

SOUTH AFRICA / JUDGMENT

## Triple M Prop (Pty) Ltd v Setshedi (59290/18) [2021] ZAGPPHC 770 (15 November 2021)

[2021] ZAGPPHC 770

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

59290/18

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

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 15 November 2021  
CASE NO: 59290/18  
In

the matter between: TRIPPLE  
M PROP (PTY) LTD  
EXCIPIENT/ 4TH DEFENDANT  
and  
SIBONGILE  
ADELAIDE SETSHEDI  
RESPONDENT/ PLAINTIFF

**JUDGMENT**

Van der Schyff J

**Introduction**

and background

- [1] This is an exception noted against the plaintiff's particulars of claim on the ground that it lacks the necessary averments to sustain a cause of action against the fourth defendant. The parties are referred to as they are cited in the action.
- [2] The plaintiff issued summons and cited five defendants. The first defendant is the plaintiff's husband to whom she is allegedly married in community of property. The fourth defendant, the excipient in the present proceedings, is cited as 'a private company, duly registered and incorporated in terms of the company laws of South Africa with its principal place of business ...'.

On a reading of the particulars of claim it can be assumed that the property that is the subject matter of the litigation is currently

registered in the fourth respondent's name.

- [3] In the particulars of claim the plaintiff avers that she entered into a customary marriage in community of property with the first defendant, and that:

'The plaintiff and the first defendant were thus joint owners of the property known as .... (the property)'.

- [4] The plaintiff states that she and her husband became estranged and that she moved out of the matrimonial home in November 2014. Without providing any timeline, she then states that ABSA BANK Ltd issued summons against the first defendant in respect of bond arrears and he subsequently, and without her consent, entered into a loan agreement with the 'second and or third defendants'

represented by the second defendant for an unknown amount exceeding the bond arrears. To her knowledge the second and/or third

respondents required that the home be registered in their names as security for the loan. This transfer occurred without her knowledge

or consent. The second and third defendants were aware that she was married to the first defendant and that their marriage still

subsisted despite them being estranged. During February 2016 the first defendant suggested to the plaintiff that the matrimonial home be sold, and the proceeds of the sale be shared equally between them. The first defendant, at stage only, disclosed to the plaintiff for the first time that the property was registered in the name of the third defendant as per the loan agreement.

[5] The plaintiff claims that:

‘17

The plaintiff did not consent to the sale of the matrimonial home either to the second and/or the third defendant as well as to a further third party (the fourth defendant). The consent in respect of the second sale was furthermore of no legal effect as the title was already registered in the name of the third defendant although irregularly and unlawfully so.

18

At all material times thereto, the fourth defendant knew, or ought to have reasonable (sic) known the property had been transferred irregularly to the third defendant.

18.1 -18.3

19

To the plaintiff's knowledge, the first sale of the matrimonial home to the second and or the third defendant was to the amount of R400 000.00 (four hundred thousand rand), whereas the second sale of the matrimonial home to the fourth defendant was to the amount of R1400 000.00 (one million four hundred thousand rand). The aforesaid sales are almost a year apart.’

[6] The plaintiff seeks the following relief in the action: (i) ‘a declaration that the sale of the matrimonial home by the first defendant to the second and/or third defendants is void ab initio for want of spousal consent’; (ii) ‘a declaration that the sale of the matrimonial home by the second and/or the third defendants to the fourth defendant was void and unlawful’; (iii) alternatively, ‘payment of the amount of R1400 000.00 (one million four hundred thousand) by the second and or the third defendant to the plaintiff.’

Exception

[7] The fourth defendant noted an exception based on the following grounds:

- i. The plaintiff failed to aver that the first defendant was the registered owner of the property in question when the alleged customary marriage was concluded, and failed to attach the title deed of the property. In the result the plaintiff failed to properly plead the ownership of the property;
- ii. Insofar as the plaintiff's claim against the fourth defendant is premised on the *actio rei vindicatio*, the plaintiff failed to make the averment that that the fourth defendant is or was at the time of the institution of the action in possession of the property;

iii. Insofar as the plaintiff's claim against the fourth respondent is premised on fraud, the plaintiff failed to disclose a cause of action based on fraud against the fourth defendant;

iv. Whilst the plaintiff alleges that the first defendant suggested during February 2016 that the property be sold, she fails to plead properly to whom it was suggested the property be sold. On a proper reading of the pleadings this consent can only refer to the sale to the fourth defendant. The plaintiff alleges in paragraph 17 of the particulars of claim that the consent in respect of the second sale was of no legal effect, implying that she did give consent for the second sale which is now held out to be of no legal effect;

v. The plaintiff failed to plead when the property was registered in the fourth defendant's name in terms of the second sale, which date is material for purposes of sustaining a cause of action.

[8] Plaintiff's counsel submitted that the fourth defendant wrongly assumed that the action is premised on the *rei vindicatio* or the allegation that the fourth defendant was a party to any fraudulent activity. He submitted that the essential *facta probanda* was pleaded, namely that (i) the plaintiff and first defendant were joint owners of the property by virtue of a marriage in community of property, and that the property was alienated contrary to the peremptory provision of section 15 of the Matrimonial Property Act, 88 of 1984 (the MPA). Plaintiff's counsel denied that the title deed of the property is a document as contemplated in Rule 18 or that Rule 18 requires a litigant claiming to be the owner of the property through summons to attach a copy of the title deed. Rule 35 provides for discovery, and an exception cannot be raised on an issue sufficiently covered by Rule 35. Counsel argued that the pleadings could, at most, be found to be vague but since the fourth defendant chose to rely on the ground that the particulars of claim do not disclose a cause of action, and did not afford the plaintiff the remedy to remove the cause of complaint, the exception cannot stand.

## Discussion

[9] The fourth defendant's assumption that the action instituted by the plaintiff against it is premised on the *rei vindicatio* or that the plaintiff needs to make out a case that the transfer of the property was registered in the fourth defendant's name pursuant to fraud to which the fourth defendant was a party, is ill-founded. The plaintiff seeks a declarator that the sale and subsequent transfer of the property to the fourth defendant was void *ab initio*, for the lack of her consenting to either the first or second sale of the property.

[10] The Supreme Court of Appeal recently dealt with the question regarding the sale and registration of immovable property by one spouse without the consent of the other spouse in *Vukeya v Ntshane and Others* (Case no. 518/2019) [2020] ZASCA 167 (11 December 2020). The Supreme Court of Appeal stated that where parties are married in community of property, absent the protection afforded to third party purchasers by section 15(9) of the MPA, such a sale is a nullity for want of the required spousal consent.[1]

[11] The consequences of the failure to acquire consent in terms of s 15(3) of the MPA was aptly explained by the Supreme Court of Appeal in *Marais NO and Another v Maposa and Others*: [2]

[26] The effect of s 15 may be summarized as follows. First, as a general rule, a spouse married in community of property “may perform any juristic act in connection with the joint estate without the consent of the other spouse”. Secondly, there are exceptions to the general rule. In terms of ss 15(2) and (3), a spouse “shall not” enter into any of the transactions listed in these subsections without the consent of the other spouse. Subject to what is said about the effect of s 15(9)(a), if a spouse does so, the transaction is unlawful, and is void and unenforceable. This, it seems to me, flows from what Innes CJ, in *Schierhout v Minister of Justice*, called a “fundamental principle of our law”, namely, that “a thing done contrary to the direct prohibition of the law is void and of no effect”. Thirdly, if a listed transaction is entered into without the consent of the non-contracting spouse, that transaction will nonetheless be valid and enforceable if the third party did not know and could not reasonably have known of the lack of consent. While the consent requirement is designed to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, the “deemed consent” provision in s 15(9)(a) is intended to protect the interests of a bona fide third party who contracts with that spouse. [27] Section 15 thus seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other. Whether the legislature has struck an appropriate balance has been fiercely debated by academic writers, but is an issue that does not have to be engaged with in this judgment. In *Sishuba v Skweyiya and Another* the context in which s 15 and s 15 (9)(a) in particular, is to be interpreted was set out as follows: “These provisions seek to regulate marriages in community of property after the abolition of marital power. They must be interpreted and applied within this context – one in which “the restrictions which the marital power places on the capacity of a wife to contract and to litigate” have been abolished; in which “a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts that lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act”; and in which proper effect must be given to the fundamental right of everyone to equality before the law and the equal protection and benefit of the law.”

[28] A third party to a transaction contemplated by ss 15(2) or (3) that is entered into without the consent of the non-contracting spouse is required, in order for consent to be deemed and for the transaction to be enforceable, to establish two things: first, that he or she did not know that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given. In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it, the burden of bringing s 15(9)(a) into play rests on the party seeking to rely on the validity of the transaction.

- [29] The reference to reasonableness in the phrase “cannot reasonably know” imports an objective standard into the proof of this element: it must be established with reference to the standard of the reasonable person, in terms of what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw.
- [30] In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries. Van Heerden, Cockrell and Keightley say: “Lack of actual knowledge on the part of the third party is a straightforward enough stipulation and capable of determination. But “cannot reasonably know” is more problematic. It must imply that the third party is under some sort of obligation to enquire about the status of the person with whom he or she is contracting. The third party is called upon, it is submitted, to take reasonable steps to ascertain whether the person with whom he or she is dealing is married and, if so, whether they have obtained whatever consent may be necessary for the particular transaction.
- [31] The views of the academic writers are in harmony with the views expressed in various high court judgments. For instance, in *Visser v Hull and Others*, Dlodlo J, after referring to the views of Steyn, held: “I agree with Professor Steyn that a third party is expected to do more than rely upon a bold assurance by another party regarding his or her marital status. An adequate inquiry by the third party is required. If this proposition and interpretation of the liability of third parties is accepted, then it could be argued that the third parties in the case under consideration should have made the necessary inquiries into the current state of the applicant and the deceased's marital status.” The same conclusion was reached in *Sishuba v Skweyiya and Another*, with reference to the views of Van Heerden, Cockrell and Keightley replicated in para [30] above.
- [32] I endorse the views expressed in the cases to which I have referred, as well as the views of the academic writers upon which they are based: a duty is cast on a party seeking to rely on the deemed consent provision of s 15(9)(a) to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married, if so, in terms of which marriage regime, whether the consent of the non-contracting spouse is required and, if so, whether it has been given. Anything less than this duty of enquiry, carried out to the standard of the reasonable person, would render s 15(9)(a) a dead letter. It would not protect innocent spouses from the maladministration of the joint estate and would undermine the Matrimonial Property Act’s purpose of promoting equality in marriages in community of property.’ This approach and the test to apply in these circumstances, which I approve, was most recently endorsed by this Court in *Mulaudzi v Mudau and Others*.’ (Footnotes omitted)
- [12] A party who seeks to have a contract of sale declared void ab initio for the lack of spousal consent, needs to aver and prove that it was

- (i) married in community of property; (ii) that the property in question was an asset of the joint estate; (iii) that his/her spouse entered into a sale agreement in respect of the property which was duly registered in the name of a third party who is a party to the proceedings before the court; (iv) that the agreement of sale was entered into without his/her consent.

[13] The unique facts of this case are that the plaintiff avers that the property was transferred out of the joint estate without her consent to the second alternatively third defendant (the first transaction), and subsequently sold to the fourth defendant (the second sale). In paragraph 17 of her particulars of claim, and under the heading 'The second sale of the matrimonial home', the plaintiff avers that:

'The consent in respect of the second sale was furthermore of no legal effect as the title was already registered in the name of the third defendant although irregularly and unlawfully so'.

[14] In considering an exception the court needs to consider whether the pleadings, on any possible interpretation thereof, do not sustain a cause of action. The contentious 'was' can in the context of the facts also be read as 'would have been'. Although the pleadings are somewhat vague in certain aspects, it is not sufficient to sustain a cause of action, and any vagueness can be cured by further particulars.

## ORDER

In the result, the following order is made:

1. The exception is dismissed with costs.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 15 November 2021.

Counsel for the excipient:

Adv. K. Pretorius

Instructed by:

Couzyn, Hertzog & Horak

For the respondent:

Adv. C Muza

Instructed by:

Yena Attorneys

Date of the hearing:

8 November 2021

Date of judgment:

15 November 2021

[1] At para [9].

[2] 2020

(5) SA 111 (SCA)

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