

IN THE HIGH COURT OF SOUTH AFRICA, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 782/1998

IN the matter between:

**BONGINKOSI EDWARD MKHIZE  
NOMUSA JOYCE MKHIZE**

**FIRST PLAINTIFF  
SECOND PLAINTIFF**

**AND**

**CEDRICK MABIJA NO**

**DEFENDANT**

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### **JUDGEMENT**

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**RADEBE J**

#### INTRODUCTION

This matter came before me on the basis of a stated case in terms of Rule 33 (4) for the determination of a question of law, without any oral evidence being led.

#### BACKGROUND

2. The Defendant, Cedrick Mabija NO, is cited in his representative capacity as the Executor of the Estate of the Late Pumla Grenna Sangqwane (formerly Mabija) who died on 19 November 2007, ("the deceased"). He substitutes the deceased as Defendant and reference to the Defendant shall mean (the Late Pumla Mabija). The Plaintiffs are the registered owners of the immovable property known as F1495 Ntuzuma Township ("the immovable property") Mafika Douglas Sangqwane ("Sangqwane") is the former (divorced) husband of the Defendant.

3. The agreed facts are as contained in the schedule which is attached hereto as Annexure "A" and I do not intend writing it out again but will in due course make comments and/or my views on certain aspects, namely item 1. The Bundle of the agreed documents is "Annexure B".

### SUBMISSIONS

4. The issue to be decided by court revolves around the Defendant's counterclaim. In his address the Plaintiff's Counterclaim. In his address the Plaintiff's Counsel submitted:
  - 4.1 that the legal issue must be decided in Plaintiff's favour and that the Defendant's Counterclaim be dismissed with costs, on the bases that:
    - (i) Plaintiff (as third parties) relied in good faith on the data in the Deeds Office Title Deed showing only Sangqwane as the owner of the immovable property, and purchased it from him in good faith; and;
    - (ii) Both parties had a serious intention to pass and receive transfer, respectively.
  - 4.2 that the Plaintiffs be entitled to an order for the eviction of Cedric Mabiya and all who occupy the immovable property in or under him in accordance with their claim in convention.

- 4.3 that the Plaintiffs' claim in convention be adjourned to the expedited trial roll on a date to arranged with the Registrar pending compliance by the Plaintiffs with the provisions of the Prevention of Illegal Eviction from and unlawful Occupation of Land Act, No. 19 of 1998.
5. On the other hand, the Defendant's Counsel submitted that: the Plaintiffs cannot rely on a void Purchase and Sale Agreement concluded with Sangqwane, as the latter was not the rightful owner of the property; that she was in lawful occupation of the property; that the property formed the joint estate of herself and Sangqwane whom she divorced on 18 April 1995, by virtue of their marriage in community of property; that upon the decree of divorce the Defendant acquired Sangqwane's right, title and interest in and to his half share in the property by virtue of the divorce order, which stated inter alia that:
- "The parties will each retain the assets he/she possessed at 5/11/1993".*

6. In her Counterclaim the Defendant cited the Registrar of Deeds and Douglas Sangqwane as Defendants. She claimed the following:

- “(a) an Order declaring the alienation of the property situated at F1495 Ntuzuma Township, Ntuzuma, KwaZulu-Natal (hereinafter referred to as “the property”) by Mafika Douglas Sangqwane or any other person or legal person to the First and Second Plaintiffs to be invalid, *void ab initio* and of force and effect;
- (b) an Order declaring the Defendant to be lawful owner of the property;
- (c) an Order setting aside the registration of transfer of ownership of the property into the name of the First and Second Plaintiffs in the records of the registrar of Deeds for the Province of KwaZulu-Natal;
- d) an Order directing the Registrar of Deeds for the Province of KwaZulu-Natal to transfer ownership of the property out of the name/names of Mafika Douglas Sangqwane and/or the First and Second Plaintiff in favour of the Defendants”.

7. The basis of Defendant’s Counterclaim is that:

- 7.1 she was married to Sangqwane during or on about 1975 until 1995;

- 7.2 on 18<sup>th</sup> April 1995 the marriage dissolved by way of a decree of divorce issued by the North Eastern Divorce Court on 18<sup>th</sup> April 1995;
- 7.3 the Court Order indicated, amongst other things, that “the parties will each retain the assets he/she possessed as at 5/11/1993”;
- 7.4 as at 5/11/1993 Defendant was resident at the property;
- 7.5 in accordance with the said divorce order and the agreed facts, it is argued that Defendant obtained full ownership of the property and Sangqwane alienated all of his right title and interest in and to his half share of the property in favour of Defendant.
8. Firstly, I will deal with the issue raised by the Defendant as a basis of her Counterclaim in paragraph 9 thereof and those issues agreed upon by the parties in the stated case i.t.o. Rule 33(4). in paragraphs 1 & 4 (namely the marriage of 1975 and the divorce of 1995).
9. It is trite that all Black (African) persons who were married by civil rites prior to the commencement on 1 November 1984 of the Matrimonial Property Act, No. 88 of 1984, were married according to the provisions of the Black Administration Act, No 38 of 1927. The marriage certificate which appears on page 32 of the Bundle, (Annexure B) *ex facie* shows that the parties’ marriage was governed by Act 38 of 1927.

The Defendant and Sangqwane were married in 1975 prior to the commencement of the Matrimonial Property Act, No. 88 of 1984 (the MPA).

10. The now repealed Section 22(6) of the Black Administration Act (BAA) read as follows:

*"A marriage between Blacks, contracted after the commencement of this Act, shall not produce the legal consequences of the marriage in community of property between spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife, it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, commissioner or marriage officer (who is hereby authorised to attest to such declaration) that it is their intention and desire that community of property and of profit and loss shall result in their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure, such land shall be excluded from such community".* The marriage certificate which appears on page 32 of the bundle does not represent such a declaration.

The repeal of the said Black Administration Act (BAA) and 22(6) thereof does not have retrospective effect. The effect of such a marriage is that each spouse retained the ownership (not possession) of his or her own property. This is also reinforced in the case of *Ex Parte Minister of Native Affairs: in re: Molefe vs Molefe* 1946 (AD) 315.

11. Section 36(b) of the Matrimonial Property Act introduced ss 3, 4, 5 & 6 into Section 7 of the Divorce Act, 70 of 1979 (by virtue of which Act the Decree of Divorce referred to was obtained. Section 7(3)(4)(5) and (6) of Act 70 do apply to such marriages governed by s 22 of Act 38 of 1927 but can only be invoked by pleadings in a proper way. Section 7(3) of Act 70 of 1979 empowers a Court granting a divorce i.r.o. certain marriages, on application by one of the parties to that marriage, to order the transfer to such party of some of the assets of the other party to the person so applying.
12. More specifically, "Section 7(6) empowers the court, at the request of the party being ordered to transfer part of his or her assets to the other party, to impose certain conditions ameliorating the order to transfer assets by means of such deferment or other conditions as the court may deem just".

The order issued by the Divorce Court is silent on whether such transfer of immovable property ought to have taken place and Defendant has not shown such entitlement.

What the said order does is merely confirm a personal right of occupation to the Defendant which right is not indefinite. It does not change or purports to make Sangqwane change his ownership of the immovable property.

13. It cannot, therefore, be said that the decree of divorce of 18 April 1995 presupposes a division of the estate, nor forfeiture of benefits (ownership of the property) against Sangqwane, nor a redistribution contemplated by section 7(3) of the Divorce Act. The agreement between the parties as outlined in paragraph 1 of the Agreed Facts in Annexure A, cannot change the law.
14. Nothing precluded the Defendant and Sangqwane to invoke the provision of Section 25(3) of the Matrimonial Property Act, No. 88 of 1984 during the subsistence of their marriage. Section 25(3) states as follows:

*"25(3) Notwithstanding anything to the contrary in any law, or the common law contained, the spouses to a marriage entered into before the 2 December 1988 commencement of the Marriage and Matrimonial Property Law Amendment Act 3 1988, and in respect of which the matrimonial system was governed by section 22 of the Black Administration Act, 1927 (Act 38 of 1927), may" –*

- a) if they are married in community of property, cause the provision of Chapter 2 (Abolition of Marital Power) and chapter 3 (marriages in community of property) including section 15 (2) – (powers of spouses) of this Act, to apply to their marriage; or,



- b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provision of chapter 2 of this Act to apply to their marriage;

*"by the execution and registration in a registry within two years of the said commencement (2 December 1998) or by such longer period but not less than six months, determined by the Minister by Notice in the Gazette, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract was so registered."*

The application could be made in terms of section 21(1) of Act 88 of 1984.

*In casu*, there is no evidence that the Defendant and her ex-husband Sangqwane, made that registration. It cannot be said that the decree of 18 April 1995 is evidence but there was community of property in the absence of any proof that the required declaration had been made alternatively that the parties had agreed to a redistribution order in terms of Section 7(3) of the Divorce Act, No. 70 of 1979 no that such an application in terms of section 21(1) of Act 88 of 1984 was made.

15. The second point raised by the Defendant in her counterclaim is that the alienation of the property by Sangqwane is invalid and *void Ab initio*. This now brings us to the determination of whether Sangqwane was the owner (entitled to alienate, mortgaged or do whatever he desired with the property subject to lawfulness thereof.

Ownership is defined in section 102 of the Deed Registries Act no. 47 of 1937 as follows:

“owner” means in relation to

- a) immovable property, subject to paragraph (b) the person registered as the owner or holder thereof and includes... the executor of any owner who has died or ...”
- b) immovable property, real rights in immovable property and notarial bonds –
  - (i) ...
  - (ii) which are registered in the name of only one spouse and which forms part of the joint estate of both spouses in a marriage in community of property, either one or both spouses.
  - (iii) ...
  - (iv) which are registered in the name of only one spouse and which forms part of the joint estate of both spouses in a marriage in community of property to which the provisions of Chapter 3 of the Matrimonial Property Act 88 of 1984 are not applicable.

16. Therefore the Defendant never at any stage qualified as an owner since there was never a joint estate in the first place. The marriage regime entered into did not produce the consequences of a marriage in community of property, nor does the decree of divorce purport to have encompassed the provision of section 7 of the Divorce Act.

The Defendant occupied the property during her lifetime and such occupation gave her possessory rights not ownership rights. She had at the most up until the property was sold to the Plaintiffs a personal right. Such a right cannot be equated to a usufruct and was not even registerable.

17. The second point raised by the Defendant in her Counterclaim is that the alienation of the immovable property by Sangqwane to the First and Second Plaintiffs is invalid, *void ab initio* and of no force effect, and stands to be set aside. Counsel for the Plaintiffs, submitted that as at the date of the sale of the property, Sangqwane as the registered owner of the property as at the date of the conclusion of the written agreement of sale with the Plaintiffs, was vested with all the rights of ownership of the property, including the *dominium* in the property. I have already addressed the issues of ownership in paragraph 15 above.

18. All parties agree that the Plaintiffs were innocent transferees. There was no way they could have been aware of the rights of the Defendant save that they ought to have been aware that she occupied the property. It is a known fact that before a loan for finance is granted, the mortgagee would inspect the property to see if any value can be found. The Plaintiff's purchased the property through home loan granted by Ithala Bank against a mortgage bond over the said property registered as B000010/96 for the sum of R39 478 with an additional amount of R7 896.00. They have been diligently paying the bond premiums still owe an amount of R29 329.79 as at 30/11/2007. In this regard refer to pages 7-29 of Annexure B. This supports the contention that they are *bona fide* purchasers as, if they were not, they would have abandoned or defaulted in payment as early as in 1998 when it became apparent that the Defendant was not prepared to vacate the property to enable the Plaintiff to take vacant occupation.
19. The different systems of transfer identified by the Plaintiffs are usual to consider, viz; the casual system whereby ownership is passed dependent on the existence and validity of a causa giving rise to the transfer (*the justa causa*). I refer to the submission by Mr Combrinck, that:

*"if such a causa is a sale and the sale is invalid on the grounds of mistake, incapacity of one of the parties or because the formal requirements have not been complied with, the passing of ownership is also void".*

With reference to the actions of Mr Sangqwane, there was nothing precluding him from selling the property and causing transfer to pass to the Plaintiffs for reasons I already stated elaborately when dealing with the first aspect of the nature of marriage and the decree of divorce, and in respect of the definition of the "owner".

20. The other system of transfer of ownership is the abstract system. Even if one looks at the abstract system of transfer it becomes immaterial whether an agreement is void or voidable. The necessary intention of the seller, Sangqwane, and that Plaintiffs is evident from the written Deed of Sale as well as from the passing of the mortgage bond in favour of Ithala.
21. The Plaintiffs, as I have said, relied in good faith on the data in the Deeds Office, which in my view, correctly reflected Sangqwane as the owner of the immovable property. There is no evidence to suggest that Sangqwane had been married (to another person) when he entered into the contract of sale, signed transfer documents and made marital status declarations which the Deeds Registrar would require of him before registering the transfer. Furthermore, inspection of the Title Deed (page 5-6 of Bundle B) shows that there was neither a caveat nor any other endorsement on the property save for the charge in favour of the Township Manager-BC 000008/96, which was cancelled prior to transfer to the Plaintiffs being effected.

22. In the result I find that the Plaintiffs were entitled to take transfer of the immovable property, and are accordingly entitled to an order for the eviction of Cedric Mabija and all those who occupy the property in or under him, provided they comply with the provisions of the PIE Act.

I therefore make the following order:

- (a) the Defendant's Counterclaim is dismissed with costs;
- (b) the Plaintiffs' claim in convention is adjourned to the expedited trial roll on a date to be arranged with the Registrar, pending compliance by the Plaintiffs with the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act no. 19 of 1998.

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**RADEBE J**

Counsel for the Plaintiff :

Instructed by:

Adv. P.J. Combrick

Shepstone & Wylie Attorneys

Counsel for the Defendant:

Instructed by:

Adv. N. Winfred

Judgment handed down on:

05/05/2011

