

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

CASE NO: 39813/2019

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
REVISED: **NO**
01 JULY 2021

In the matter between:

A[....] A[....] V[....] N. O

Applicant

and

Y[....] V[....]

Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 01 July 2021*

SENYATSI J:

[1] On 1 March 2021, I dismissed with costs an application for cancellation of the Notarial Deed of *Usus* No: 18/06456 over the property situated at [...] E[...] Close, Eco Park, Highveld. The reasons for the dismissal of the application are as set out below.

[2] The applicant and respondent are divorced. As part of their divorce settlement, the applicant provided accommodation to the minor children born of the parties, as well as to the respondent and consequently, a notarial deed of *usus* property as described in paragraph [1] above was registered to give effect to accommodation.

[3] The use of the property by the respondent and the minor children was subject to terms and conditions contained in the notarial deed of *usus*. The usage of the property would lapse once the respondent concludes marriage to a third party other than the applicant. The property was to be exclusively used by the minor children and the respondent. The respondent consented to the cancellation of the right of usage of the property and undertook to sign all required documentation within 7 (seven) days of written demand by the Trust or its appointed conveyancers.

[4] The applicant averred that the respondent was in breach of the terms of the notarial deed of *usus* in that the property is not used for the exclusive benefit of the respondent and the minor children born of the marriage. Furthermore, so averred the applicant, the respondent breached the terms of the notarial deed of *usus* by allowing her mother to move in and reside in the property. She also allowed, so continued the applicant, an unknown Indian male to reside on the property.

[5] The respondent raised grounds of opposition to the application, namely:

- (a) There was no proper service of the application;
- (b) The court lacks jurisdiction;
- (c) Non-joinder of the respondent's mother and the registrar of deeds and;

(d) The respondent requires assistance from her- mother and therefore she has not breached the terms of notarial deed of *usus*.

[6] These defences will be dealt with each in reference to the legal principles applicable on each of them to make a determination on whether each of them is sustained by the facts and evidence adduced on the papers. It has to be stated that although the defences were raised in the opposing affidavit of the respondent, the heads of argument filed on behalf of the respondent focused on only two points *in limine*, namely, that this court lacks jurisdiction on the matter and the non-joinder of the registrar of deeds and the respondent's mother to the proceedings. The other points were not canvassed further. For the purpose of this judgment, I will take it that the other points on lack of proper service of the application and the averment that the respondent sought the assistance of her mother to assist her with taking care of the minor children have been abandoned.

[7] The jurisdiction of the court to adjudicate on a matter is regulated by section 21(1) of the Superior Courts Act 10 of 2013 which provides as follows:

“A Division has jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a) to hear and determine appeals from all Magistrates’ Court within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”

[8] Section 6 (3) (a) of the Superior Courts provides as follows:

"The Minister must, after consultation with the Judicial Service Commission, by notice in the Gazette, determine the area under the jurisdiction of a Division, and may, in the same manner, amend or withdraw such a notice."

The respondents counsel submitted that the South Gauteng High Court has jurisdiction over magisterial districts of Alberton, Benoni, Boksburg, Brakpan, Delmas, Germiston, Johannesburg, Kempton Park, Krugersdorp, Nigel, Randburg, Randfontein, Roodepoort, Springs, Vanderbijlpark, Vereeniging and Westonoria. Counsel for the respondent furthermore, contends that the North Gauteng High Court has jurisdiction over magisterial districts of inter alia, Tshwane North, Tshwane East, and Tshwane North. The argument, submitted on behalf of the respondent further states that since both parties are resident and domiciled in Centurion, the property forming the subject to the disputed violation of the registered *usus* is in Centurion and that the settlement agreement was made an order of the Court in the High Court of South Africa, Gauteng Division, Pretoria and that the deed of *usus* was registered in the Pretoria Deeds Office that this Court lacks jurisdiction. I do not agree with this submission.

[9] The Minister of Justice and Correctional Services has, by notice given in terms of Government Gazette No.39001 dated 15 January 2016, determined that the Gauteng Local Division of the High Court in Johannesburg has concurrent jurisdiction with the main seat in Pretoria. It follows therefore that the defence on this point must fail.

[10] I now deal with the non-joinder point in limine that the Tshwane East and Tshwane North. The argument submitted on behalf of the respondent further states that since both parties are resident and domiciled in Centurion, the property forming the subject to the disputed violation of the registered *usus* is in Centurion and that the settlement agreement was made an order of the Court in the High Court of South Africa, Gauteng Division, Pretoria and that the deed of *usus* was registered in the Pretoria Deeds Office that this court lacks jurisdiction. I disagree with this contention for the reason already stated.

[11] I now deal with the non-joinder point *in limine* that the applicant has failed to join the Registrar of Deeds. In her opposing papers and heads of argument, the Registrar is incorrectly referred to as the Master of Deeds instead of the Registrar of Deeds.

[12] The Deeds Registries Act 47 of 1937 regulates laws in the Republic relating to the registration of deeds. Section 3 of the same Act spells out the duties of the registrar in various provinces which, *inter alia*, includes registration of notarial deeds such as *usus* which the registrar is required to keep a record thereof.

[13] The test for non-joinder has been set out by courts. In *Absa Bank Ltd v Naude NO*¹ the court held that:

“It has now become settled law that the joinder of a party is only required as a matter of necessity- as opposed to a matter of convenience- if that party has a direct and substantial interest which may be affected prejudicially by the judgment of court in the proceedings concerned (see e.g. Bowring NO v Vrededorp Properties CC, 2007 (5) SA 391 (SCA) para 21).”

[14] Section 97 (1) of the Deeds Registries Act of 1937 provides as follows:

“Before any application is made to the court- for any authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days’ notice before the hearing of such application and such registrar may submit to the court such report to thereon as he may deem desirable to make.”

I have not seen any evidence of proof such notice to the registrar of deeds in Pretoria. The applicant contends that is not necessary to join the registrar as the relief sought is not against the registrar of deeds but against the respondent. This may be so, but the registrar still to be notified or joined in the proceedings.

[15] It was submitted furthermore on behalf of the applicant that the registrar will be ordered to effect cancellation once the court has made such an order. This

¹ (20264/2014) [2015] ZASCA 97 (1 June 2019)

submission ignores the provisions of section 97 (1) of the Deeds Registries Act which are peremptory with regards to the need to file notice regarding any proceedings in court in terms of which the registrar is required to perform any act in the deeds. This action also includes the cancellation of *usus* notarialy executed.

[16] I, therefore, hold the view that failure to notify or even join the registrar of deeds is fatal to the application.

ORDER

[17] The following order is made:

- (a) The application is refused with costs.

SENYATSI

*Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

REPRESENTATION

Date of hearing: 01 March 2021

Date of Judgment: 01 July 2021

Applicant Counsel: Adv H Van Der Vyver

Instructed by: Shaheed Dollie Incorporated

Respondent Counsel: Adv E De Lange

Instructed by: Muthray and Associates