



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2257/2016

In the matter between:

KHANTSE ANNA TSUKUDU N.O

and

THABO JAPHTA TLHOPANE

1st Respondent

MATLALINYANE LUCIA SEFALI

2nd Respondent

CORAM: NICHOLSON, AJ

HEARD ON: 2 MARCH 2017

JUDGMENT BY: NICHOLSON, AJ

DELIVERED ON: 9 MARCH 2017

- [1] This is an opposed application and counterclaim relating to competing claims for transfer of an immovable property situated within the jurisdiction of this honorable court.
- [2] The applicant in this matter is the Executrix in the Estate Late Mary Mamorolong Tsukudu. (The deceased) who died on 29 July 2014.
- [3] The deceased entered into a deed of sale with the 1st Respondent on 27 May 1994 in respect of the property situated at Erf [....] Puthaditjhaba-A (the property). It is common cause that this deed of sale still subsists.
- [4] The Applicant resold the property to the second Respondent in terms of a Deed of Sale dated 11 March 2015, a deed of sale she has attempted to substitute with a document dated 2 April 2015.
- [5] As a consequence of this second deed of sale, Applicant became aware of the 1st Respondent's claim to the property and this matter arose with regards to the competing personal rights of the 1st and 2nd Respondents to claim transfer of the property.
- [6] There are some questions associated with the validity of the Deed of Sale to the 2nd Respondent as the document initially submitted

to the Court was not signed by both parties and the court initially refused to allow the document to be substituted by the document dated 2 April 2015. Despite this refusal, and after Respondent's successful request for a postponement to submit a supplementary affidavit relating to Applicant's attempt to enter the Contract into evidence, the Applicant has slipped the document into the court papers as an attachment to her response to the supplementary affidavit.

- [7] The property was sold to the 1st Respondent for a purchase price of R 38 000.00, which purchase price Applicant alleges was never paid in full.

Transfer of the property to the 1st Respondent was to take place on payment of the full purchase price. Transfer costs to be borne by the purchaser.

- [8] Applicant asserts that an amount of R 5 200.00 remains outstanding on the purchase price and thus the property was never transferred to the 1st Respondent. Applicant alleges that the failure of the 1st Respondent to pay the purchase price in full was communicated to her and other family members by the deceased on numerous occasions over a period of approximately 15 years before her death.

- [9] The court was asked to accept the hearsay evidence on the basis that the deceased is unable to testify, the evidence has probative

value and cannot be viewed as prejudicial. Applicant therefore asserts that the evidence should be admitted in the interests of justice.

- [10] Having considered the authority to which the Court was referred by Applicant (the Law of Evidence Amendment Act (45 of 1988 s3(1); *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another*; *McDonald's Corporation v Dax Prop CC and another*; *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC* [1996] ZASCA 82; 1997 (1) SA 1 (A); [1996] 4All Sa 1 (A); *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting* 2002 (3) SA 765 (T)), the court concluded that the probative value of the information is questionable in that the Applicant's documentation before the court brings her general reliability into question. Had deceased made these statements to numerous family members it would have been a simple matter to obtain a supporting affidavit from one or more family member to this effect. Furthermore, Applicant has had to substitute the Letters of Executorship submitted as part of her papers as well as the contract between herself and the 2nd Respondent that is the basis for this application. Further, the other evidence before the court does not support the alleged content of the hearsay evidence. In particular, the objective fact that the 1st Respondent is possessed of the Deed of Grant, which document was only to pass to him on payment of the purchase price, flies directly in the face of the hearsay evidence being offered. For these reasons, the court finds that it is not in the interests of justice to admit the hearsay evidence. The admission

of the Hearsay would in any event not have had an impact on the finding of the court given that it's effect would in any event have been countered by the other evidence before the court.(*Makhatini v Road Accident Fund* (2002 (1) SA 511 (SCA) per Navsa J)

- [11] In terms of the Deed of Sale between the deceased and the 1st Respondent, the Deed of Grant to the property would be delivered to the 1st Respondent on payment of the full purchase price. The Deed of Grant is in his possession and is *prima facie* proof that the full purchase price was paid.

- [12] The Court thus accepts that on a balance of probabilities, the 1st Respondent did indeed pay the full purchase price and was thus entitled to take transfer of the property.

- [13] The issue thus squarely before the court is that, if both Deeds of Sale are valid, 1st and 2nd Respondent's personal rights to transfer of the property compete and it falls to the court to determine to which of the two Respondents transfer should be effected. The Applicant asserts that the 2nd Respondent should receive transfer. The basis for this assertion is that this is the most just and equitable solution to the conundrum.

- [14] In making this assertion, the Applicant drew the court's attention to authority regarding the application of the maxim, *Qui prior est*

tempore potior est jure, the first in time is first in law. (*Ingledew v Theodosiou and another* [2006] JOL 18296 (W); [2006] ZAGPHC 62; *Bekker v Schmidt Bou Ontwikkelings CC and others* [2007] 4 All SA 1231 (C); 2007 (1) SA 600 (C); *Vlok v Silver Crest Trading 154 (Pty) Ltd and others* [2013] ZAFSHC 218; *Standard Bank of SA Ltd v Petrus Jacobus Koekemoer* case [2012] ZAGPPHC 300; and *Wahloo Sand BK en andere v Trustees of the Hambly Parker Trust, en andere* 2[2001] ZASCA 137; 2002 (2) SA 776 (SCA)) Applicant argued that these cases are authority for the view that the maxim need not be applied in every instance and that it should only be applied where it is just and equitable to do so.

- [15] The court was not convinced that it would be more equitable to transfer the property to the 2nd Respondent than to the 1st. The contention that the 1st Respondent does not deserve to take transfer as his behavior in putting the Deed of Grant in his cupboard for 20 years and not proceeding to take transfer of the property disqualifies him is not sound in law. The Applicant's argument seems to be based on her outrage at this failure of the 1st Respondent to complete the formalities with regards to the property. How it could be just or equitable to deny transfer to a buyer who paid the full purchase price many years ago and who has been using the property as an owner without challenge for in excess of twenty years is a puzzle to the court.

- [16] Finally, the Applicant argues that the 1st Respondent's claim for transfer of the property has prescribed in terms of the Prescription Act (68 of 1969). Again, the Applicant offers extensive cases authority in this regard. (*Leviton and Son v De Klerk's Trustees* 1914 CPD 685; *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A); *Oertel en andere NNO v Direkteur van Plaaslike Bestuur en andere* 1983 (1) SA 354 (A); *Desai NO v Desai and others* 1996 (1) SA 141 (A); *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC); *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and others* (CCT 232/15) [2016] ZACC 49) This case law is authority for the contention that an obligation to effect transfer of property constitutes a debt that is capable of extinction through prescription as envisaged by the Prescription Act.
- [17] The 1st Respondent acknowledged in argument, the view that an obligation to transfer immovable property constitutes a debt in accordance with *Desai (supra)* and offered further authority for this in the form of *eThekweni Municipality v Mounthaven (Pty) Ltd* ([2015] ZAKZDHC 78). It was argued for the 1st Respondent that, *Fegen and Another v Mphkathi* ([2013] ZASCA 100) is authority for the view tendered by the 1st Respondent that prescription can be interrupted by an express or tacit acknowledgement of the indebtedness. It is asserted that the Applicant's repeated offers to transfer the property to 1st Respondent on production of proof of payment of the purchase price constitutes such an acknowledgement, alternatively, a renunciation of the benefits of Prescription.

- [18] The court was referred to *Brown v Courier* (1963 (3) SA 325 (N)) and *Lindhorst v Andersen* ([2006] ZAECHC 70) as regards renunciation.

As in *Lindhorst*, the 1st Respondent has been allowed to believe and act as if he is the owner of the property. He has leased the property out for over 20 years without any challenge. This is a tacit acknowledgement of the debt. Furthermore, the Applicant's persistent assertions, including in her founding affidavit, that she would transfer the property to the 1st Respondent on production of proof of payment amounts to a renunciation of the benefits of prescription.

- [19] The facts of this case unequivocally support the assertion that the Applicant renounced the benefits of prescription and 1st Respondent may seek transfer of the property.

- [20] Applicant has requested that should the court find for the 1st Respondent that the deceased estate should not be burdened with the costs of the application or the counterclaim as it is a small estate with few resources. The Court can find no merit in this argument and finds it somewhat disingenuous for the Applicant to assume that the 1st Respondent is better situated to absorb the costs of a legal process that was initiated by the Applicant and persisted in by her even after proof of payment had been presented in the form of the Deed of Grant being in 1st Respondent's possession.

- [21] In conclusion, the Applicant also drew to the court's attention its obligation to infuse the law of contract with the values and principles of the Constitution (108 of 1996) as required in *Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (cc); 2012 (#) BCLR 219 (CC)).
- [22] First Respondent instituted a counterclaim for transfer of the property to him and for facilitation of said transfer. He also claimed legal costs. He presented argument for a punitive costs order against the Applicant in her personal capacity as well as in her capacity as Executrix of the deceased estate, on the basis that she had persisted in the matter in bad faith. The Court considered this argument but determined that the Applicant did not act in bad faith in bringing this application. This is a complex legal situation that benefits from clarification by the court.
- [23] After consideration of the papers submitted to the court and on hearing of argument in this matter, the court makes the following order:
1. The Applicant's application is dismissed.
 2. The Applicant is ordered to transfer the property (Erf [....] Phuthadithaba-A) to the 1st Respondent within 90 days of this order.
 3. Should the Applicant fail to sign the transfer documents for any reason, the Sheriff of the High Court, Harrismith, is

authorized to sign the transfer documents on behalf of the Applicant.

4. A.V. Theron and Swanepoel Attorneys are instructed to attend to the registration of transfer of the property in the 1st Respondent's name.
5. 1st Respondent is liable for all reasonable costs, including clearance figures, transfer duty, transfer costs and other costs incidental to registration of transfer.
6. As 1st Respondent is in possession of the property and has been for in excess of 20 years, the Applicant is not required to supply him with a valid Electrical Certificate in terms of the schedule to the Machinery and Occupational Safety Act.
7. Applicant to pay the costs of the application and counterclaim on a party and party scale.

C. NICHOLSON, AJ

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