

SOUTH AFRICA / JUDGMENT

Rumbu v Mareka and Others (239/16)

[2017] ZAECHC 16 (14 November 2017)

[2017] ZAECHC 16**COURT**

Eastern Cape High Court, Bhisho

BEFORE

B R Tokota

CASE / FILE NUMBER

239/16

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****(EASTERN CAPE LOCAL****DIVISION, BHISHO)****Case No: 239/16****In**

the matter between:

NONZIMA

MARGARET RUMBU

Applicant

and

NOKUZOLA

DORIS MAREKA

First

Respondent

THE

MASTER OF THE HIGH COURT

Second

Respondent

THE

REGISTRAR OF DEEDS

Third

Respondent

JUDGMENT

TOKOTA J:

- [1] The applicant seeks a declaratory order that the property situated at Unit [...], Mdantsane, Local Municipality of Buffalo City, is her property. She further seeks ancillary orders that the registration of the property in the name of the first respondent be cancelled and that the property be registered in her name and such registration be facilitated by the signing of documents to effect it. Further, she seeks an order that she be appointed as the executor of the estate of the late Ntsikelelo Solomon Rumbu.
- [2] The first respondent is opposing the application and the remaining respondents abide the decision of this Court.
- [3] The property in question is House No. [...] NU [...] Mdantsane. It was the property of one Ndleleni Melvin Rumbu, the late father of the applicant. Melvin died on a date not specified in the papers. After his death his son Ntsikelelo Solomon Rumbu (Solomon) inherited the property. Ntsikelelo Rumbu was married to Sylvia Sister Rumbu (Sylvia). Out of the marriage a son, Bulelani Rumbu, was born.
- [4] Solomon died intestate on 17 September 1990. On 23 October 1990 his brother Mthuthuzeli Previous Rumbu (Previous) was appointed by the Magistrate, Mdantsane, as a representative of the estate. The appointment of Previous was subsequently withdrawn and on 11 March 1994 Nomalungelo Agnes Bongco was appointed to administer the estate of the late Solomon. Nomalungelo Bongco died on 10 April 2007 and the first respondent was appointed to administer her estate.
- [5] After the death of Nomalungelo Bongco, on 24 April 2007, Sylvia was appointed by the Master of the High Court, the second respondent, to take control of the assets of the estate of the late Solomon, her late husband, in particular House number [...] (which is the subject matter of this litigation) situated at NU [...] Mdantsane.
- [7] Subsequent to her appointment of 24 April 2007 Sylvia sold unit [...] to the first respondent. It is this sale which triggered these proceedings.
- [8] On 15 December 2009 the first respondent instituted proceedings against the applicant in the Magistrate's court seeking an eviction order. In March 2014 the parties signed a settlement agreement in terms whereof the first respondent was to take occupation of unit [...] and the applicant to return to unit [...] NU [...], Mdantsane. The first respondent was to pay, as compensation to the applicant for improvements to the property, a sum of R10 000.00.

- [9] It is not clear whether the settlement agreement was made an order of Court. It is in dispute as to whether the first respondent reneged on the agreement. The first respondent alleges that these proceedings have been instituted after she obtained an eviction order. I was informed by Counsel from the bar that the settlement agreement was never made an order of court. I need not resolve that dispute as it is not relevant for the determination of the issues in this matter.
- [10] The applicant contends, as a basis for the relief sought, that the sale of the property to the first respondent was unauthorised and therefore unlawful. She submits that this is a family house which she inherited from the intestate estate of the late Solomon. Sylvia supports the first respondent as the lawful owner of the property.
- [11] The applicant has been staying in house No. [...] since the death of her father. She claims this was as a result of a family arrangement. Prior to that arrangement she was staying at her own house No. [...] NU [...], Mdantsane. She has effected some improvements on house No. [...].
- [12] It seems to me that the first issue to be determined is whether the applicant is the owner of unit [...]. If it is found that the applicant is the owner of the property in question her application must succeed *cadit quaestio*. If it is found that the applicant is not the owner of the property then she has no right to claim that it be transferred to her. In the event it is found that there is no legal basis for the claim that she be declared the owner, then the application must fail.
- [13] Despite repeated reading of the papers, I have not been able to find the basis for the cause of action. In paragraph 10 of her founding affidavit the applicant alleges that after her father's death Solomon inherited his estate "inclusive of the property" in question. In paragraph 31 she claims that the property is her family home and her inheritance in terms of the intestate succession. In paragraph 36 she avers that the first respondent acquired the property through unauthorised transaction between herself and Sylvia.
- [14] The basis of the claim is that the property was sold to the first respondent by Sylvia who had no authority to do so by virtue of the fact that the applicant is the one who inherited the property from the intestate estate of the late Solomon. Furthermore the applicant contends that Sylvia's letters of executorship were subsequently cancelled. This contention cannot be correct.
- [15] As can be gleaned from the above it is not correct that the applicant inherited the property in question. From her own version this property was inherited from her late father by Solomon, Sylvia's late husband. Because of the contradictions in the founding papers I had to enquire from Ms Mostert, who represented the applicant, what exactly is the true position. Ms Mostert, conceded that the applicant had no right to the property in question. It is therefore not correct to say that she inherited it.

- [16] The applicant contended that Sylvia was appointed on 18 April 2007 as the executor of the intestate estate of Solomon. She then contends that, as that appointment was subsequently cancelled Sylvia no longer possessed powers dispose of the property. This contention must be rejected. The letters of executorship dated 18 April 2007 which she claims were cancelled had nothing to do with this property. Ms Mostert conceded that the cancellation of those letters was of no moment because it related to an undisputed property, unit [...] NU [...]. I put it to her during the debate that, in any event that appointment was cancelled by the Estate Controller and not by the Master of the High Court.
- [17] The next question is whether, in the light of the above, any argument that the sale was unauthorised can be sustained. In terms of section 13 of the Administration of Estates Act No. 66 of 1965.

“(1) No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master.”

Section 18(3) of Administration of Estates Act No. 66 of 1965 provides:

“(3) If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed.”

- [18] Sylvia was appointed by the Master of the High court on 24 April 2007 to administer the estate of her late husband. The letter of appointment authorises her to take control of all the assets of the deceased and to transfer any property sold to the person entitled to such assets. The letter of appointment specifically refers to property [...] situated at NU [...], Mdantsane. That appointment was never challenged or revoked at any time. It follows therefore that any argument that Sylvia was not authorised to sell the property cannot hold water. When I drew the attention of Ms Mostert to this appointment she conceded that it was a valid appointment but the applicant was not aware of the existence thereof until the filing of the answering affidavit.
- [19] A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent.[1] A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action, would entitle the litigant to an appropriate remedy. In this case there is no legal basis upon which the declaratory order in favour of the applicant can be made.

Unreasonable delay

- [20] Before the hearing of this matter I requested the parties to prepare and submit supplementary heads of argument dealing with the delay in bringing this application. Ms Mostert complied with my request but Mr Maseti, who appeared for the first respondent, did

not comply. When I asked him why, he informed me that he did not understand the request as referring to him as well. I asked him to address me nonetheless but he informed me that he was not a fait with the principle of common law unreasonable delay. I am indebted to Ms Mostert for her supplementary heads in this regard. I am of the view that there was a substantial delay in bringing these proceedings.

- [21] The applicant became aware of the sale, at least from the papers, as far back as December 2009. These proceedings for a declaratory order were instituted in October 2016 after the lapse of a period of almost seven years. It has been stated that where a party can, with ordinary diligence, ascertain his rights, he cannot remain supine for an indeterminate period and seek to enforce his rights when it suits him: it is public policy to have finality in the affairs of men. The maxim *vigilantibus non dormientibus jura subveniunt*, which is of general application, is equally applicable here. Courts of justice should not come to the aid of parties who slept on their rights.[2]
- [22] In any event having found that the applicant has no right to the property in question it is not necessary to dismiss the application on the basis of unreasonable delay. The application has no merit and cannot succeed.
- [23] Regarding the question of costs Ms Mostert submitted that this is a family dispute and that I should not mulct the applicant with costs. Her submission was that, if the application is dismissed, an order that each party should pay its own costs would be appropriate. Furthermore, so the argument ran, the applicant was not aware that Sylvia had been properly appointed on 24 April 2007. This argument has no merit. Despite the knowledge that the property was sold by Sylvia pursuant to the letter of authority issued to her by the second respondent, the applicant persisted with this application. She filed replying affidavit persisting that the sale was unlawful. This contention was carried through until I pointed out the defects in the application in court.
- [24] Mr Maseti, on the other hand, asked for a punitive cost order on an attorney and own client scale. There is no legal basis for this contention. The respondent did not pertinently take this point in the papers. Furthermore Mr Maseti was unable to advance any legal basis for such a punitive cost order. Instead the first respondent took a point of non-joinder in the answering affidavit. This point was a non-starter which need not be addressed here.
- [25] It is trite that the question of costs is a discretion of the court which must be exercised judicially. The award of costs is to be decided on the basis of fairness and equity. It is a general rule that a successful party is entitled to his costs unless there are good reasons to depart from such rule. In my view any party who initiates civil litigation does so at the risk of paying costs in the event of failing to succeed. There will be no rational for deviating from the general rule. There is no merit in the submission for punitive costs order.
- [26] In the result the following order is made:
1. The application is dismissed;

2 The applicant is ordered to pay costs of the first respondent.

B RTOKOTA

JUDGE OF THE HIGH COURT

BHISHO

Counsel for the Applicant: D Mostert Instructed by: Magqabi Sethj Zita Inc Inc East London For the 1st Respondent: Attorney P L C Maseti Instructed by: MASETI INC. 12 Bell Road EAST LONDON

Date heard: 19 October 2017

Judgement delivered: 14 November 2017

- [1] See Suid-Afrikaanse Onderlinge Brand- en Algemene Versekeringsmaatskappy Bpk v Van den Berg 1976 (1) SA 602 (A)
- [2] See MG Holmes (Pty) Ltd v National Transport Commission 1951 (4) SA 659 (T); Wolgroeiers Afslaers (Edms) Bpk v Muni van Kaapstad 1978
- (1) SA 13 (A); Cape Town Municipality v Abdulla 1974 (4) SA 428 (C)

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