

SOUTH AFRICA / JUDGMENT

Nkwana v Lekgoathi and Another (34680/2015) [2017] ZAGPPHC 193 (17 May 2017) [2017] ZAGPPHC 193

COURT

North Gauteng High Court, Pretoria

BEFORE

G B Rome

CASE / FILE NUMBER

34680/2015

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

CASE

NO: 34680/2015
17/5/2017

Reportable:

No
Of
interest to other judges: No
Revised.
In
the matter between;
MARY
NKWANA Applicant
and
MPHO
LEKGOATHI First
Respondent
Registrar
of
Deeds Second
Respondent

JUDGMENT

ROME AJ:

1. In this matter the applicant seeks an order that the "sale registration and transfer" of an immovable property to the first respondent be set aside.
2. The property is described as Erf 422 Mamelodi East ("the property"/"the immovable property").
3. The basis of the application is said to be that the property was once owned by a Mrs Selina Mapoti ("the deceased").
4. The deceased is alleged to have died on 17 July 2013; the applicant alleges that she was both the executrix of the deceased and her niece.
5. The deceased, according to the applicant, died testate.
6. The application is based on a will dated 14 June 2012 in which the deceased is alleged to have made the deceased the "beneficiary to the property above". The applicant alleged that she is the executrix of the estate.
7. The applicant annexed a copy of the will to her founding affidavit.
8. The terms of the will do indeed provide for a bequest of the immovable property to the applicant. The applicant is nevertheless in terms of the will, not the nominated executrix; rather the executor nominated under the will is a third party (Mmumsetsi Sefanyetso).
9. The applicant did however annex to her affidavit a letter of authority dated 11 November 2013 (appointing the applicant) from the Master of the High Court.
10. There is nevertheless no indication in the founding affidavit how this letter of appointment could be reconciled with the deceased's above direction as to who her executor was to be.
11. in his answering affidavit the first respondent averred that she acquired title to the property under a deed of transfer registered with the Deeds Registry Office on 14 March 2014.
12. This transfer thus postdates the death of the deceased.
13. The first respondent however averred that as she had already entered into an underlying sale agreement for the purchase of the property, prior to the death of the deceased, the asset was not really that of the deceased to have bequeathed at the time of her death.

14. This contention by the first respondent loses sight of the fact that transfer of property under our law is governed by the abstract theory of property.
15. In *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) the SCA held (at paras 21 and 22 of the judgment that

The time has come for this court to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well. In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property, is effected by registration of transfer in the Deeds Office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Ke/ (Edms) Bpk hla Merkel Motors v Bodenstein* 1980(3) SA 917 (A) at 922E-F; *Dreyer and Another NNO v AXZS Industries (pty) Ltd* (supra) para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass -despite registration of transfer - if there is a defect in the real agreement (see eg *Preller v Jordaan* 1956 (1) SA 483 (A) 496; *Klerck NO v Van Zyl and Maritz*

16. At the time of the transfer of the property the only person who could have had the requisite intention to transfer the property (regardless of any underlying causa), would have been the executor of the estate.
17. This is so because it is trite that at the time of the death of the erstwhile owner his property passes into his estate and falls to be dealt with by his executor or trustee of his estate.
18. In this matter the transfer to the first respondent was ex facie the transfer deed executed under power of attorney dated 27 March 2013^[1] granted to the transferor by the representative of the estate late Mdagi Simon Mapoti and Selina Mapoti (the deceased) in her then

capacity as surviving spouse; this does raise some concern as to:

- a. who precisely represented the estate or the executor of the deceased when the transfer was effected; and
 - b. whether such person's intention to effect transfer could be properly attributed to the estate of the deceased?
19. Had the applicant in fact been the executrix in the estate she may thus have made some progress or traction in regard to attacking the registration of the deed of transfer.
 20. The applicant however did not attend at the hearing, whether represented by her attorneys of record, counsel or in person.

21. The applicant instead purported to file a document titled "notice of motion" in which she sought to join three persons to the present application (also referred to hereafter for convenience as "the main application") and to stay the main application until the joinder has been effected. This document was served on the first respondent whose counsel handed up a copy thereof to this Court at the hearing of the application.
22. The above "notice of motion" is dated 10 May 2017 ("the May notice"). There is no indication therefrom whether the relevant three persons sought to be joined were (or are to be) served with the application for their joinder. Certainly there is no indication from the document itself that they were so served.
23. Absent any indication of service of the May notice on the three individuals sought to be joined and given the non-appearance of the applicant, the application in the May notice (to the extent that it was even properly before this Court, which is doubted) for a stay is without foundation.
24. This Court however makes no ruling at this time on the application for joinder, as the May notice of motion somewhat strangely (given the nature of the relief sought in regard to the stay), provides that notice of opposition to the joinder application is to be given by 15 June 2017 and it further states that absent such opposition the joinder application will be heard on 21 August 2017; i.e. some 3 months after the date of the present hearing.
25. At this stage it suffices to note that the application in the May notice for a stay of the present hearing even if it was properly
before this Court (which is doubted) ought not to be granted for the reasons set out in this judgment.
26. In respect of the main application the application for the setting aside of the transfer of the property falls to be dismissed.
27. This is so because in the affidavit (dated 10 May 2017) annexed to the May notice, the applicant alleges that the Master of the High Court "cancelled the letters of authority issued in my name".
28. The applicant thus on her own version has no locus standi in these proceedings as she is not (on her own version) charged with attending to the affairs of the estate of the deceased. The current executors (purportedly the three people she seeks to join) would on the applicant's version be the correct applicants.
29. The applicant has in her affidavit however disclosed no indication nor facts as to why she would after the above cancellation have any locus to continue to prosecute the main application. (Likewise in her affidavit of 10 May 2017 she sets out no proper reasons for a stay of the hearing of the main application in such circumstances).

30. Given the applicant's unexplained and seemingly inexplicable non- appearance there is a temptation to grant costs on a punitive scale because of the disrespect shown to this Court.
31. Counsel for the first respondent requested a punitive costs order when the matter was called. On consideration and given the somewhat vague identification of precisely who on behalf of the deceased estate apparently authorised the transfer of the property, it appears inappropriate to grant a punitive costs order.
32. No order needs be made in respect of the balance of the relief sought in the May notice.
33. In the result the following order is made.

"1. the application for a stay of the hearing of the application is dismissed.

2. The application is dismissed with costs."

G B ROME

ACTING JUDGE OF THE HIGH COURT

- [1] I.e., a mere 3 months before the death of the deceased and which power of attorney would in any event have terminated in respect of the deceased on her death. It appears that the deceased's interest in the property at the time of the above sale was that she was the executor of her husband's estate and she had an interest in the property as the surviving spouse

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Prepared on 11 October 2026 · Esheria