IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

REPORTABLE

CASE NO.3475/2008

In the matter between:

ANNA VISSER	APPLICANT
and	
FRANS HERMANUS HULL	1ST RESPONDENT
CARON DEBRA HULL	2ND RESPONDENT
AARON MARTHINUS JOHANNES HULL	3RD RESPONDENT
JENINE MADELEIN HULL	4TH RESPONDENT
THE REGISTRAR OF DEEDS	5TH RESPONDENT

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
For the Applicant	:	**ADV. R. KONSTABEL**
Instructed by	:	KC Van Vught Attorneys

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Instructed	:	Laubscher & Hatting Quattor Building Voortrekker Road BELLVILLE C/o CK Friedlander Shandling Volks 4th Floor 80 Strand Street CAPE TOWN
Date(s) of Hearing	**:**	**17 FEBRUARY 2009**
Judgment delivered on	**:**	**21 MAY 2009**

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JUDGMENT DELIVERED ON 21 MAY 2009

DLODLO, J

[1] The nature of this application is such that the Court is being asked for an order setting aside an Agreement of Purchase and Sale purportedly entered into by and between one Pieter Phillipus Matthys (the Applicant's deceased husband) and the First to the Fourth Respondents. In terms of this Agreement, an immovable property belonging to the Applicant and the deceased was sold to the First, Second, Third and Fourth Respondents. The second leg of the relief sought in the Notice of Motion reads as follows:

"Dat Vyfde Respondent gelas word om die name van Eerste, Tweede, Derde en Vierde Respondent van hul rekords te verwyder en dat die onroerende eiendom, erf 106 Tindallstraat, McGregor deel van die gesamentlike boedel van Applikant en Pieter Philippus Matthys word."

The immovable property, forming the subject matter of this application was sold and transferred to the Respondents during the lifetime of the deceased, but without the knowledge of the Applicant. The Applicant made this discovery when she was served with eviction papers and this was during the lifetime of the deceased. The Applicant successfully resisted eviction. The present application is opposed by the First to the Fourth Respondents. The Fifth Respondent lodged no opposition to the application but will obviously abide by the decision of this Court. The Applicant is an adult female pensioner who presently stays at erf 106 Tindall Street, McGregor, in the Western Cape (the property which is the subject matter in this application). The First to Fourth Respondents are husbands and wives resident at 1 Kammieskroon Street, Heideveld, Athlone and 66 Orpheuskruising, Eastridge, Mitchell's Plain, Western Cape respectively. In the further handling of this matter the Applicant will continuously be referred to as such. But, the First to the Fourth Respondents will be referred to as "the Respondents". The Fifth Respondent will simply be called "the Registrar of Deeds". Mr. Konstabel and Mr. Nel appeared before me for the Applicant and the Respondents respectively.

FACTUAL BACKGROUND

[2] The Applicant and the deceased were married to each other by way of a civil marriage in community of property. The marriage was entered into on 10 June 1962. The marriage was still subsisting when the deceased fraudulently and without the knowledge of the Applicant, alienated the immovable property belonging to the joint estate for an amount of Ten thousand five hundred rands (R10 500). It needs to be mentioned that whilst it is so that the Applicant and the deceased separated from each other for some years, but that they were not divorced. The Respondents who bought the immovable property are blood relatives of the deceased. The Applicant contended that they knew that she and the deceased were married to each other and had children. According to the applicant the Respondents usually visited the very property owned by the joint estate when she and the deceased still lived together there as husband and wife. It is common cause that the Applicant and her children solely occupied the very property for approximately twenty nine (29) years and they are still in occupation of the house even todate. The Applicant contended that the aforesaid factual situation is well within the knowledge of the Respondents. The Deed of Sale was entered into by the deceased and the Respondents without the knowledge and the consent of the Applicant. She only became aware of the alienation of the property by the deceased after the said property had been transferred and registered by the Registrar of Deeds into the names of the Respondents.

[3] The Applicant was only approached by the Respondents regarding this property after same was registered into their names. As indicated above, the Respondents applied for an order to evict the Applicant

from this property. This application though, was resisted by the Applicant and it was subsequently withdrawn. The application served before the Magistrate's Court. In the papers there is a Court order by the magistrate which accorded the Applicant what is called *"lewenslange verblyfreg"*. In the papers before this Court, the Applicant averred that the Deed of Sale entered into between the deceased and the Respondents is null and void in that her husband one-sidedly and without her oral or written consent, entered into such an agreement affecting the property of their joint estate. The Applicant contended that because the Respondents knew that she and the deceased were married, they also knew or must be taken to have known that her consent was necessary in order to give effect and legality to the Deed of Sale they entered into. The following paragraphs of the Applicant's Founding papers are of importance and for background purposes they are quoted:

"*Toe die oorledene die gemeenskaplike woning verlaat het, het hy amper nooit vir my en die kinders besoek nie. Ek moes die kinders grootmaak as 'n enkelouer wat nie maklik was nie. Hy het gedurende hierdie tydperk geen finansiële bydrae gelewer tot die instandhouding van die woning of gehelp met die betaling van belasting en ander munisipale dienste nie. Die verantwoordelikheid om na die kinders om te sien, die instandhouding van die woning en die betaling van belasting en munisipale dienste het alles swaar op my skouers gerus. As gevolg van die finansiële probleme kon ek nie altyd die belasting en munisipale dienste by bring nie en het met R14 000,00 agterstallig geraak. As gevolg van my omstandighede het die munisipaliteit die agterstallige belasting en munisipale dienste van R14 000,00*

afgeskryf. Ek het toe onderneem om voortaan my belasting gereeld te betaal. In 2007 het ek weer agterstallig geraak in die bedrag van R5 000,00 waarvoor ek 'n aanmaning ontvang het. My skoondogter, Sylvia Matthys en my seun Paul Matthys met wie sy getroud is, het my uit die verknorsing gehelp deur reëlings te tref om die bedrag af te betaal. Voorafgenoemde persone het 'n ooreenkoms met die munisipaliteit aangegaan om die agterstallige skuld te vereffen. Sylvia en Pieter het my ook gehelp oor die jare om verbeterings aan die ses vertrek woning aan te bring soos 'n spoel buite toilet, kragboks, deur vensters in te sit, die vloer te herstel en die mure te pleister. Die bedrag wat hulle bestee het beloop ongeveer R5 000,00."

[4] In 2007 the deceased on two (2) occasions visited the Applicant unexpectedly and he wanted the Applicant to append her signature on a certain document evidencing the sale of this immovable property for the sum of Ten thousand five hundred rands (R10 500). The Applicant refused and told him the property was not for sale. When the Respondents demanded the eviction of the Applicant from the property, it occurred to the Applicant's mind that this was the result of the trickery which the deceased was involved in when he secretly wanted her to sign a certain document. It is averred on behalf of the Respondents that they had no knowledge of the existence of the marriage between the deceased and the Applicant. In the First Respondent's own words in this regard, *"Alhoewel dat ek en my broer geweet het dat die oorledene en Applikant op 'n stadium saam gewoon het en kinders het, was ons nie bewus van hulle getroude*

status nie." The Respondents brought it to the Court's attention that even in the transfer documents the deceased had declared that he was unmarried. In the Answering Affidavit the following important averment is made by the Respondents:

"Dit is korrek dat die oorledene verwant is aan my moeder se familie. Ek kan egter nie sê wat presies die verwantskap is nie. Die tye wat ek en my broer te McGregor aangedoen het, het ons nie met oorledene en sy familie gemeng of pertinent kontak gemaak nie. Hulle doen en late het ons nie aangegaan nie. Eers nadat die huis alreeds op ons naam geregistreer was het ons vir die eerste keer na die huis gegaan en versoek dat Applikant en die inwoners die plek moet ontruim. Sy wou nooit met ons praat nie en het ons na haar seun verwys. Hy het ons weggejaag……..die eiendom nie deel is van die gemeenskaplike boedel nie aangesien die Respondente eienaar(s) van die huis geword het…..die verkoping wettig was en dat daar nie gronde vir tersydestelling van die ooreenkoms is op grond van nietigheid, of op enige ander gronde nie."

The question central to this dispute appears to be whether or not the Respondents knew about the existence of a marriage between the deceased and the Applicant. The sub-question is whether or not it could reasonably have been expected of them to have known about the existence of this marriage relationship.

DISCUSSIONS

[5] The dispute in the instant matter can only be resolved if one considers the provisions of section 15 of the Matrimonial Property Act 88 of 1984, a section that deals with the alienation of property without the

consent of a spouse where the marriage was in community of property. This section is lengthy and should have been quoted in full *infra* before the discussion. I decided against quoting the provisions of section 15 of the Matrimonial Property Act. The reader is referred to the statute itself. The ambit of section 15 should be interpreted as intended to protect the one spouse against the illicit selling or alienation of property forming part of the joint estate by the other spouse who does that without the knowledge and/or consent of the innocent spouse. In this case the Applicant was unaware that the property was being sold, the Applicant was also unaware of the terms and conditions of such proposed agreement. In terms of section 15 (2) (ii), one spouse may not without the written consent of the other spouse enter into a contract to do anything relating to the alienation, mortgage, burden with a servitude or confer any other real right in immovable property forming part of the joint estate. See ***Kotzé NO v Oosthuizen*** 1988 (3) SA 578 (C). Ownership of immovable property which forms part of the matrimonial joint estate is required to be registered in the name of the husband and wife. However, in the instant matter, I am told the legal position was such that a woman who was what then became known as non-white could not be registered owner of an immovable property. That situation, however, did not take away the rights of a spouse married in community of property to be regarded a co-owner of the joint asset of such marriage.

[6] N Zaal in his article entitled "Marital Milestone or Gravestone? The Matrimonial Property Act 88 of 1984 as a Reformative half-way mark for the eighties", published in the 1986 **Tydskrif vir die Suid-**

Afrikaanse Reg (TSAR) on page 57 criticizes section 15 of the Matrimonial Property Act by stating that the section is flawed as it does not afford a non-contracting spouse sufficient protection and does not enhance or encourage the essential consultation between spouses concerning important transactions during marriage. (**1986 TSAR** 57 at pages 66-67). The aggrieved spouse in the case under consideration was absent during the time when her husband entered into negotiations in relation to the property, she had no opportunity to offer any objection in relation to the lack of authority of her husband and had no opportunity to sign any documentation in this regard. Had she been aware of the proposed sale price, she would surely have objected knowing that the property in question is far more valuable. If a spouse wishes to donate or alienate any asset of the joint estate not mentioned in section 15 (2) or 15 (3) (a) of the Act without value and the alienation will prejudice the interests of the non-contracting spouse, the informal consent of the other spouse must be obtained. See section 15 (3) (c) read with section 15 (8). In terms of section 15 (3) (c) the spouse cannot alienate an asset without value. At common law, fraudulent intent will have to be proved whereas in terms of section 15 (3) (c) all that has to be proved is that the gratuitous disposition will probably prejudice his interest in the joint estate.

THIRD PARTY KNOWLEDGE

[7] Section 15 (9) (a) and section 15 (6) provide protection for third parties who contract with spouses married in community of property where that spouse has not obtained the necessary consent for the sale of an immovable property. Professor L Steyn (in **2002 South African**

Law Journal Volume 119 - SALJ) criticizes the decision in the case ***Distillers Corporation Ltd v Modise*** 2001 (4) SA 1071 (O). Professor Steyn states that the court in the **Distillers case** incorrectly formulated the test for liability for third parties. Steyn proposes that the correct formulation is whether the *"...third party 'cannot reasonably know' that the required consent is lacking. The test is not whether the third party would not reasonably have known…the word "cannot" in the phrase "cannot reasonably know" implies that a duty is cast upon the third party to take reasonable steps to investigate whether, in the circumstances, consent is required and if so, whether it has been obtained, this duty was overlooked by the court in the Distillers case."* (See page 256 **South African Law Journal Vol. 119 - SALJ**). Professor Steyn further submits that a third party should take steps to investigate whether the necessary consent has been obtained. She stated as follows in the Journal: *"The third party should take steps which a reasonable person would take to investigate whether consent is required and if so, whether it has been obtained. This is necessary because the third party must be satisfied that the reasonable person cannot know that consent is lacking."*

[8] I agree with Professor Steyn that a third party is expected to do more than rely upon a bold assurance by another party regarding his or her marital status. An adequate inquiry by the third party is required. If this proposition and interpretation of the liability of third parties is accepted then it could be argued that the third parties in the case under consideration should have made the necessary inquiries into the current state of the Applicant and the deceased' marital status. This is

so particularly since they were blood relatives and in the normal course of relationships such a topic would have surfaced at some point in time. As submitted on behalf of the Applicant, they lived in a close knit community and were well aware of the fact that the Applicant and her children lived in the said immovable property for many years. Professor Steyn quotes June Sinclair as a basis for her argument that the third party is put on an inquiry. Sinclair states the following: *"... the words 'cannot reasonably know' to carry any significance, they must imply that the third party is 'put on an inquiry' and is called upon to take reasonable steps to ascertain whether the person has the necessary consent..."* (See page 258 **SALJ** *supra*). After referring to numerous authors Steyn concluded that there is a general consensus that for it to be said that the third party cannot reasonably know that consent is lacking, the legislature requires at the very least adequate inquiry by the third party.

[9] I pause and remind the reader that in the instant matter the four Respondents who bought the immovable property belonging to the joint estate represent a third party in the context of this Judgment. Professor Steyn has also suggested that the reasoning in the case ***Glofinco v Absa Bank Ltd. (t/a United Bank) and Others*** 2001 (2) SA 1048 concerning agency by estoppels should be adopted. In the latter case, the following appears at 1066G-H: *"Unfortunately, the assurance or representation of an agent about her authority is not good enough... If one doubts the authority of a person the last person who should be asked about whether the authority exists is that person."* (See also page 259 **SALJ**, Steyn *supra*)

A contrary view can be seen in the case ***Naidoo and Another v Naidoo and Others*** 2009 JOL 22674 (N) where the court stated at paragraph 12 that *"the issue whether or not a husband or wife had the written authority of his spouse to alienate a certain immovable property is something that would be peculiarly within the knowledge of the aggrieved spouse, and third parties contracting with the defaulting spouse,(if I may refer to him as such), are entitled to assume, that such a defaulting spouse has the requisite written authority more especially when the non-contracting spouse is present when negotiations in relation to the property take place, and offers no objection in relation to the lack of authority of her husband, and in fact signs documents making common cause with his conduct."*

This, however, does not find relevance in the instant matter.

[10] Was there an appropriate endorsement on the Title Deed of the property in question? It should also be noted that in the case of an immovable property, the husband will normally not be able to effect a transaction with a third party without his wife's consent since her written consent will be required by the Registrar of Deeds before he will register the relevant real right on the Title Deed of the property. If this is the case how could it be possible for the Respondents in the case under consideration to have concluded the Deed of Sale? Did the Registrar of Deeds in this instance request the written consent of the wife in this matter? The position in the instant case though, is that first and foremost the name of the Applicant did not appear on the Title Deed of the property. Secondly the Registrar of Deeds must have found papers to be in order in that the transfer papers included an

Affidavit by the deceased (in his capacity as seller) in which he declared that he was unmarried. As indicated earlier on in this Judgment I was told from the bar that the reason why the Applicant's name did not appear on the Title Deed was basically because of the practice in the past which applied to certain race groups. We now know that the deceased lied about his marital status when he made such an Affidavit. The Registrar of Deeds is not at all to blame for what happened with regard to this property. The name of the Applicant did not also appear on the Deed of Sale. This fact also gave the Registrar of Deeds a prima facie impression that the deceased was not married or at least not in community of property. This factual situation taken together with the declaration by the deceased that he was unmarried could legitimately lead any bona fide officer (like the Registrar of Deeds) to believe that the true state of affairs was that the seller was either not at all married or (if married), his marital status had no patrimonial consequences.

[11] Professor Hahlo states that *"...if immovable property forming part of the joint estate is registered in the deeds registry in the name of either the husband or wife, the registrar of deeds will, on application, note on the title deed or if the title deed is not available, the registry duplicate thereof and in all the appropriate registers that it is the property of which in terms of section 15 (2) (a) the registered spouse cannot dispose without the written consent of the other spouse, this is in accordance with section 17 (4) of the Deeds Registries Act."* (See page 256 **Hahlo The South African law of Husband and Wife 5th edition**) The circumstances or the property in question might

sometimes provide an answer. The third person's special knowledge concerning the marital circumstances of the spouse with whom he contracts, could conceivably also be a factor. Looking at the circumstances of this case, it was argued that the third parties had special knowledge since they were closely related to the deceased husband with whom they had contracted for the purchase of the house. I accept this submission. In my view, the Respondents knew very well that the transaction was being conducted behind the Applicant's back. They connived with the deceased and the purpose was obviously to prejudice the Applicant's interests on this asset of the joint estate. They did not take any steps at all in satisfying themselves about the nature of marriage between the deceased and the Applicant. It is reasonable to have expected them even to come and ask the Applicant and/or any of her children. They could also have asked the members of the community. McGregor is a very small place where everybody knows virtually everything about each other. It was easy to find out. They never investigated because they knew that they were assisting their relative (the deceased) to succeed in compromising the interests of the Applicant in this matrimonial asset.

DID THE ALIENATION OF PROPERTY AMOUNT TO A DONATION WITHIN THE MEANING OF SECTION 15 (3) (c)?

[12] Section 15 (3) (c) states that a donation cannot be made without the consent of the other spouse. This is expressly prohibited. In the case of ***Commissioner for Inland Revenue v Estate Hulett*** 1990 (2) SA 786 (A) at 791D the court stated the following: *"Thus if the property, whose fair market value is R100 000 is sold for R10 000, there will be*

a deemed donation for R90 000." Gratuitous disposal of property is discussed in of ***De Jager v Grunder*** 1964 (1) SA 446 (A). The aggrieved spouse in this instance of a donation could possibly have a common law remedy by instituting the action *Pauliana utilis* to recover the assets from the third party. See the case of ***Pickles v Pickles*** 1947 (3) SA 175 (W), ***Pretorius v Pretorius*** 1948 (1) SA 250 (AD) and ***Nel v Cockroft and Another*** 1972 (3) SA 592 (T). The *actio Pauliana* only seems to be applicable to donations by a husband to a third party in *fraudem uxoris*.

[13] As stated earlier on in this Judgment a spouse cannot alienate an asset without value. Section 15 (8) sets out the factors that the court will take into account in determining whether a donation or gratuitous alienation will or probably will not unreasonably prejudice the interest of the other spouse. The factors which the courts will customarily take into account in determining whether a spouse's interest will be prejudiced unreasonably are the value of the donation, the reason for it, the social and financial standing of the parties, their standard of living and any other factor the court deems fit. The act regulates the position where transactions are concluded contrary to the requirement of consent of the other spouse, and this also covers situations where donations are made without the consent in *fraudem uxoris*. The written consent required for the performance of the juristic acts listed may be given *ex post facto* by way of ratification within a reasonable time. This, however, was not obtained in the instant matter. The immovable property under consideration was sold for a mere Ten thousand five hundred rands (R10 500) as opposed to its municipal

value of Ninety eight thousand rands (R98 000). The aggrieved spouse in this instance will therefore clearly be unreasonably prejudiced.

UNDERVALUED PURCHASE PRICE

[14] In ***Laws v Laws and Others*** 1972 (1) SA 321 (W) the applicant alleged that in fraud of her rights in the joint estate, the first respondent has disposed of the residential property to the second respondent for R10 200 (an amount alleged to be about one-half of its realizable value). In ***Laws*** case *supra,* however, an interim interdict was applied for restraining the transfer of the property. It was submitted that there was no *prima facie* case of collusion between the first and second respondents to defeat the applicant's rights and that delay in transfer could only result in damages to the cost of the joint estate should the second respondent cancel the sale and sue for damages for the loss of his bargain. The following passage by **Voet** was quoted: *"...or other circumstances are present from which a presumption of fraud looms out quite clearly. In such a case it is fair that relief should be given to the wife or her heirs. This is so at any rate to this extent, that on dissolution of the marriage the wife or her heirs first deduct as much as has been used up by the generosity causelessly displayed; or, if so much does not remain after debts have been deducted, a Paulian action is afforded to the wife or her heirs for the revocation of the donation in so far as it was a fraud upon the wife."* (See page 323C-D ***Laws*** *supra*). According to **Voet**, *"...the Actio Pauliana is an action for the recovery of a thing alienated by a debtor in fraud of his creditors and that the action arises where the*

fraudulent alienation has been made with the knowledge of the person to whom the alienation has been made, that is to say, where the latter has shared in the fraud." Interestingly the court reasoned that even though Voet was concerned with donations by the husband in fraud of the wife, there can be no difference in principle in the case of other forms of transactions by which the husband acts in fraud of his wife's interests in the joint estate. The court referred to ***Pretorius*** *supra*. In the latter case the factual scenario was highlighted as follows: *"the court was concerned with an action by a wife to set aside the sale of a property by her husband, to whom she was married in community of property. The husband was separated from his wife, the wife alleged that the price was well below the true value of the property and that the joint estate under the husband's control had practically given away a valuable asset and the husband and the third party had defrauded the wife."* The court in defining the term "fraud" reasoned that the wife would at least have to show that the circumstances rendered it probable that the husband had her rights in mind when he entered into the impugned transaction and that he appreciated that it would prejudice her rights. Further she would at least have to show that in all the circumstances the transaction was an unreasonable one for the husband to have entered into. This applies squarely to the case under consideration. In my view, the Applicant demonstrated that the deceased had her rights in mind at the time he entered into this "impugned" transaction and he certainly appreciated that it would prejudice her rights. In fact, this is what he intended.

[15] In the case of ***Kellerman v Kellerman*** 1957 (3) SA 764 (O), the court relied upon the ***Pretorius*** case *supra* as reflecting the requirements of proof by the wife alleging a fraudulent abuse by the husband of his power of administration of the joint estate. Even though the two common law authorities referred to were obviously decided before the passing of the Matrimonial Property Act of 1984, I am of the opinion that the reasoning of the courts and the principles set out above could be relevant to the case under consideration. The court further relied on Professor Hahlo (**The SA Law of Husband and Wife** 3rd ed. at page 156), who states that *"...if a husband married in community of property makes donations out of the joint estate to third persons in deliberate fraud of his wife, then the wife or her estate has a right of recourse against him or his estate on dissolution of the marriage, and that where necessary, she or her estate may proceed with the Actio Pauliana directly against the third party for the gift or its value."* It was argued that the price of Ten thousand two hundred rands (R10 200) was absurdly inadequate and it is probable that the second defendant knew that. The court remarked that the same principles would also apply equally to a fraudulent transaction in some form other than that of a donation. Assuming then "some other form of transaction" would include the fraudulent transaction for the sale of land, then the wife would have to show that:

(a) The circumstances render it probable that the husband had her rights in mind when he entered into the impugned transaction and that he appreciated that it would prejudice those rights;

(b) Viewed objectively, the transaction was in all circumstances an unreasonable one for the husband to enter into;

(c) The third party to whom the disposition was made was aware when entering into the transaction that the husband's disposal of the asset was being effected fraudulently as against the wife.

The Applicant in the instant matter succeeded, in my view, to show the three (3) requirements mentioned *supra*.

REMEDIES AVAILABLE TO THE AGGRIEVED SPOUSE:

[16] Section 15 (9) (b) of Act 88 of 1984 provides: *"that when a spouse enters into a transaction with a person contrary to the provisions of subsections (2) and (3) of section 15 and that spouse knows or ought reasonably to know, that he will probably not obtain the consent required in terms of subsections (2) and (3) or that the power concerned has been suspended, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the spouse upon the division of the joint estate."* In terms of section 15 (9) (b) of the Act, an adjustment should be effected in favour of the non-consenting spouse upon the eventual division of the joint estate, if the joint estate had suffered a loss. It is important to show the loss suffered by the joint estate where the interest in a joint estate has been prejudiced as a result of conduct on the part of the other spouse which is contrary to the provisions of sections 15 (2) and (3). In an instance such as this where the one spouse has been prejudiced, the court may grant a declaratory order or an order ad *pecuniam solvendum* and *ad factum praestandum*. If the spouse who enters into the transaction is aware or should reasonably have been aware that the required consent will probably not be obtained, adjustment in favour of the other spouse must take place on the dissolution of the marriage, but only if

the transaction results in a loss to the joint estate. In the instant matter it can be argued that there is certainly a loss to the joint estate in that the house which was sold for Ten thousand five hundred rands (R10 500), was certainly undervalued as its municipal value was Ninety eight thousand rands (R98 000). The question of adjustment does not arise in the instant matter. The dissolution of the marriage and division of the estate is out of the question. The death of the deceased intervened.

[17] In terms of section 20, where the interest of one spouse in the joint estate is being and probably will be seriously prejudiced by the conduct or proposed conduct of the other spouse, the former spouse may apply to the High Court for immediate division of the joint estate. The court will take into account the prejudice which the conduct of the one spouse has caused the other in respect of the assets of the joint estate. See ***Leeb v Leeb*** 1999 (2) ALL SA 588 (N) at 597. Where a spouse's interest in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, section 20 of the Act allows the court to order the immediate division of the joint estate in equal shares or on such basis as the court may deem fit. The applicant would have to establish on a balance of probability that she was entitled to an order in terms of section 20. The court in ***Kruger v Kruger*** 2005 JOL 14366 (T) found that there was no serious prejudice to the applicant, as it took into account the increase of the value of the house in future; it therefore found that the immediate division of the joint estate will be prejudicial to the Respondent particularly in respect of the house. N Zaal in his article

referred to earlier on in this Judgment states that *"Third parties who are at pains to obtain property from a person who has due spousal consent, may still be unseated by a vindication action emanating from the unconsulted spouse of a predecessor in title."* See ***Chetty v Naidoo*** 1974 (3) SA 13 (A) at 20 B where Jansen AJ said of *dominium* "…the owner may claim his property wherever found, from whomever holding it."

[18] An action for fraudulent concealment is one based on delict and the liability of the wrongdoer is to put the injured party in the same position in which he would have been if the wrongful act had not been committed. See: ***Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd.*** 1936 TPD 209. The object is to make good the loss suffered by the injured party as a direct result of the fraudulent concealment. Possibly the wife could sue for patrimonial loss and would then have to prove that she suffered patrimonial loss as a direct result of the wrongful act. Patrimonial loss includes loss in property, business or prospective gains, capable of pecuniary assessment. It includes all damages flowing from wrongful act including prospective damage and depreciation in market value. See also: ***Oslo Land Co v Union Government*** 1938 AD 584 at page 592.

Annél Van Aswegen in an article which appears in **Modern Business Law, Volume 6 1986** under the title **"Transactions between a spouse and a third party: the effect of the Matrimonial property Act 88 of 1984"**, expressed an opinion with which I am in agreement. (See page 142 of the book). The opinion Van Aswegen expressed is

that in instances where the wife acts without the necessary consent, she binds neither herself nor her husband. However, the other party to such a transaction is bound, and the husband may ratify or repudiate such a contract, either expressly or tacitly by conduct (See **De Wet and Van Wyk – Kontrakreg en Handelsreg** 4 ed (1178) 64). Ratification amounts to *ex post facto* assistance. But where transaction is repudiated and performance has already taken place, the husband can recover the wife's performance with the *condictio indebiti*, but he has to restore the third party's performance in so far as the joint estate has been enriched thereby. (See: Hahlo 148 *supra*). I hasten to mention though that the above expressed opinion bears no relevance in the instant matter.

[19] In ***First National Bank of Southern Africa v Perry and Others*** 2001 (3) SA 960 (SCA) the court dealt with the enrichment action *Condictio ob turpem vel iniustam causam*. The court found that the enrichment action is available not only if the defendant acquires property with knowledge of illegality, but also if he subsequently while still in possession, becomes aware of illegality. The property in question must have been transferred to the defendant under illegal agreement; the implication is that the defendant must have had knowledge of the illegality at the time of the transfer. Could this be applicable to a situation where the third party accepts transfer of an immovable property knowing that the consent requirements in terms of section 15 of the Matrimonial Property Act 88 of 1984 has not been fulfilled? In the instant matter Mr. Konstabel argued that the immovable property was acquired with knowledge of illegality. I am

inclined to agree with this submission. The Respondents are more related to the deceased than they are to the Applicant. It is apparent that they colluded to prejudice the Applicant's interests. The alienation of the immovable property in question for the undervalued price of Ten thousand five hundred rands (R10 500) has certainly unreasonably prejudiced the interest of the wife in the joint estate in terms of section 15 (3) (c) of the Act and is also contrary to the provisions of section 15 (2) of the Act.

[20] The reasoning of the court in ***Bopape and Another v Moloto*** 1999 (4) ALL SA 277 (T) should enjoy consideration. The court in ***Moloto*** matter stated that: *"...there is no reason to limit the remedies of an aggrieved spouse to the four corners of section 15 (9) (b) of the Act. There is no sound reason why an aggrieved spouse should suffer prejudice pending the possible eventual division of the joint estate which may or may not come about. It may also be prejudicial to an aggrieved spouse to seek a division of the joint estate in terms of section 20 of the Act. To accomplish a lawful donation or alienation without value, the consent of both spouses is required. When it is clear that such consent is absent, the alienation cannot be lawful…it follows that such alienation is void."* I fully associate myself with this reasoning. It should also be noted that the contracting spouse (deceased husband) in this matter acted unreasonably in that he could have made an application to the court which might have given him leave to enter into the transaction without the consent of the Applicant if the court was of the opinion that there is good reason to dispense with the consent. See in this regard section 16 (1) of the Act. Why was

the aggrieved spouse not consulted in regard to the agreement of sale, since the contracting spouse and the third parties knew at all times that his wife and children were living in the said immovable property for many years? The answer to the aforegoing rhetoric question is telling.

[21] I have formed a firm view that the agreement on the strength of which the property relevant to this case was transferred to the Respondents is most certainly null and void regard being had to the afore-going discussion. I have good reasons to set aside the agreement of purchase and sale. The consequence will obviously be that the present registration of the property in the names of the Respondents shall not stand. That in effect shall mean that the registration of the property shall revert to the name of the deceased. Therefore, the property shall form part of the deceased estate jointly owned by the Applicant and the deceased. The question then becomes what must happen to the Respondents? The fact that I have found that they took no steps at all to inquire about the matrimonial status between the deceased and the Applicant does not mean they must simply lose the sum of Ten thousand five hundred rands (R10 500) they paid to the deceased. If it is so ordered, then it would mean they are being punished for their apparent unlawful conduct in this matter. Our law does not work like that. The deceased estate will be unjustifiably enriched to the extent of this sum of money.

[22] There are three (3) basic elements for liability in an unjustified enrichment action, namely:

(a) The enrichment of the Defendant and the corresponding impoverishing of the Plaintiff;

(b) A causal link between the Defendant's enrichment and the Plaintiff's impoverishment;

(c) The absence of a cause that justifies the retention of the enrichment by the Defendant.

(See: **Wille's Principles of South African Law** – 8th ed. page 631 1046).

The remarks by the Court in ***Minister of Justice v Van Heerden*** 1960 (4) SA 377 (O) are of importance. The Court remarked as follows at 381F-382A:

"Dr. van Heerden het egter aangevoer dat waar eiser die waarde van die diamante eis hy moet aantoon dat hy besit van die diamante verloor het sonder enige skuld of gedrag aan sy kant. Hy het gesteun op wat VAN DEN HEEVER, R, in Pucjlowski v Johnston's Executors, 1946 W.L.D. 6, gesê het, naamlik:

'The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequently become inoperative (causa non secuta; causa finita). In general, the object is the recovery of the property itself together with its natural fruits; quod retineur (D. 24.1.6); quod ex iniusta causa apud aliquem sit (D. 12.5.6)' quod non ex iusta causa ad eum pervenit vel redit ad non iustam causam (D. 12.7.3); quod alterius apud alterum sine causa deprehenditur (D. 12.6.66). INNES, C.J., expressed the same idea in Wilken v Kohler, 1913 AD 135 at p.145, where he says: 'The ratio of that decision was that neither party to such an invalid agreement would be allowed to

enrich himself at the expense of the other. The party attempting it would be made to return any assets received on faith of an arrangement which he either could not or would not carry out.' It is only in exceptional circumstances that economic value may be recovered by condiction in lieu of the recovery of the asset: a common characteristic of such cases is that the plaintiff has been deprived of ownership in his property through no fault or even conduct of his own – e.g., condiction of the value of fruits consumed by the mala fide possessor (C. 4.9.3); the value of property lost to him by specification; loss of ownership due to res amotae by his wife, etc. Where, as in this case, a party to a putative agreement puts the other party into possession or leaves him in possession not as lessee, but for the objects of the intended contract, I cannot see on what equitable basis he can claim a rental or the value of use and occupation – unless one relies upon a vague and superficial notion of equity which is not reflected in the law."

Simply put, someone who has paid a sum of money or delivered property to another believing in error that it was due to such person when in fact it was not due, is entitled to recover that sum of money or property from the latter by means of the *condictio indebiti*. See: **Wille's Principles of South African Law** at page 636- paragraph 3. It is my view that the Respondents are entitled to proceed against the deceased estate in order to recover their Ten thousand five hundred rands (R10 500) paid in terms of the abortive Deed of Sale. It is so that general enrichment action compels the recipient to pay the Plaintiff damages. Whilst damages are generally paid in money, the Judge is at large at the instance of the prejudiced party to award

damages in another form than money. This in fact means that the Defendant can be ordered to return the property which he has received. The adage is clear and is as follows: *"Hij die ongerechtvaardigt is verrijkt ten koste van een ander, is verplicht, voor zover dit redelijk is, diens schade te vergoeden tot het bedrag van zijn verrijking. Voor zover de verrijking is vermindered als gevolg van een omstandigheid die niet aan de verrijkte kan worden toegerekend, blijft zij buiten beschouwing. Is de verrijking verminderd in de periode waarin de verrijkte redelijkerwijze met een verplichting tot vergoeding van de schade geen rekening behoefde te houden, dan wordt hem dit niet toegerekend. Bij de vastelling van deze vermindering wordt mede rekening gehouden met uitgaven die zonder de verrijking zouden uigebleven."* Briefly translated as: **"He who is unjustifiably enriched at the expense of another, is obliged, to the extent that it is reasonable, to compensate him by paying damages in the amount of his enrichment."**

ORDER

[23] In the circumstances I make the following order:

(a) The Agreement of Purchase and Sale purportedly entered into by the deceased and the Respondents on 19 May 2006 in terms of which Erf 106 Tindall Street, McGregor, situated in the Breërivier/Wynland Municipality, Division Robertson, Western Cape, which was purchased by the Respondents, is declared null and void and is thus set aside.

(b) It is ordered that the Registrar of Deeds takes steps to deregister the property by removing and/or erasing the names of the Respondents such that the registration of the property and ownership thereof revert to the name of the deceased and thus the deceased estate; the Registrar shall necessarily have regard to the relevant provisions of the Alienation of Land Act 68 of 1981 in giving effect to this portion of the order.

(c) The costs to be paid to the Applicant shall be calculated such that the Respondents shall only pay 50% thereof jointly and severally the one paying the other to be absolved; another 50% shall be recoverable from the deceased estate.

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DLODLO, J