



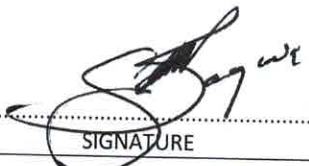
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 22815/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

24/08/20
DATE


SIGNATURE

In the matter between:

JOSEPH BONGANI HLONGWANE

First Applicant

KGOTLELLO DISEMELO

Second Applicant

and

TINTSWALO MERCY MSALESA

First Respondent

MADUMETJA JOHANNES MSALESA

Second Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Third Respondent

THE REGISTER OF DEEDS

Fourth Respondent

SHERIFF OF THE HIGH COURT, WONDERBOOM

Fifth Respondent

JUDGMENT

BAQWA J

INTRODUCTION

1 This application was initially brought as an application as an urgent application. It now proceeds before this Court as an opposed application in which the applicants seek relief in the following terms:

- 1.1 That the first and second respondents be compelled and ordered to sign transfer documents in respect of the sale of Erf 3925 Doornpoort Extension 34 Township in favour of the buyer within 10 days from date of this order.
- 1.2 That the fifth respondent be ordered and authorised to sign all transfer documents on behalf of the first and second respondents in respect of the sale of Erf 3925 Doornpoort Ext.34 Township in favour of the buyer.
- 1.3 That the fourth respondent be ordered to facilitate the transfer of Erf 3925 Doornpoort Extension 34 Township and register the house into the name of the buyer.

- 2 The application is opposed by the first and second respondents who have filed not only opposing papers but also a counter-application.
- 3 In the counter application the first respondent (who is married to the second respondent) seeks the following relief: an order:
 - 3.1 Declaring that first respondent is the holder of the fifty per cent of the rights to Erf 3925 Casia Street, Doornpoort Ext 34;
 - 3.2 Declaring the first liquidation and distribution account void and invalid;
 - 3.3 Ordering the appointment of an independent evaluator to determine the market value of the land in question excluding the house on Erf 3925 and declaring the value determined by the evaluator to be binding on the parties.

BACKGROUND

- 4 The respondent was married to the applicants' late father, Joel Hlongwane ("the deceased") on 18 June 1997. The deceased and the first respondent acquired Erf 3925 Casia Street, Doornpoort ("the property") during their marriage which was a vacant plot.
- 5 The property which was acquired on 6 June 2000 was registered at the deeds registry reflecting both their names as co-owners.
- 6 The parties divorced on 27 May 2002. A decree of divorce was issued incorporating a settlement agreement. Consequently, a Liquidator was appointed to execute the division of their join estate.

ISSUES IN DISPUTE

- 7 The applicants allege that the first respondent has no right to the immovable property as any rights she possessed were extinguished at the time of divorce and that, that included rights to the property for which she was compensated when the deceased paid a sum of seventeen thousand rands (R17 000.00).
- 8 The first respondent contends that she still remains a co-owner of the said property as she still appears as the registered co-owner at the Deeds Office.
- 9 Regarding the counter-application by the first respondent, the applicants deny having acknowledged the first respondent as a co-owner. They state that they merely approached her to sign the transfer documents to a buyer in her capacity as one of the persons reflected in the title deed. They deny therefore that first respondent holds any right, title or interest to the proceeds of the sale of the property.

THE LIQUIDATION AND DISTRIBUTION ACCOUNT

- 10 As part of the evidence presented by the applicants is the Liquidation and Distribution Account which was produced by the Liquidator referred to earlier. It is recorded in the account that the deceased purchased the first respondent's half-share of the vacant plot they co-owned at the time of their divorce. There is no other evidence as to what happened at the time of divorce.
- 11 The first respondent does not deny the narration of events leading to their divorce including the decree of divorce and the appointment of the Liquidator. According

to the evidence presented, the Liquidator was appointed by the first respondent's Attorneys.

- 12 The first respondent admits having had at least one meeting or discussion with the Liquidator who paid her a visit at her place of work prior to the preparation of the account.
- 13 She however claims that she did not have any further engagement with him nor was she furnished with the Liquidation and Distribution Account until the institution of those proceedings.
- 14 The Liquidation Account is a significant piece of evidence for a number of reasons. It is the only objective evidence we have as a recordal of the consequences of the divorce. The parties are in agreement as to how it came into being. The only bone of contention seems to be the validity thereof which has arisen through the first respondent's counter-application and in which she seeks that it be declared null and void.

ANALYSIS

- 15 The apparent reason for the current dispute is the failure by the deceased and/or the Liquidator to have the first respondent's name removed from the title deed after the issue of the Liquidator's report.
- 16 Nobody seems to have paid attention to that matter until the deceased passed away and the applicants were appointed as executors in his estate.

- 17 The Liquidator has filed an affidavit in which he confirms the averments by the applicants. He explains the process of compilation of the Liquidation and Distribution and confirms that the sum of R17 000.00 was credited to first respondent's account. Counsel for the first respondent confirmed that the Liquidator was appointed by the first respondent through her Attorneys. Yet, she states that over a period of eighteen years of not hearing anything from the Liquidator she neither consulted the Attorney nor the Liquidator for a progress report. The Liquidator states that he issued the necessary report and produced cheque stubs to prove payments made to first respondent 18 years ago. The credibility of Mr Jordaan seems to be beyond reproach whilst the same cannot be said of the first respondent. Her account leaves yawning gaps as to what happened immediately after the divorce. It is riddled with bare denials.
- 18 Regarding the issue of applicants agreeing to pay the first applicant fifty percent of the proceeds of sale the probabilities seem to be as follows. The applicants were aware of the fact that the deceased had bought first respondent out at the time of divorce. This is apparent from the Liquidator's report. The likelihood that they would again promise the first respondent payment out of the proceeds is in my view not probable.
- 19 The probabilities seem to favour the likelihood that upon realising that her name has not yet been erased from the title deed, she perceived an opportunity to make a profit second time around.

- 20 This inference may be drawn from the fact that if she knew that she was being owed a half-portion of the immovable property for a period of about eighteen years she would have pursued her rights in that regard. She did absolutely nothing about it. She now seeks in her counterclaim to have the Liquidator's report nullified without advancing any grounds for that contention. This seems to be a belated attempt to erase evidence which is irrefutable and which gives a lie to her claim.

THE COUNTERCLAIM

- 21 The Liquidation Account was issued in execution of a court order. Inevitably, the impact of the court order on the property of the divorcing parties, be it movable or immovable, for a division, is such that the Liquidator executes that function on the basis of the court order. The transfer of the property is effected in the execution thereof. The fact that, that was not done by either the deceased or the Liquidator does not alter that position nor does it revive rights that were brought to an end by the decree of divorce.
- 22 The decree of divorce incorporated a settlement agreement by the parties. What the first respondent now seeks to do is to unravel the consequences of a court order which was never appealed against nor set aside.
- 23 The first respondent seeks to raise, *inter alia*, prescription against the applicants. That defence is bad in law in that as stated earlier, she herself has not pursued her perceived right for a period of eighteen years. Moreover, the applicant's claim arose in 2019. Prescription does arise.

- 24 Subsequent to the divorce order and the Liquidation Account, the ownership of the property vested on the deceased even through the formality of transferring the property into his name was not executed. The first respondent cannot cling to the failure to execute the formality to claim the right of co-ownership.
- 25 Besides the absence of grounds for the setting aside of the Liquidation and Distribution Account, the validity or otherwise of that report would have to be challenged in a substantive application in which the Liquidator would have to be joined as an interested party. In my view, the applicants have correctly raised a defence of non-joinder to the counter application. Absent the joinder, the counter-application cannot succeed.

COSTS

- 26 The applicants submit that the first respondent ought to be mulcted in punitive costs for opposing the application whilst being fully aware of the true facts. She has also launched a counter application which has no proper basis in law. I agree.

THE ORDER

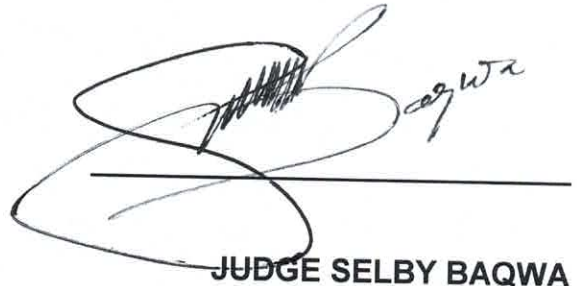
- 27 In the circumstances, I make the following order:
- 27.1 First and second respondent are compelled and ordered to sign the transfer documents in respect of the sale of Erf 3925 Doornport Extension 34 Township, Registration Division JR Gauteng Province measuring 783 square metres in favour of the buyer within 10 days from date of this order.

27.2 The fifth respondent is ordered and authorised to sign all transfer documents on behalf of the first and second respondents in respect of the sale of Erf 3925 Doornport Extension 34 Township in favour of the buyer.

27.3 The fourth respondent is ordered to facilitate the transfer of Erf 3925 Doornport Extension 34 Township and register the property into the name of the buyer.

27.4 The counter-application by the first respondent is dismissed.

27.5 The first and second respondents are ordered to pay the applicant's costs on an attorney and client scale, jointly and severally, the one to pay the other to be absolved, such costs to include the employment of Counsel.



JUDGE SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on : 17 August 2020

Judgment delivered 24 August 2020

Appearances:

For the Applicant

: Adv. SS Masina

Instructed by

: T. Sikhala Attorneys

For the 1st – 2nd Respondent

: Adv. MQ Matome

Instructed by

: Ngoveni Attorneys