

SOUTH AFRICA / JUDGMENT

N.N.P v C.B.S and Others (2021/59500)

[2023] ZAGPJHC 1357 (21 November 2023)

[2023] ZAGPJHC 1357**COURT**

South Gauteng High Court, Johannesburg

BEFORE

PH Malungana

CASE / FILE NUMBER

2021/59500

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII Note:**

Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBER:

2021/59500
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
In

the matter between:

N.N.P
Applicant
And
C.B.S
First
Respondent
N.T.S
Second
Respondent
M.D.P
Third
Respondent

JUDGMENT

MALUNGANA AJ

Introduction and background facts

[1] The applicant in the present case is one of the surviving children of the late B P (“the deceased”). By way of a notice of motion she seeks to have a contract of purchase and sale of the deceased’s immovable property declared null and void, on the ground that the deceased was, owing to physical and mental infirmity, incapable of understanding and asserting to it, and

that she was improperly persuaded and unduly influenced to execute it.

[2] It appears from the record that the matter originates from urgent court where it was struck off for lack of urgency. On 25 January 2023, I remitted this matter for viva voce evidence after it became clear to me that a genuine dispute of fact exists that cannot be resolved on the papers.

[3] The relief sought by the applicant is grounded on the following allegations. On 1 July 2021, the first and second respondents purchased from the deceased, certain immovable property situated at Erf[...], Emfihlweni Township, Tembisa, for a purchase price of R250 000. When the deceased passed on in January 2022, the property had already been transferred and registered in the names of the first and second respondents. The applicant contends that the deceased had a history of mental and physical disability. Her behaviour did not demonstrate the conduct of someone with a sound mind. Furthermore, she suffered from strokes and other chronic

ailments during her lifetime. For her contentions, the applicant relied on the report compiled by Dr J A Smuts, a neurologist, and a medical record obtained from the Tembisa hospital.[1]

[4] It is worth noting, at the outset, that in compiling his report Dr Smuts did not consult nor physical exam the deceased. His report is based on the clinical records and other collateral information provided to him by the applicant, as well as other related medical materials.[2]

[5] Dr Smuts’ analysis of the records from Tembisa Hospital revealed the following medical history of the deceased:

.

“1.1 Medical History.

General Medical History: Hypertension and Sugar.

Mildly obese

Sexual assault admission to Cape Hospital – admitted for blistering, bruising arm, buttock and the back.

Surgery: Total abdominal hysterectomy 1985 – due to “lesions” in the uterus.”

[6] The hospital records further reveal that in January 2016 she was diagnosed of Uncontrolled blood pressure, oedema, in January 2017 she was diagnosed of Uncontrolled HPT and Pulmonary Edema, left R11 and was sent to abdominal LAP, and in January 2021 she was diagnosed of stroke.

[7] He opines that the deceased had neurological deficits and proven ischaemic infarctions of the brain. He also opines that she had a brain atrophy. However, infarctions and atrophy do not directly relate to cognitive impairment, although it is very often associated.[3]

[8] Importantly, Dr Smuts states in paragraph 5 of his report that:

“To try to establish the cognitive ability of the patient, other facts known and facts related to her conduct, must preferably be evaluated.

- a. I was informed that she was in fact mentally disturbed for years. Her behaviour was not of someone with a sound mind.
- b. Over and above that, she could not walk, or bath herself without assistance.

These facts seem to be known to many people and thus should be verified and can then be added to the known medical facts to construct a complete picture of the cognitive ability of the patient and her ability to conduct any form of discussion making.

(c) It is further noted that the patient was chronically ill.

- On 09/01/2016 it is noted that she had uncontrolled blood pressure oedema.
- On 09/01/2017 she was admitted to the Tembisa Hospital with diagnosis of uncontrolled HPT and Pulmonary Edema. Left RII Most likely diastolic dysfunction.
- The other medical records confirm that she was obese and had orthopaedic as well as gynaecological problems.”

[9] Dr Smuts’ conclusion on the mental status of the deceased was that she was indeed cognitively impaired and most likely demented after the stroke on 6 January 2021. She had a speech impairment described as aphasia and did not possess the cognitive ability to understand the contents of the document she signed.[4]

[10] The applicant further relies on the manuscript affidavit deposed to by the deceased, in terms of which she avers the deceased had given her and her child the right to stay in the property in the event of the deceased’s passing away.[5]

[11] In contrast to the applicant's allegations, the first and second respondents contend in their opposing papers as follows: They concluded the agreement of purchase and sale of the property with the deceased in good faith. After the conclusion of the sale agreement he visited the property in question to inform the applicant of his ownership of the property, and gave the occupants a 30 days verbal notice to move out of the property.[6] The applicant reported him to the community committee. The latter summoned him to a meeting on 17 December 2021. At the meeting he showed the committee an agreement of sale that he had purchased the property. Subsequently they went to the applicant's

property to explain the transaction in detail. According to the first respondent the applicant had known since July 2023 that her late mother concluded the agreement in the presence of her brother, who is the third respondent in this matter. These facts are contained in the applicant's heads of argument filed in support of the urgent application.

[12] With regard to the deceased's mental status, the first respondent contended that the applicant relies on general hospital records randomly prepared by nursing staff and doctors who are not expert in the field. He had asked the court to disregard such evidence.

[13] The respondents further raised four in limine points, which I propose to consider later in this judgment. In a nutshell the in limine points raised by the respondents are as follows:

- (a) First Point in Limine That the applicant did not comply with the provision of Rule 6(5)(b) in failing to give a timeous notice of set down for the hearing of the application. The thrust of the respondent's argument in this connection is that they were served with the notice of motion on 11 March 2022 whilst the application was enrolled to be heard on 28 March 2022. The 10 days period within which they had to file a notice of intention to oppose fell on the 22nd March 2022. In essence the respondents contend it was a short service;
- (b) Second Point in Limine That the applicant lacks locus standi in judicio in that she had not been appointed as an executrix for the estate of her late mother;
- (c) Third Point in Limine That the applicant's founding affidavit does not comply with the Justice of Peace and Commissioner of Oaths Act, in that it does not disclose the full name and business address of the commissioner of oaths under his signature, and does not state his designation or office held by him. The applicant wants this court to hold that the affidavit in question is invalid.
- (d) Fourth Point in Limine That the applicant failed to set out grounds upon which this Court finds jurisdiction to entertain the application.

Summary of evidence

[14] During Dr Smuts' testimony it was put to him that his views as articulated in his report are speculative in that he did not consult with the deceased. He stood by his opinion, and maintained that his views are based on the facts within his knowledge and experience. It was Dr Smuts' evidence that on consideration of the deceased's medical history she was cognitively impaired.

[15] The applicant's testimony was to the effect that she used to live with the deceased and her children at the property. She was the primary care giver of the deceased. She would be there to give the deceased medication. The church told her not to take medication, and her eyes would change to look like that of a snake. She would inform the neighbours to throw things into

her own yard. Although the deceased had a long period of mental illness, she was not an insane person. She would do certain things on her own. Her condition was exacerbated by the stroke. In July 2021, the deceased left Gauteng to Transkei without informing the applicant. At some stage the social worker observed the symptoms of unstable mind and suggested that the deceased be referred to a psychiatrist.

[16] On the previous occasion the taxi would fetch her from the gate when she left for Eastern Cape. But this time the applicant was not informed beforehand. She was told by her cousin sister, Nokululeko that the deceased had visited her uncle in Transkei. When the deceased sold the property her brother, M was also there to witness the transaction. She only realized that the property was sold when the first respondent came to the property to produce the papers. At some stage in 2021, the transferring attorney, Osborne called her to come to Kempton Park but she refused to go to their offices. She informed Osborn that her mother was mentally challenged to sell the property, as she would have nowhere to stay.

[17] It was put to the applicant during cross examination that M, the deceased' son would testify that the deceased used to do recycling. Her reply was that M was the one doing recycling. She last spoke to M in March 2022 after the sheriff delivered his papers relating to this matter. M lived in Natal-Spruit, Alberton. It was further put to her that the sheriff's return of service stated that the papers were served upon M at the address of the property in dispute. Her reply was that she gave M the papers.

[18] On the proceeds of the sale of the house, the applicant testified that she visited the bank to get the statement whilst her mother was in Transkei, January 2015. When asked about the bank card, she replied that she did not apply for a new one. In this regard her attention was drawn to the fact that there was a bank card replacement fee charged on the statement. She then replied that she told the bank consultant that she would return the money she spent from the deceased's bank

account. In this regard, the applicant further testified that she transferred the amount of R48 000.00 from the deceased's

bank account into her own account, because she wanted to preserve the money. In total she withdrew the sum of R133 000. She

testified that the first respondent knew that they were poor and they would use the money.

[19] The first respondent's testimony was to the effect that he received a telephone call from the deceased in which the latter requested him to assist her in finding a buyer for her property. She also told him that she wanted to go back to the Eastern Cape. At that moment the first respondent informed the deceased that he was also in looking to buy a property, and there and now expressed his intention to buy the deceased's property. A meeting subsequently held at his house to further discuss the issue in person. Owing to the fact that the deceased attended the meeting without any witness, the responded

advised the deceased to consult with her kids regarding the sale of the house. After the deceased had informed the kids, the applicant was unhappy about her mother selling the property. Consequently, she referred the matter to the street committee. At that point the first respondent informed the deceased that he was no longer proceeding with the deal, but the latter begged him to buy the property. She told him that she wanted to go back home in the Eastern Cape because she was suffering in Gauteng. The purchase price for the property was agreed at R250 000.00.

[20] After reaching agreement on the purchase price the parties, together with the deceased' son, M proceeded to the transferring attorneys' office where they signed the necessary transferring papers. The first and second respondents then paid a deposit of R100 000 towards the purchase price. When the first respondent received the title deed he visited the property to show the applicant that he is now the legal owner of the property. He also informed her that she had to arrange to vacate the property together with her family for him to occupy the house. Again, she reported the matter to the street committee who advised him to bring proof of purchase. Despite being showed the proof the applicant was still not happy. The first respondent then called the deceased on the speaker whereupon the applicant pleaded with the deceased to return home. She also told the deceased was angry when she sold the property. He denied that the deceased suffered from mental illness. They

were attending church together for four years. He used to give a lift when they attended church. He testified that the deceased also used to borrow money from him, but would later pay it back.

[21] Under cross examination, the first respondent testified that whilst at the transferring attorney's offices the deceased insisted on travelling to the Eastern Cape immediately. He loaned her an amount R3000.00 for taxi fare. He also arranged for her to be transported to the taxi rank so she could catch a taxi. He maintained that there was no indication that the deceased suffered from any mental illness.

[22] The deceased's son, M, testified for the respondent. It was his testimony that her mother called him about the sale of the house, and requested him to accompany her to the transferring attorneys' offices. She further told him that she resolved to go back to the villages. In Transkei, she planned to stay with his uncle. When asked if he ever received any money from the deceased, he replied that he only received R50 000.00 into his account. His late mother told him to

build two rooms on the land which she bought with the proceeds from the sale of the property. On his relationship with the applicant, he testified that she did not like him. She would not let his kids visit the deceased's home. After the deceased's death the applicant tried to hide the deceased's body from him by falsifying her surname. She tried to steal the body from the deceased's funeral undertakers, after he moved it there. On who eventually took the balance of the money left in the deceased account, the witness testified that it was the applicant. On the deceased's mental status, M testified that his mother was mentally stable. To his knowledge the deceased only suffered a stroke in December. He maintained that his late mother was recycling goods with a big sack to make extra income. He denied being an alcoholic or drug abuser. He testified that he was once involved in an accident in which some of his colleagues lost their lives. So, the employer took him for counselling.

[23] Under cross examination, he testified that he did use the deceased's card while she was in hospital until the bank stopped. His late mother had a funeral cover with Zamakuhle Funeral Undertakers, and they should be the ones who conducted the burial of his mother. In support of his version that his late mother did not suffer from any mental condition, testified that the deceased at some stage worked as a domestic worker, and she would not have been employed as such if she was mentally challenged.

[24] The second respondent is married to the first respondent. By and in large her evidence corroborated that of her husband. She was pregnant when the offer to purchase was signed so she did not accompany her husband to the attorneys' office in Kempton Park. She testified that the deceased attended the same church with them. She had no knowledge about the deceased being stopped by the church from taking her medication. There were close to the deceased to an extent that her husband used to help the deceased with her recycling business. They collected empty bottles and plastic waste for recycling.

Legal principles and

analysis

[25] In deciding a question of contractual liability depending upon mental capacity a court of law must determine whether the person concerned was or was not able at the time capable of managing the particular affair in question, that is to say, whether his mind was such that he could understand and appreciate the transaction into which he purported to enter. An enquiry into the condition of a man's mind is a very difficult and delicate enquiry, of which both parties to the litigation are entitled to due notice. See *Pheasant v Warne* 1922 AD 481 at

p. 489.

- [26] It is trite that animus is an essential element in contractual obligations. Once it is clear that the necessary intelligence is wanting there can be no animus or consenting mind. There may be times of mental deficiency and other times of sanity, so that even where a person has been declared

insane, if a lucid interval supervenes, he thereupon ipso facto again acquires the right to enter into contracts., and his capacity to do so continues until insanity again supervenes. See *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669 at 672.

- [27] It follows that I must consider whether it has been proved to the court's satisfaction that at time when the contract of sale of the property in question was concluded, the deceased was unable to appreciate the implication of the transaction. The contract of sale of an immovable property, is quite a simple and does not require a high degree of intelligence to understand the nature of the contract. According to Dr Smuts the deceased may not have been able to understand the document she signed. However, his opinion must be assessed with reference to other evidence placed before this Court.
- [28] As I understand Dr Smuts' evidence he did not consult with the deceased prior to compiling the report placed before the Court. His conclusion that the deceased could have been cognitively impaired after she suffered a stroke in January 2021 is based on the clinical records. That evidence is somewhat contradicted by other evidence. It was the applicant's evidence that her mother was not completely mentally challenged. She would certain tasks on her own. She also went to Transkei on her own. Then there is a further fact that I think is important, that is M, her son testified that her mother was doing a recycling business. His evidence was corroborated by the second respondent who testified her husband would assist the deceased in collecting empty bottles and plastics to boost her recycling business. It is undisputed that the deceased attended the same church with both the first and second respondents at Holy Jerusalem. M and the other respondents were unanimous that there was nothing to suggest that the deceased was of an unsound mind. "No presumption of law arises in insanity unless there has been an actual declaration of insanity." [7]
- [29] This leads me to the final, and most probably the most important aspect of this case. According to the evidence placed before, which is uncontroverted the deceased called the first respondent who works in the taxi industry and made her intention to sell known to him. She told him that she intended to sell her property and move back to the village. Following that telephonic conversation, she visited him at his house to discuss the nitty-gritties of the sale. When the offer to purchase and other related documents were executed she saw it fit to call her son, the third respondent, to accompany her to the offices of the transferring attorneys, and for him to witness the conclusion of the transaction. After the conclusion of the transaction she travelled alone to Transkei. To my mind this is the conduct of someone who understood that if she sold her house she would get the money upon the registration of the property, and she also understood that she would relinquish ownership

over the property. What is more, is that she never returned to the property after the conclusion of the sale agreement.

Conclusion

[30] Looking at the evidence as a whole, I come to the conclusion that a valid sale agreement between the deceased and the concerned respondents came into existence. Even if I am wrong in my conclusion, no inquiry has been held in terms of the provisions of rule 57 of the Uniform Rules of Court. The Constitutional Court in *Road Accident Fund and another v Mdeyide*[8], refused to set aside a settlement agreement in circumstances where the curator ad litem was appointed without the full inquiry in terms of rule 57 of the Uniform Rules of Court, and having the attorneys concerned as the primary source of information. Similarly, in this case no witness was called to testify on the authenticity of the clinical records relied upon by Dr Smuts. As in *Mdeyide* (supra), this Court cannot endorse ex facto unsubstantiated expert opinion concluded after the applicant had instructed her attorneys to institute the current application.

[31] Turning now to the special pleas raised by the respondents. I deal first with the special plea of lack of locus standi in judicio. It is common cause that the applicant is the surviving daughter of the deceased and lives in the property which is the subject matter in these proceedings. The first respondent had given a verbal notice to vacate the property. This is the force behind this application. I hold that she is an affected party competent enough to bring these proceedings. As regards the remaining special pleas I find them to be highly technical in nature, and do not warrant the attention of this Court. They can just be dismissed out of hand for lack of merits. Accordingly, they are so dismissed.

Order

[32] In the result, the following order must ensue:

1. The application is dismissed with costs.

PH MALUNGANA

Acting Judge of the High Court

Gauteng Division, Johannesburg

Heard: 27 June 2023

Judgment:

21 November 2023

APPEARANCES

For Applicant: Adv Mnqobi Langa

Instructed by: Rachel Jiyana Inc.

For Respondents: Mr Malale

Instructed by: Malale Nthapeleng Attorneys

- [1] Case Lines 001 -1-149. Para 9 of the Founding Affidavit.
 - [2] Case Lines 011-5.
 - [3] Case Lines 011-7. Para 3 of Dr. Smuts' Report.
 - [4] Case Lines 011-10. Para 4 of Dr. Smuts' report. "In evaluation of the limited information available, it is my conclusion that the patient was indeed cognitively impaired to the degree that she most likely was demented after the stroke of 6/1/2021."
 - [5] Case Lines 001 1-167. The deceased's affidavit.
 - [6] Case Lines 009-9. Answering Affidavit. Para 27.
 - [7] Prinsloo Curators Bonis v Trafford and Prinsloo 1905 TS 669 at p.672.
 - [8] (CC10/10)
 - [2010] ZACC 18, 2011 (1) BCLR 1 (CC), 2011 (2) SA 26 (CC) (20 September 2010)
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2023/1357.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nnp-v-cbs-and-others-unknown-topic-agpjhc-2023>

Prepared on 8 October 2026 · Esheria