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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

- (1) NOT REPORTABLE.
- (2) NOT OF INTEREST TO OTHER JUDGES.
- (3) REVISED.

**Case Number: 33233/2016**

**27/10/2017**

In the matter between:

SEEMELA NGWANA THAMAGA (In her capacity  
As the Executrix of the late SEEMELA HLABISHA  
JACKSON)

PLAINTIFF

and

MASHIGO GIDEON SWALANE  
REGISTRAR OF DEEDS - JOHANNESBURG

1<sup>st</sup> RESPONDENT

2<sup>nd</sup> RESPONDENT

*Coram:* HUGHES J

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**JUDGMENT**

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HUGHES J

Introduction -

[1] The applicant, Seemela Ngwana Thamaga, is the surviving spouse of Seemela Hlabisha Jackson (the deceased).

[2] The first respondent is Mashigo Gideon Swalane, who resides at [...]. The second respondent is the Registrar of Deeds Johannesburg who has not filed any papers thus choosing not to partake in these proceedings.

[3] This is an application for the de-registration of the first respondent as registered owner to the property, Erf [...], and the re-registering of the property in the name of the applicant.

### Background

[4] On 31 August 1981, the applicant and the deceased were married in community of property, which marriage still subsisted at the time of death of the deceased on 21 August 2008.

[5] During the course of the applicant and deceased marriage they acquired a property in the East Rand, being [...] (the property) on 16 October 1982.

[6] After the death of the deceased and specifically on 8 September 2009 the applicant was appointed as executrix of the estate of the deceased.

[7] The first respondent asserts that he is the rightful owner of the property and alleges that he and the deceased entered into a written agreement for the sale of said property. He contends that on 19 March 2008 he deposited the purchase price of R35 000.00 into a Capitec bank account with account number: [...] alleged to be that of the deceased. It transpired that on 30 March 2008 the first respondent took occupation of the property.

[8] In advance of the case made out by the applicant she attached as annexures to her founding affidavit the following documents, of which this court has had sight of the originals:

- (i) The proof of her marriage to the deceased;
- (ii) The death certificate of deceased;
- (iii) The letter of appointment as executrix;
- (iv) The East Rand Administration Board Daveyton Residential permit initially obtained by her and the deceased;

- (v) The deed of transfer of the property in favour of the applicant and the deceased.

[9] The first respondent on the other hand, but for being in occupation of the property, has put up no documents to support his claim that he purchased the property from the deceased, neither has he put up the title deed to illustrate that he is the title owner of the property.

[10] The applicant states that on 3 April 2009, she approached the first respondent about his occupation of the property. This is when the first respondent provided the applicants with a Windeed enquiry of the property from the Deeds Office which reflects that he was the current titled owner and the applicant and his husband were the previous owners of the property.

#### Issue

[11] The applicant seeks a declaratory order, amongst other relief, that she is the rightful owner of the property, thus instructing the Registrar of Deeds Johannesburg to remove the first respondent as the *defacto* registered owner of the property and effecting transfer of the property to the applicant. Further relief sought, is authorising the Sheriff of Benoni to sign the necessary property transfer documents and that he or she remove the first respondent from the property and return possession to the applicant.

#### Discussion

[12] The applicant denies that the deceased sold the property to the first respondent. In amplification of such denial she avers that her and the deceased being married in community of property at the time of such alleged sale, which she still denies, cannot be a valid sale without her consent.

[13] In addition, the applicant also disputes that allegation that the first respondent deposited an amount of R35 000.00, of which the first respondent puts up the deposit slip as an annexure, into the bank account mentioned above allegedly being that of the deceased. To this end she argues that the bank account reflected on the deposit slip produced by the first respondent is not the

Capitec bank account of the deceased.

[14] The applicant further argues that the transfer of the property which took place whilst she was appointed executrix could not have materialise without her consent as well. She argued that this is yet another fact to be taken into consideration when deciding the validity of the first respondent's alleged purchase and transfer of the property.

[15] Notably, in the answering affidavit of the first respondent he admits that when approached by the applicant, he informed her that *"he had purchased the property from my deceased husband."* When he was confronted by the applicant with the proposition that he could not have purchased the property without her knowledge and consent, he persisted that he had purchased the property from the deceased. To confirm his purchase and registration as owner the first respondent provided the applicant with the Windeed search document obtained from the deeds office which depicts his details as the registered owner.

[16] Counsel for the first respondent submitted from the bar that no documentation had been provided by the first respondent due to the fact that the attorney who had conducted the transfer had informed that he had destroyed the documents, as five years had passed to retain such documents in safekeeping. Glaringly, there is no confirmatory affidavit filed by the conveyancing attorney to confirm counsel's submission from the bar.

[17] What also emerges from the first respondent's answering affidavit is that he alleged that he and deceased signed the purchase and sale agreement, thereafter the deceased *"then took the offer to purchase with him and indicated that he will soon take it to Limpopo so as the wife, applicant can append her signature."* The answering affidavit is then silent as regards the fact whether the applicant had indeed appended her signature to the purchase and sale agreement.

[18] In addition, I might add, the answering affidavit is also silent as to whether the applicant, the deceased and the first respondent all appeared before the conveyancer, as required by law, to sign the relevant transfer documents to enable the transfer of the property.

[19] The applicant is adamant that the sale and transfer of the property was

fraudulent and was not valid in law. On the other hand the first respondent argues that he concluded a valid contract of sale with the deceased and the transfer of the property was valid, legal and of force and effect.

### Conclusion

[20] The applicant by submission of the original document as stated in paragraph 8 above and the submissions made in her founding affidavit it cannot be dispute that she was married to the deceased, that she and the deceased and was appointed executrix. Further that her and the deceased were the tiled owners of the property prior to the alleged alienation contended by the first respondent.

[21] The Alienation of Land Act 68 of 1981, section 2(1) states the following:

*"No alienation of land after the commencement of this section 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."*

[22] Further in the **Law of Contract in South Africa 5<sup>th</sup> Edition by R.H. Christie at page 111:**

*"The object of the section being as thus stated, and not the protection of either buyers or sellers as a class, and the legislature having expressly stated that contracts which do not comply with the section shall be of no force or effect, there is no room for the argument that the section can be waived by either party."*

[23] In terms of section 2(1) mentioned above no alienation of land can exist or come to the fore if the deed of alienation, the purchase and sale agreement, is signed by only one party, in this instance one spouse. Taking into account that the applicant is adamant that she did not sign the deed of alienation, being the purchase and sale agreement and deed of transfer, and the first respondent admitted in his answering affidavit that he and the deceased only signed. Nowhere in the papers of the first respondent is mention made that the applicant

signed any papers. See **Kotze v Newmont SA Ltd 1977 (3) SA 368 (NC) at 372A-E.**

[24] Thus, for the sale of the property to be valid, the first respondent had to show that the purchase and sale agreement between him and the deceased had the signature of the applicant and was valid. This is so, as the applicant and the deceased were married in community of property and it is trite that the deceased could not alienated the property without the applicant being a party and signatory to the purchase and sale agreement between the first respondent and the deceased.

[25] In addition, on an examination of the Windeed provided by the first respondent, the alleged date of purchase between the first respondent and the deceased is recorded as 13 March 2008. The registration of the property is recorded took as 21 October 2008, whilst the deceased died on 21 August 2008. As the executrix was only appointed on 8 September 2009, any documents that would have been required to be signed, after the date of death of the deceased and before registration of the property, would have had to be signed by the executrix with the assistance of Master. According to the applicant this was not done as, she as the executrix, had not been appointed as yet and the Master was not advised of the transfer. She argues so, because the Master would have informed her of any pending transfer or transfer during the period that this transfer took place.

[26] Ultimately, the buck stops with the applicant, the first respondent could not under any of the circumstances surpass her consent and participation. On the papers before me does there in fact exist disputes of fact which require determination? In my view there does not, for the fact that the first respondent has clearly admitted in his papers that he concluded a purchase and sale agreement with the deceased. He takes it no further, he does not refute the applicant's contention that she did not signed the purchase and sale agreement, rightly so I might add, as he adamantly admitted he concluded the purchase and sale agreement with the deceased. In essence no dispute of fact exist on the papers as the first respondent on the papers has never refuted the applicant's version that she had not signed and that she had not granted her consent. I have in the circumstances followed the 'robust approach' adopted in **Room Hire Co**

**(Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1165**

where Murray AJP(as he then was) stated: "The respondent's affidavit must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard."

[27] On the affidavits before me the first respondent admits he contracted with the deceased thus there is no dispute of fact when the applicant avers that he did not contract with her as well for the transaction and transfer to be valid in law. In these circumstances I also refer to **Prinsloo v Shaw 1938 AD 570 at 576**. There is nothing before this court to refute the applicant's submissions and they remain undisputed. In fact we have an admission from the first respondent that he only contracted with the deceased. There is therefore no dispute of fact on the papers before me and it is prudent in these circumstances to adopt a common sense robust approach to circumvent any stratagem by the first respondent.

[28] Of interest, the first respondent alleges that he paid the purchase price upfront for the purchase of the property. Even if on the version from the bar that the documents have been destroyed by the attorney, the first respondent would himself be in possession of the title deeds and not with the conveyancer, as the transaction was paid up so to speak.

[29] In conclusion, in terms of section 28 of the Alienation of Land Act, if there is non-compliance with section 2(1), that alienation is of no force or effect and is rendered null and void. In the circumstances, the alienation of the property, [...], to the first respondent is of no force or effect and is declared null and void.

Order

[30] In the result the following order is made:

1. An order confirming that the applicant, Seemela Ngwana Thamaga is the surviving spouse of the late Seemela Hlabisha Jackson and the legally appointed representative/executrix of the late Seemela Hlabisha Jackson;
2. An order confirming that the applicant, Seemela Ngwana Thamaga is the legal owner of the property Erf: [...];
3. An order declaring that the transfer of the property Erf: [...] into the first Respondent, Mashigo Gideon Swalane, was effected as a result

of fraudulent conduct on the part of the first respondent, Mashigo Gideon Swalane.

4. An order directing the second respondent, the registrar of Deeds to cancel the registration of the property Erf: [...] in the name of the first respondent, Mashigo Gideon Swalane.
5. An order directing the second respondent, the registrar of Deeds to effect transfer of the property Erf: [...] into the applicant, Seemela Ngwana Thamaga's name;
6. An order authorising the Sheriff Benoni or any other sheriff who has jurisdiction in the area where the property is situated to sign all the necessary documents in order to effect transfer of the property Erf: [...], into the applicant's name Seemela Ngwana Thamaga.
7. An order directing the Sheriff Benoni to remove the first Respondent, Mashigo Gideon Swalane from the property and to place the property in the possession of the applicant, Seemela Ngwana Thamaga ;
8. An order directing the first respondent, Mashigo Gideon Swalane pay the costs of this application.

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W. Hughes

Judge of the High Court, Gauteng, Pretoria

Dates heard: 11 October 2017

Date of order: 11 October 2017

Date judgment delivered: 27 October 2017

Appearances:

Appearance for the Applicant: Adv. Thobejane

Instructed by: Botha Massyn & Thobejane



Appearance for the Respondent: Adv. Nkuna

Instructed by: B.P Ndaba Incorporated