that they signed the sale agreement without reading it. If that is the case, they have themselves to blame for it. The fact is, they had the sale agreement for three days before signing it and they had it (annexure FA6) at their house. The sole purpose of taking the sale agreement for three days before signing it was to study its terms.

[24] Their current averment that they never perused the sale agreement is so far-fetched that no reasonable court will believe. Why then, in their view, did ABSA not execute the house if there was no arrangement with ABSA by the applicant? They were happy to enjoy the fruits of applicant's intervention with ABSA hence no one troubled them with execution after the applicant's prompt intervention. Not only did the respondents sign the sale agreement but in addition thereto they executed two special powers of attorney on 15 November 2020 in which they:

- authorised their appointed agents to sign documents on their half share in the property to be transferred to the applicant; and
- authorised their appointed agents to, in their name, place and stead appear at the office of the Registrar of Deeds, Pretoria, or any other competent official in the Republic of South Africa to pass transfer of their half share in the property to the applicant.

[25] The sale agreement placed certain obligations on the Applicant. It is common cause that she has since negotiated with ABSA and entered into a Settlement Agreement with ABSA. She has complied with all the terms of the sale agreement with the respondents. Applicant has complied with the settlement agreement with ABSA. She has paid her monthly instalments promptly, under these circumstances the court finds that she has acquired all the rights which were previously held by the respondents over the property by virtue of their half share. The court declares that what was the respondents' half share on this property has been acquired by the applicant. Consequently, the respondents have no claim of right over this property any longer and they have no power to stand in the applicant's way when she wants to deal with the property as she pleases. The fact that the property is currently still registered in the names of both respondents and the applicant is no bar against the applicant when

she exercises ownership rights over the property.

[26] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily.[3]

Costs

[27] The applicant urged this Court to mulct the respondents with a punitive cost order on the ground that they were forewarned that if they persisted with their failure to co-operate with the applicant, they would be liable for costs as between attorney and client. I am not satisfied that the said reason alone would justify this Court to punish the respondents with a punitive costs order.

Order

[28] Consequently, the following order is made:

28.1 The first and second respondents are directed to co-operate with any processes and steps to be taken by the applicant to sell the immovable property described as section 9 L[...], Sectional Scheme number 813/2003 situated at 1[...] L[...] Street, Erf 1[...] Rustenburg, held by Deed of Transfer S[...] (“the property”), including but not limited to granting the applicant, the applicant’s duly appointed agent/s and prospective purchasers access into the property for the purposes of viewing it with the intention to sell it;

28.2 The respondents are forthwith interdicted and restrained from denying the applicant, the applicant’s duly appointed agent/s and prospective purchasers access into the property for the purposes of viewing it with the intention to sell it;

28.3 In the event that the respondents and/or those acting under their instruction fail to comply with the above orders, any member of the South African Police Service is authorised to accompany the applicant, the applicant’s duly appointed agent/s and/or prospective purchasers to the property to ensure that they gain access to the property for the purposes of viewing it with the intention to sell it; and

28.4 The respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

SAMKELO GURA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING: 02 JUNE 2022 DATE OF JUDGMENT: 22 JUNE 2023 COUNSEL FOR THE APPLICANT: ADV. N S NXUMALO COUNSEL FOR THE RESPONDENTS: In Person

[1] Aquatur (Pty) Ltd v Sacks 1989 (1) SA 56 (A) at 62A-E.

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- [2] Wightman t/a J W Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA).
- [3] Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017) at para 23.
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