

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO. : 20/2014

Heard on : 29 January 2015

Date delivered : 14 April 2015

In the matter between:

**JOHANNES TEBOHO TSIBULANE
NOMAFENE LOUISA TSIBULANE**

First Applicant
Second Applicant

And

**NKOSINATHI WORKMAN NGXOLELA
PHAKAMA NGXOLELA
THE REGISTRAR OF DEEDS, CAPE TOWN
LLEWELLYN FRANCOIS SHARP, N.O.
THE MASTER OF EASTERN CAPE HIGH
COURT, PORT ELIZABETH
STANDARD BANK OF SOUTH AFRICA
LIMITED**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Fifth Respondent

Sixth Respondent

JUDGMENT

MAJIKI J:

Introduction

[1] The applicants made an application for an order in the following terms:

- 1.1 that the deed of sale entered into between Ntombizonke Christine Mpanda in her capacity as the master's representative of the estate late Kukge Zamba, under certificate number 5038/2001, and the applicants, on 10 October 2005, be declared valid and enforceable;
- 1.2 that the subsequent deed of sale entered into between first and second applicants and Rox George Zixashe in his capacity as the master's representative of estate late Kukge Zamba, under certificate number 148/2007, and first and second respondents, on 4 October 2007 be declared void;
- 1.3 that the third respondent be directed to cancel the deed of transfer 7000006192/2008 in terms of which erf number [...], Ibhayi, Port Elizabeth known as [...] [.....], Kwa Zakhele, Port Elizabeth was transferred to and on behalf of the first and second respondent from the estate of the late Kukge Zamba with estates number 2093/2009 on 29 August 2012 and other ancillary reliefs.

Application to amend the notice of motion

[2] During the hearing of the application I granted an order for the amendment of the applicant's Notice of Motion to include the following;

- 2.1 that the appointment of Rox George Zixashe dated 17 January 2007, as the representative of the master to take control of the assets of the estate of the late Kukge Zamba in terms of section 18(3) of the Administration of Estate Act 66 of 1965, be and is hereby reviewed and set aside.

- 2.2 that the time period referred to in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) be extended in accordance with section 9(1)(b) thereof, in so far as it is required, for the validity of the actions taken by the applicants in terms of section 7(1) of the said Act.

[3] I granted the order after a substantive application was made for the amendment of the applicant’s notice of motion. It appeared that the said application was opposed, the first respondent had stated that he was not consenting to the introduction of the amendment but would abide by the decision of the court. He filed an opposing affidavit.

[4] According to the applicants at all material times they were aware of the two appointments and had placed the authority of Zixashe to sell the property in dispute. However, they had no knowledge of how and why his appointment came about. They only became factually aware of the invalidity of his appointment and reasons thereof upon the receipt of the master’s report on 21 August 2014. The master’s report gave them the information pertaining to the factual basis of the invalidity of Zixashe’s appointment.

[5] According to the master when he appointed Zixashe he was not aware that the magistrate had already made an appointment. The magistrate at the time was not legally authorised to make the appointment, but, in circumstances where the magistrate had already issued letters of authority, the master is disqualified from accepting jurisdiction of the matter once the magistrate has already done so in terms of Regulation 4(1) of the Regulation for the administration and distribution of estates of Deceased Blacks R200 of 1987.

[6] The applicants were of the view that the matter would settle upon the receipt of the factual information from the master and it would not be necessary

to apply for an order reviewing and setting aside the master's appointment of Zixashe.

[7] The applicants conceded that the master's appointment being an administrative action it had to be set aside by the court but it remained a nullity as it was an invalid act. It may be treated as valid until declared invalid. When it became clear that the respondents were not willing to have the matter settled they made the application for the amendment of the notice of motion.

[8] According to the respondents the applicants had always been aware of the fact that the first and second respondent had purchased the property and was registered in their names, in February 2008. This the applicants alleged in their papers in proceedings held in the magistrate court. Furthermore, in a letter to the first and second respondents' attorneys on 21 July 2009, they recorded that they were aware of the appointment of Zixashe.

[9] In the circumstances the application for review of the master's administrative act was way outside the 180 days provided for in PAJA. Furthermore, the applicants were seeking to alter their application by introducing a new matter.

[10] The court was of the view that the amendment was necessary in order to determine the real dispute between the parties. The real dispute was the sale of the same property, based on two appointments for the administrators of the same estate, to which the property in question belonged. A decision about the validity of one appointment was therefore central to the dispute between the parties. If the amendment was refused at this stage, the applicants would have, as they indicated, to bring another application, seek condonation for bringing the application for review out of time and still seek the relief for review. The same parties would have to be in court again on relatively the same issues. Furthermore, the court accepted that the time the applicants became aware of the factual basis for the invalidity of Zixashe's appointment was at the time

they received the master's report. The application for review was therefore not out of time.

[11] Finally, regarding the issue of prejudice, the respondents would not suffer real prejudice if the order for amendment was granted at this stage, unlike the applicants who would still have to seek that the master's act be set aside together with the consequent actions based on the said appointment by the master.

Validity of Master's appointment

[12] The first issue that requires determination is whether the master's act of appointing Zixashe on 17 January 2007 in the light of the earlier magistrate's appointment of Mpande on 27 December 2001 is valid. The applicants seek that it be declared invalid and set aside.

[13] According to the applicants although the said act is treated valid until a court has determined the issue of its invalidity, that does not mean that it is in fact valid. An invalid act, being a nullity cannot be ratified, validated or amended.

[14] The master has communicated that he was not legally entitled to accept jurisdiction and make an appointment after the magistrate had already appointed Mpanda on 27 December 2001 in terms of regulation 4(1) of the Regulation for the Administration and Distribution of Estates of Deceased Blacks of 1987. The master did so without knowledge of the prior magistrate's appointment. The master's appointment therefore falls to be declared invalid and set aside.

Prescription

[15] The respondents have raised the issue of prescription in their heads of argument. The applicants objected to this, the respondents' attempt to raise the issue of prescription in the heads of argument. During the hearing of the application it did not seem that the respondents were still pursuing their argument in this regard. Nonetheless, it is trite that prescription is a special defence. Section 17 of Prescription Act 68 of 1969 provides:

*“(1) A court shall not of its own motion take notice of prescription.
(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings : Provided that a court may allow prescription to be raised at any stage of the proceedings.”*

The application of these provisions was clearly articulated in the following authorities:

Minister of Justice and Constitutional Development v Mathobela and Others [2007] ZANWHC.

Ntame v MEC Department of Social Development Eastern Cape [2005]2 AllSA 535 (SE)

The respondents therefore are not entitled to raise this special defence of prescription in the heads of argument.

Validity of sale of the property to the parties

[16] During the hearing of the application on the amended basis, counsel for the applicants submitted that the consideration of the issue of review of the master's decision settles the whole matter. If the court sets aside the appointment by the master, it follows that the consequent sale by Zixashe ought to be cancelled.

[17] Counsel for the first and second respondents on the other hand submitted that, whether I review Zixashe's appointment or not, the consequences of Zixashe's action can still have legal consequences. Zixashe

at the time of the registration of transfer believed that the letters of appointment were correctly issued and therefore he had the authority to enter into the agreement of sale. The provisions of Section 2(1) and 28(2) of the Alienation of Land Act 68 of 1968 (Alienation of Land Act”) were fully complied with. J T12(3) which is the information about rates account from the municipality in the names of the applicants must be ignored, it is not before court, furthermore, any number of irregularities could have occurred at the municipality.

[18] Section 2(1) of Alienation of Land Act provides that, no alienation of land after the commencement of the act shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority. Section 28(2) of the same Act provides that any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio*, if the alienee had performed in full terms of the deed of alienation or contract and the land in question has been transferred to the alienee.

[19] The background to the sale to the respondent is that they purchased and paid for the property from Zixashe. Zixashe concluded the agreement the agreement of sale in his capacity as the executor of the estate by virtue of the master’s appointment. The property was subsequently transferred into the respondents’ names in February 2008.

[20] The respondents dispute that they had been aware of this prior sale as averred by the applicants when they entered into a sale agreement with Zixashe. They aver that they only became aware, even of the fact that the applicants were in occupation of the property on 30 January 2008.

[21] According to the applicants on 30 April 2004 they initially entered into a deed of sale with Mpanda. They paid the purchase price on the same day. In September 2004 they applied for electricity pre-meter box. In October 2004 they took occupation of the property. Even though they were entitled to claim

delivery of the property through the registration of the property into their names, the transfer was delayed. Later, they found out that Mpanda had signed the deed of sale in her personal capacity and not in the representative capacity.

[22] On 10 October 2005 they entered into another deed of sale wherein Mpanda correctly acted in a representative capacity. The water and electricity account had already been in their name. Mpanda could not settle the rates with the municipality, as it is the duty of the seller to do so. Mpanda could not even succeed in having the account written off as it was already in respondents' names. The registration therefore could not take place. A copy of the statement of account dated 11 May 2005 in first applicant's name is annexed.

[23] The applicants, as well, dispute that they were aware of the sale of the property to the respondents. According to the applicants in February 2008 they received a letter addressed to the respondents at the property's address advising the respondents that the property was registered in the respondents' names on 30 January 2008. That is how according to the applicants, the applicants came to know of the sale to the respondents.

[24] The authority in *Le Roux v Nel [2013] ZA SCA 109* states that where there is a competition between real right and personal right, even if the personal right is prior in time, the real right prevails. However, when a person who acquires a real right with the knowledge of the existence of an earlier personal right cannot receive performance, the prior personal right is protected.

Existence of the dispute of fact

[25] There is a dispute as to whether the respondents were aware of the prior sale by Mpande to the applicants. According to the applicants the respondents were aware, or they ought to have been aware of the said sale. In support

thereof the applicants annexed a municipal rates clearance printout information JT712(3) referred to above. When Zixashe settled rates, for them to obtain the rate clearance certificate, they should have seen that the rates account was in applicant's names. The respondents stated that this could have been a consequence of a number of irregularities that could occur on the part of the municipality.

[26] Furthermore, the applicants state that had the respondents visited the property in September 2007, as the respondents allege, the respondents could not have found the property to be vacant. The applicants were in occupation of the property, and the kitchen door was not at the back where the respondents say it was. This is yet another indication that they never visited the property. Any such visit, if such was true, would have made the applicants aware of the sale of the property to the respondents.

[27] The respondents aver that the facts indicate that the respondents only took occupation of the property in December 2007. The applicants' deed of sale state that possession and occupation of the property shall be taken upon the registration of the property. The issue of the kitchen door not being on the side they indicated may not be a factor to be taken into account, considering that such allegation is made years later after they inspected the property in September 2007.

[28] Finally on the facts that relate to the dispute about knowledge of prior sale to applicants, the applicants aver that the respondents' valuers came to the property in October 2007. The applicants denied them access to the property. In disputing this the respondents submit that the bond could have never been approved by the bank, if this were true. The second respondent was advised by the first applicant that the applicants were in occupation of property since December 2007. The applicants failed to mention any of this in their papers, despite the fact that these have always been contentions between parties since earlier proceedings.

[29] I agree with the parties that there is a dispute of fact. The question is whether such dispute warrants referral of the matter to oral evidence or the matter can be decided on affidavits.

[30] The dispute relates to issues that relate to the determination of whether the respondents had constructive notice of the prior sale.

[31] Before I consider the issue that is central to the dispute of fact (constructive notice) I need to have regard to the decision in *Philani Ma Afrika v Mailula 2010(2)753 SCA. In Emfuleni Local Municipality v Builders Advancement Services and Others 2010 (4) SA 133 (GSJ)*, although with great difficulty, the court referred to the judgment in *Philani Ma-Afrika*. The sale was set aside and registration of the property to the *bona fide* purchaser (Mailula) was cancelled, because the person who signed the deed of sale (Mkhumbuzi) on behalf of the seller (Philani), was not authorised to do so. This was despite the fact that the registration had already been effected and the purchaser was *bona fide* in the sale. Furthermore, the court *a quo* had found that he had not been party to the irregularities, non-compliance with section 228 of the Companies Act and other acts of internal fraud perpetrated on members of the seller company by unauthorised persons.

[32] In my view, it is not necessary to pronounce on the effect of the existence of the dispute of fact. The application of the legal principles in the authorities settle the issue of the validity or otherwise of the sale to the respondents in the circumstances of this case.

[33] Finally, in *Knox v Mofokeng 2013 (4) SA 46 (SGH)* the court restated the principle in *Legetor Mckenna In and Another v Shea and Others 2010(1) SA 35 (SCA)* regarding the abstract theory. The requirements of the theory are, delivery (in the case of immovable property, registration of transfer in the deeds office), and the real agreement. The element of the real agreement are an

intention on the part of the transferor to transfer the property and that of the transferee to become the owner of the property. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass despite registration of transfer if there is a defect in the real agreement. The sheriff lacked authority to transfer the property to the second respondent, pursuant to the purported sale in execution. All subsequent transfers of the property were held to be invalid.

[34] In *Seale v Rooyen N.O. and Others 2008(4) SA 43 SCA* the court referring to the authority in *Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (5) SA 262 SCA*, clarified as follows:

“I think it is clear from Oudekraal, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent”.

[35] Consequently, by reason that I have set aside the appointment of Zixashe by the master, the sale of the property entered into by Zixashe and the respondents, based on his appointment ought to be declared invalid.

In the result the following order is made:

1. The appointment of Rox George Zixashe dated 17 January 2007, as the representative of the master to take control of the assets of the estate of the late Kukge Zamba in terms of section 18(3) of the Administration of Estate Act 66 of 1965 is hereby reviewed and set aside.
2. The subsequent deed of sale entered into between first and second

applicants and Rox George Zixashe in his capacity as the mater's representative of estate late Kukge Zamba, under certificate number 148/2007, and first and second respondents, on 4 October 2007 is hereby declared void;

3. The third respondent is hereby directed to cancel the deed of transfer 7000006192/2008 in terms of which erf number [...], Ibhayi, Port Elizabeth known as [...] [.....], Kwa Zakhele, Port Elizabeth was transferred to and on behalf of the first and second respondent from the estate of the late Kukge Zamba with estate number 2093/2009.
4. The deed of sale entered into between Ntombizonke Christine Mpanda in her capacity as the master's representative of the estate late Kukge Zamba, under certificate number 5038/2001, and the applicants, on 10 October 2005, is hereby declared valid and enforceable;
5. The first and second respondents are hereby ordered to pay costs of the application from 21 August 2014.

B MAJIKI

JUDGE OF THE HIGH COURT

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