IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 20127/2022

(1)	REPORTABLE: ~~YES /~~ NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES/~~NO
(3)	REVISED: ~~YES/~~NO
_____	_____
DATE	SIGNATURE

In the matter between:

NELISILE PRUDENCE HLATSHWAYO **FIRST APPLICANT**
(Executrix in the Estate late Mkhosi Ben Hlatshwayo)

HLATSHWAYO: NELISILE PRUDENCE **SECOND APPLICANT**

and

MABYANA RUTH SEBOLAISHI **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS **SECOND RESPONDENT**
(JOHANNESBURG)

THE MASTER OF THE HIGH COURT **THIRD RESPONDENT**
(JOHANNESBURG)

JUDGMENT

MANAMELA, AJ

Introduction

[1] The applicant launched an application in terms of section 6 of the Deeds Registries Act,[1] ("the Act") for the cancellation of a title deed registered in the names of the first respondent in respect of Erf 1[…] Emdeni Township (the "property").

[2] The applicant, Nelisile Prudence Hlatshwayo is acting in her official capacity as the Executrix of the Estate of the late Mkhosi Ben Hlatshwayo and in her personal capacity apparently as an heir. The first respondent is the registered owner of the property. The second and third respondents are interested parties with statutory powers to deal with the subject property and the administration of estates, respectively, with no direct interest to the outcome of the matter.

[3] The first respondent opposes this application.

[4] In terms of the Notice of Motion, the applicant seeks the following orders –

> "1. An order directing the Second Respondent to cancel Title Deed No.T38782/2018 in terms of section 6 of the Deeds Registries Act 47 of 1937, as amended;
>
> 2. An order declaring that the immovable property described as Erf […] Emdeni Township forms part of the Estate of the late Matefu Ellijah Hlatshwayo and Ntubuza Nora Hlatshwayo held by Certificate of Registered Right of Lease hold No. TL81095/1998.

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[1] 47 of 1937.

3. That the First Respondent be interdicted, restrained and prohibited from disposing of the immovable property described as Erf 1[…] Emdeni Township by amongst others things, selling, donating, and/or alienation pending finalization of this Application.

4. That the Second Respondent be interdicted, restrained and prohibited from transferring and registration of ownership.

5. An order directing the Third Respondent to deal with the Estate late Mkhosi Ben Hlatshwayo, Estate No. 119968/2021 in terms of Intestate Succession Act 81 of 1987 and consider the Second Applicant as heir entitled to benefit therefrom.

6. No costs order is sought against any of the Respondent unless they elect to oppose this Application.

7. Further and/or alternative relief."

[5] At the hearing of this application, the applicants only wanted to proceed with paragraphs 3 and 4 of the Notice of Motion, briefly, that the first respondent be interdicted from disposing of and transferring the immovable property.

[6] Section 6 of the Act provides as follows:

"6 Registered deeds not to be cancelled except upon an order of court –

(1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.

(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the

relevant endorsement thereon evidencing the registration of the cancelled deed."

Background facts

[7] The applicant's grandparents, the late Ntubuza Nora Hlatshwayo and her late husband Matefu Ellijah Hlatshwayo were the previous owners of the subject property which was under Deed of Transfer Number TL81095/1998. Matefu Ellijah Hlatshwayo passed on 04 October 2002 and Ntubuza Nora Hlatshwayo passed on 20 December 2006. They were married in community of property to each other, and both died intestate, respectively.

[8] The applicant's late father Ben Hlatshwayo was appointed an estate representative in terms of section 18(3) of the Administration of Estates Act,[2] as amended, and was issued with a letter of authority dated 16 October 2017, in respect of the estate of his late mother, Ntubuza Nora Hlatshwayo.

[9] Upon his appointment as the estate representative, Ben Hlatswayo was enjoined to wind up the estate of Ntubuza Hlatshwayo in accordance with the Administration of Estates Act. In the process, the property known as Erf 1[…] Emdeni was apparently sold for R 250,000.00 and transferred to the first respondent around 08 October 2018.

[10] On 17 January 2021, Ben Hlatshwayo passed away and he was survived by his wife Elizabeth Siphiwe Hlatswayo, to whom he was married in community of property. The applicant was appointed the executrix of her parents' joint estate under letter of executorship dated 27 July 2021.

[11] The applicants contend that the sale and transfer of the property to the first respondent was unlawful; secondly, that the late Ben Hlatshwayo never received payment of the R 250 000.00 from the respondents; and thirdly, that the signatures

[2] 66 of 1965.

on the transfer documents, which includes the power of attorney to pass transfer, are not that of the late Ben Hlatshwayo.

[12] The first respondent contends that she is the lawful owner of the property, having purchased it in good faith and in compliance with all necessary legal requirements. The first respondent raises several points *in limine*, which I will deal with herein below, namely, that the applicants failed to comply with the provisions of rule 41A of the Uniform Rules of Court; that the applicants lack *locus standi;* that the applicants failed to comply with the requirements of a declaration; that the applicants failed to comply with the requirements of an interdict; that the applicants failed to join Loraine Alice Doherty/Gascoine Randon and Associates to the proceedings; that there are dispute of facts; that the applicants followed a wrong procedure being interdict, instead of a review application; and lastly, that the application is moot.

Issues for Determination

[13] The issue to be decided is whether the property was lawfully transferred to the first respondent. Before dealing with this issue, I had to consider the points *in limine* raised by the first respondent.

Points in limine and Analysis of Facts
First Point in Limine - applicants failed to comply with the provisions of rule 41A

[14] The Respondent alleged that the Applicants did not serve a rule 41A notice.

[15] Rule 41A (1) deals with mediation and provides a working definition of mediation as:

> "a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating

discussions between the parties and assisting them in their negotiations to resolve the dispute."

[16] Rule 41A was evidently introduced as a mechanism to enable parties to resolve disputes in an expedited and cost-effective manner and, as was recently held, potentially avoid an adverse court order following a trial or motion proceedings.[3]

[17] The four pillars of mediation which are identified by rule 41A are the following:

(a) it is a voluntary, non-binding non-prescriptive dispute resolution process;

(b) the terms of the process to be adopted are those agreed upon by the parties;

(c) the mediator facilitates the process to enable the parties to themselves find a solution and makes no decision on the merits nor imposes a settlement on them; and

(d) the process is confidential.

[18] In accordance with rule 41A (2), the applicants are required to serve a notice on the respondent stating whether they consent to or oppose the referral of the dispute to mediation. The rule is worded as follows:

"(2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

[3] *Maxwele Royal Family & Another v Premier of the Eastern Cape Province & Others* [2021] ZAECMHC 10 at para 50.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation."

[19] The court in *P v O*[4] *(21264/2019)* at para 19 stated as follows:
"Rule 41A was introduced as an amendment to the Rules and came into effect on 9 March 2020. Its underlying objective is to make it mandatory for litigating parties to consider mediation at the inception of litigation."

[20] In *Nedbank Ltd v D & Another*,[5] Boonzaaier AJ stated as follows:

"the court may direct the parties to consider mediation as a dispute resolution mechanism when it is clearly evident that such a procedure will benefit the parties and move them closer to better resolving the dispute by such mechanism."[6]

[21] In *Sokhani Development & Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality,*[7] Zono AJ found that non-compliance with rule 41A and its provisions are not fatal to the proceedings.

[22] It is already evident that the applicants' failure to adhere to this rule is a procedural irregularity that cannot simply be overlooked. However, this non-compliance, on its own, may not necessarily bar the application, as such I find that the parties may at any stage of the proceedings, before the judgment is granted still refer the matter to mediation. In that regard the *point in limine* in respect of non-compliance with rule 41A cannot stand and is dismissed.

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[4] [2022] ZAGPJHC 826.
[5] [2022] ZAFSHC 331.
[6] Id at para 15.10.3.
[7] [2024] ZAECMKHC 44.

The Second point in limine – Lack of locus standi

[23] The first respondent raises a point *in limine* that the second applicant lacks *locus standi*, arguing that there is no basis for the latter to claim to have an interest in this matter. The second applicant contends that her *locus standi* is based on her being an intestate heir of her father's estate, the late Ben Hlatshwayo, secondly, on the basis that her mother denounced her benefit from the estate.

[24] *Locus standi* refers to the right or standing of a legal person to bring or defend an application or action in a court. If a litigant fails to show it has *locus standi*, "the court should, as a general rule, dispose of the matter without entering the merits, and that it should only enter the merits in exceptional cases or where the public interest really cries out for that."[8]

[25] It is trite that he who has a right to sue is said to have *locus standi* in such application or action. In this matter, the first respondent has placed the second applicant's *locus standi* squarely in dispute. The test is whether the second applicant has a direct personal interest in the suit to be considered.[9]

[26] In *Minister of Safety and Security v Lupacchini and Others,*[10] two connotations of the expression were aptly identified. It was well said that in its primary sense, *locus standi* refers to the capacity to litigate, that is, the capacity to sue or to be sued. It was correctly pointed out that whilst the capacity to litigate is of course not the same as the capacity to act, there is usually a close correlation between them. In its secondary sense, the expression denotes whether a person has a sufficient interest in the subject matter of the case to be allowed to bring or defend the claim.

[27] I will first deal with the claim that the first applicant is the "intestate heir of her father's estate" as a basis for *locus standi*. In her founding affidavit the second applicant mentioned that her father was survived by his wife, to whom he was

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[8] *Areva NP Incorporated in France v Eskom Holdings SOC Limited and others* [2016] ZACC 51; 2017 (6) BCLR 675 (CC); 2017 (6) SA 621 (CC) at para 41.
[9] *Rescue Committee, Dutch Reform Church v Martheze* 1926 CPD 298 at 300.
[10] [2009] ZAFSHC 82.

married in community of property and who has apparently renounced her benefits. The second applicant further stated that she was the sole child of her parents. However, in the same affidavit, the second applicant attached confirmatory affidavits signed by her mother and her sister, Alvina Dudu Hlatshwayo simply confirming the correctness of her averments.

[28] This does not seem comprehensible, the second applicant does not provide clarity as to when and how her mother renounced her benefit from the estate, or when such renunciation was filed with the third respondent, whether it was accepted or not. The second applicant does not indicate why her mother and sister were not cited as co-beneficiaries or co-applicants. I find no reasonable explanation for excluding the surviving spouse from benefiting in her joint estate with the deceased Ben Hlatshwayo.

[29] I find it unacceptable that the second applicant places reliance on the confirmatory affidavit signed by her mother, as the only proof of the latter's renunciation of her benefits from the joint estate. Any renunciation must be filed in writing with the third respondent.

[30] I also find it contradictory that the second applicant in paragraph 5 of the notice of motion is seeking an order that she be considered as heir entitled to benefit from the estate of her late father Ben Hlatshwayo. There are no facts to substantiate this claim. Rule 6(1) determines that every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

[31] In support of what constitutes a direct and substantial interest, the court in *Watson NO v Ngonyama and Another*[11] extended on what was held in *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others,*[12] which is as follows:

[11] [2021] ZASCA 74; 2021 (5) SA 559 (SCA) ("*Watson*").
[12] [2005] ZASCA 12; 2005 (4) SA 212 (SCA).

"In *Transvaal Agricultural Union* this court set out the two tests to determine whether a party has a direct and substantial interest in the outcome of the litigation:

'The first was to consider whether the third party would have locus standi to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.'"[13]

[32] The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in *Dalrymple v R*:[14]

"The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law."[15]

[33] The aforesaid facts which need to be set out include, the facts pertaining to an applicant's *locus standi*. It is "trite law that appropriate allegations to establish the locus standi of an applicant should be made in the launching affidavits and not in the replying affidavits".[16]

[34] Further, it is trite that an applicant should make out its case in its founding affidavit and not in reply, or worse, belatedly in argument.[17]

[35] The second applicant claims an interest as an intestate heir but has not demonstrated how this interest gives her the right to challenge the sale of the subject

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[13] *Watson* above n 11 at para 53.
[14] 1910 TS 372.
[15] Id at 379.
[16] See *Scott v Hanekom* 1980 (3) SA 1182 (C) at 1188-H.
[17] See *Director of Hospital Services v Mistry* 1979 (1) SA 626 at 636 A-B. See also *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) at para 177.

property. The second applicant has further failed to establish the test for direct interest as established in *Watson NO* above. It is evident that the subject property was sold by her late father in 2017 in the course of winding up his parents' estate. It is trite that the requirements for transfer are twofold: (1) delivery effected by registration of transfer in the deed's office; and (2) the existence of a real agreement, the essential elements of which are an intention on the part of the transferor to transfer the property and an intention on the part of the transferee to acquire ownership of the property.

[36] I find that the first applicant's powers as executrix do not actually extend to an authority to invalidate any actions taken by her father in another estate, in his representative capacity as the executor.

[37] Accordingly, I am satisfied that the *locus standi* of the applicants has not been established and on this basis, the application cannot stand.

Third Point in Limine - applicant failed to comply with the requirements of a declaration

[38] A declaratory order is a flexible remedy which may be accompanied by other forms of relief including a mandatory order.[18]

[39] A declaratory order is an order by which a dispute over the existence of a legal right is resolved, which right can be existing, prospective or contingent. An interdict is an extraordinary remedy aimed at preventing harm or enforcing rights.

[40] To obtain a declaratory order the following requirements must be met -

(a) The court must be satisfied that the applicant has an interest in an existing, future, or contingent right; and

[18] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 005 (4) BCLR 301 (CC); 2005 (2) SA 359 (CC) at paras 107-108.

(b) Once so satisfied, the court must consider whether or not the order should be granted.[19]

[41] In this case, the applicants failed to demonstrate an uncontested right to the property. Furthermore, the second applicant's lack of *locus standi* undermines any claim she may have to a declaratory order.

Fourth Point in Limine - Applicants failed to comply with the requirements of an interdict

[42] An interdict is a legal remedy that can be granted by a court where someone needs protection of their rights against a threat of, or an actual unlawful interference. The general requirements for obtaining an interdict are trite and are as follows –

a. There must be a clear legal right (the right being/which will be infringed).
b. There must be a well-grounded basis for believing the applicant will suffer irreparable harm if the interdict is not granted.
c. The balance of convenience must favour the applicant.
d. No other available remedy.

[43] For a successful interdict, one has to prove that there is there is a clear existence of an enforceable right. Generally, the court may only grant an interim interdict if there is a *prima facie* right. This will only last for a period until the right and its violation can clearly be proven, then a final interdict will be granted depending on the facts of the case.

[44] The first respondent contends that the applicants failed to prove or to indicate that she has a clear right, alternatively, *prima facie* right, which justifies the granting of an interdict against the first respondent regarding the property. The first respondent further contends that the applicants failed to prove a threat to their right

[19] See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; 2005 (6) SA 205 (SCA) at paras 16-17.

and to prove the absence of alternative remedy. On this basis as well, the applicants stand to fail.

Fifth Point in Limine - applicants failed to join Loraine Alice Doherty/Gascoine Randon and Associates to the proceedings

[45] The averment here is that the applicants failed to join key parties who played a crucial role in the transaction, specifically the attorneys involved in the transfer. The absence of these parties renders any declaratory or interdictory relief ineffective, as the court cannot make binding orders on those who were not party to the proceedings.

[46] The law is clear, a court must refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation have been joined as parties.[20]

[47] Non-joinder is ordinarily a matter for a dilatory plea rather than an exception. A dilatory plea does not strike at a cause of action, it is directed rather at delaying its hearing until something happens to render it appropriate for the hearing to proceed. In the case of a successful plea of non-joinder, that something would be the joinder of another party with a legal interest in the relief being claimed.

[48] The authentication of signatures on transfer documents are generally verified and confirmed by the conveyancer who attended to the transfer. Similarly, the same attorneys have a legal duty to receive and ensure that the purchase price is paid. Therefore, I am of the view that it is necessary for these attorneys to clarify when and how the purchase price was paid. It is also necessary for the attorneys to clarify who, when and where the transfer documents were signed. This cannot be taken lightly.

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[20] *City of Johannesburg v SALA* [2015] ZASCA 4; (2015) 36 ILJ 1439 (SCA). See also *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657 and 659; *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA); and *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115; 2013 (1) SA 170 (SCA).

Sixth Point in Limine - dispute of facts

[49] The existence of significant disputes of fact in this matter, particularly concerning the validity of the sale and the signatures involved, necessitates a civil action rather than a motion for an interdict. I find that the issues raised cannot be resolved on paper without proper evidence and cross-examination. The applicants should have foreseen these disputes and chosen the appropriate procedural route. Again, on this basis alone, the applicants cannot succeed.

Seventh Point in Limine - applicants followed a wrong procedure, being interdict instead of a review application, and that the application is moot

[50] The first respondent further argues that the applicants should have considered an application for review instead of declaratory application and interdict. It remains questionable as to what steps were taken to bring this matter to the attention of the third respondent for a determination whether the sale of the property approved as part of the liquidation of the deceased estate. The applicants fail to elaborate on these facts. I cannot find any basis for even considering a review application for this matter as the third respondent's administrative action is not under scrutiny. In that regard, this point *in limine* does not success.

[51] Be that as it may I agree with the first respondent's counsel in so far as the argument about mootness of this application is concerned. The second applicant alleges that her father never received any payment of R 250 000.00 in respect of the purchase price, without providing any evidence in support of that allegation.

[52] The applicants dispute the signature on the transfer documents passing transfer to the first respondent without providing any expert evidence for the allegation made. This Court cannot draw an inference based on the applicants' own comparison of some documents signed by her late father, particularly without engaging the attorneys who took charge of the transaction.

[53] The second applicant contends that she became aware of the transfer of the property on 5 April 2022, without bringing the court into her confidence as to what

she did with the property since the date of her appointment as the executrix of her father's estate or circumstances leading to her becoming aware. There is simply no basis or corroboration for the allegation that the first respondent has defrauded the deceased of the property.

Conclusion

[54] I find that the applicants have not established a proper case for the relief sought. I cannot find any legal basis to justify the applicants challenge of ownership of the immovable property duly transferred by the executor of the estate of the then registered owners during his lifetime. All the points *in limine* raised by the first respondent calls for evidence to be adduced properly at trial. Motion proceedings are clearly not appropriate for the issues raised. The lack of *locus standi*, failure to join necessary parties, and significant disputes of fact collectively undermine the applicants' case. The application is procedurally flawed and substantively unsound.

Order

[55] In the premises the following order is made:

(a) The application is dismissed with costs, including the costs of counsel, on a scale as between attorney and client.

PN MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicants T Matimbi instructed by HR Monyai Attorneys
For the Respondent/Plaintiff: B Socikwa instructed by Mamathuntsha Inc. Attorneys

Date of hearing: 11 September 2024
Date of Judgment: 23 October 2024

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the Caselines electronic platform. The date for hand-down is deemed to be 23 October 2024.