

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case Number: 66618/10

8/12/17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED
8/12/2017
DATE

SIGNATURE

In the matter between

ELIZABETH REFILWE MOSWANYANE CHIDI

APPLICANT

and

MATSELENG LUCY NGWENYA

RESPONDENT

In re:

ELIZABETH REFILWE MOSWANYANE CHIDI

And

MATSELENG LUCY NGWENYA

1ST RESPONDENT

THE DIRECTOR-GENERAL: DEPARTMENT OF HOME
AFFAIRS

2ND RESPONDENT

THE MASTER OF THE HIGH COURT, PRETORIA

3RD RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

4TH RESPONDENT

Coram: HUGHES J

REASONS

HUGHES J

[1] This is an unopposed application for the relief as reflected in the draft order which comprises of :

- (a) An order for a presumption of death of John Chabane Ngwenya;
- (b) The appointment of an executor of Mr Ngwenya's estate;
- (c) The rectification of the purchase and sales agreement of immovable property;
- and
- (d) Transfer of the said immovable property.

[2] The applicant purchased immoveable property from the first respondents' deceased husband. The deceased and the first respondent were married in community of property. In the cause of that transaction the husband of the first respondent signed the contract of sale without the first respondent being a party to the transaction.

[3] It is trite that a spouse of a marriage in community of property requires the written consent of the other spouse in order to enter into a contract to sell immovable property which is subject to the Alienation of Lands Act 68 of 1981.

[4] In this present case this written consent, in terms of section 15(2) (g) read with section 15(5) of the Matrimonial Property Act 88 of 1984 (the Matrimonial Property Act), was not attained. Section 15(2)(g) and 15(5), simply put states that a spouse married in community of property cannot enter into the purchase or sale of alienation of land without the written consent of the other spouse.

[5] Even so, in the current situation the first respondent submitted an affidavit confirming her knowledge of the sale of the property which was done in an attempt to have the property registered in the applicant's name. The reason being is that though

the applicant paid and took occupation of the property there was a delay in initiating the transfer of said property into the applicant's name.

[6] I do not propose to go into the reasons therefore save to say that no fraudulent or underhandedness is part of the reasons for the delay. Said differently, when the first respondent deposed to the affidavit confirming her knowledge of the sale, payment of the purchase price and occupation of the applicant, her husband was now deceased and both her and the applicant were desirous of effecting the transfer of the property into the name of the applicant.

[7] Sections 15 (9) (a) and section 15 (6) provides protection to third party who contract with a spouse married in community of property without the other spouses consent.

"Section 15 (9)(a) reads:

"When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;"

Section 15 (6) reads:

"The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business."

[8] In this case there is nothing on the paper that indicates that the applicant had knowledge or no knowledge that the consent was lacking. However, after the death of the first respondent's husband there is an affidavit by her stating she was aware of the sale and that the applicant had purchased and paid for the immovable property. There is also the fact that the applicant lived in the said property.

[9] There is also a host of correspondence one in particular being annexure ERM10 dated 7 October 2014 attached to the founding affidavit of the applicant. This is a letter written on behalf of the applicant by her employer to have a conveyancer, Weavind &

Weavind Inc for a quote to transfer the property from the first respondent to the applicant. The following paragraph is of grave concern:

"The property is registered into the name of Mr C J Ngwenya - who died intestate – no information or documentation can be obtained from the surviving spouse, is she not prepared to assist or to co-operate in any way to get this matter to proceed.

Legalwise- a certain Everlyn said that Mrs Ngwenya gave them instructions to claim R18 000.00 from Ms Chidi – but never provided them with any further information, so their file was also closed." [My emphasis]

[10] From my understanding of the above it is evident that there is a dispute between the first respondent, Mrs Ngwenya, and the applicant. The first respondent seems to contend that she is entitled to an amount of R18 000.00 from the applicant for some or other reason. As this information is provided in relation to the sale and transfer of the property, in my view, this claim contended could only be linked to the purchase price of the property. That being said the submission made in the first respondent's affidavit that the applicant relies upon may not be correct that the entire purchase price was paid.

[11] I am of the view that the applicant has not done enough to trace and locate the first respondent to clarify the issue of the sale of the property and this claim she contends she has against the applicant. Why do I say so, she does not explain how it came about that she managed to get the affidavit in 2014 but the correspondences of 7 October 2014 states that the first respondent was "*not prepared to assist or co-operate in any way*". There is a clear contradiction in terms.

[12] Further, the applicant has not demonstrated in the papers that, at the time she concluded the purchase and sale of the property, she could not have reasonably known that the required consent was lacking. The applicant in the circumstances ought to have taken reasonable steps to investigate whether in the situation that prevailed the consent was required or not, and if required, whether it had in fact been obtained. See **Visser v Hull 2010 (1) SA 521 (WCC) at 527 para [7]**.

[13] In the circumstances the relief sought by the applicant is refused and the application is dismissed.

[14] Consequently the following order is made:

[9.1] The application is dismissed.

A handwritten signature in black ink, appearing to be 'W. Hughes', written over a horizontal line.

W. Hughes

Judge of the High Court Gauteng, Pretoria