



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO.
3443/2021

In the matter between:

NTOMBOXOLO DYIBISHE N.O. Plaintiff

and

NONKULELEKO SHENXANE First Defendant

MAKHAYA XHALABILE Second
Defendant

NOMATHAMSANQA DYIBISHE Third
Defendant

JUDGMENT

RUGUNANAN J

[1] These are exception proceedings at the instance of the first defendant.

[2] The parties are conveniently referred to as in the main action in which the plaintiff, in her capacity as executrix of the estate of the late Mxolisi Joseph Dyibishe, has suited the aforementioned defendants.

[3] The particulars of claim contain the following material facts:

‘5. The deceased is the owner of the immovable property situated at 65 Raglan Road, Grahamstown, also known as Erf 4068, Rhini, Makana Municipality, which he held through the third defendant, his nominee.

6. The property exists, is clearly identifiable and has not been destroyed or consumed.

7. The first and second defendants are in unlawful possession alternatively detention of the property.’

[4] The plaintiff’s claim, essentially against the first and second defendants, is for relief formulated as follows:

‘1. It is declared that the deceased . . . is the owner of the immovable property... which he held through the third defendant, his nominee;

2. The first and second defendants are evicted from the property;

3. The first and second defendants are ordered to have the property transferred to the name of the plaintiff within 60 days from the date of this order.’

[5] The claims derive from two causes of action, namely: (i) a declaration of ownership, and (ii) an order for eviction.

The issues

- [6] The grounds of excipiability are that the particulars of claim do not sustain these causes of action and are vague and embarrassing. A pleading may be vague and embarrassing due to lack of intelligibility in the formulation of the cause of action. Where the formulation of a cause of action raises an issue with its legal validity, a court is duty bound to dispose of the matter if there is a point of law to be decided.¹
- [7] An exception is a legal objection to an opponent's pleading and complains of a defect inherent in the pleading. A convenient starting point commences with an acceptance that the facts stated in the pleading are correct.² Put another way, no facts stated outside those mentioned in the pleading may be adduced by either party nor can reference be made to any other document.³ The exception may thus only be taken if the defect against which objection is taken appears *ex facie* the pleading itself.
- [8] The relief directed at declaring the deceased's ownership of the property and for securing its transfer into the name of the plaintiff requires comment on what a deceased estate is, and exactly who it is that is vested with the power of administration.
- [9] Appositely, this is dealt with in *Clarkson NO v Gelb and others*⁴ where it is stated that:

‘A deceased estate is an aggregate of assets and liabilities. It has no legal personality and, when referring to it as an entity, one must be careful not to imply or understand thereby that one is dealing with anything like a *persona*. The executor is vested with its administration and he alone has the power to deal with this totality of rights and

¹ Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, Juta, 5th ed, Volume 1 generally at page 632 and 635

² Erasmus, *Superior Court Practice*, Volume 2 at D1-293 [Service 9, 2019]

³ *Gallagher Group v IO Tech* 2014 (2) SA 157 (GNP) at 161D

⁴ 1981 (1) SA 288 (W) at

obligations. He is not merely a procurator or agent. His primary duty is to obtain possession of the assets of the deceased, to realise them as far as may be necessary, to make payment of debts and expenses, to frame a liquidation and distribution account, and thereafter to make a distribution to the heirs and legatees.

Heirs and legatees can claim whatever is due to them only after confirmation of the liquidation and distribution account’ (emphasis added)

[10] In clarification, the executor and the deceased are separate and distinct *personae*. The executor does not step into the shoes of the deceased on the latter’s death – he does not succeed to the person of the deceased but is simply required to administer and distribute the estate under the provisions of the Administration of Estates Act (the Act)⁵ (see *Van den Bergh v Coetzee* NO⁶).

[11] The Act precludes the exercise of executorial powers by anyone other than the executor who acts under the authority of the Master in terms of the Act.⁷ It is therefore the executor that has *locus standi* to liquidate and distribute the estate; and where an estate has been dispossessed of a right in property it is the executor who is entitled to prosecute the restitution (see *Kara v The Properties formerly known as the Farm Cato Manor No 812*⁸). But in doing so the executor does not acquire full *dominium*. While the estate is being administered, the underlying *dominium* is a bare *dominium* bereft of absolute control and the unqualified right to use and enjoy that which is in a deceased estate. How much of the bare *dominium* ultimately translates into full *dominium* depends on the requirements of administration (whether testate or intestate) leading to

⁵ Act 55 of 1965

⁶ [2001] JOL 8365 (T) at pages 5-6

⁷ See section 13

⁸ [2002] JOL 9306 (LCC) at paragraph [8]

the confirmation of a liquidation and distribution account (see *Keyes NO v Ellinas and Others*⁹).

Declaration of ownership and transfer

[12] In argument it was submitted for the plaintiff that the property is claimed under the *rei vindicatio*.¹⁰ A vindicatory action is available to an owner who has been deprived of their property without consent and who seeks its recovery from someone else who retains possession.¹¹ A claimant invoking a vindicatory claim must allege ownership of the property¹² (i.e. full *dominium*). The plaintiff has not made this allegation. Instead it was submitted that the issue of ownership can be dealt with during the trial in due course. This proposition is unsound since an exception must be dealt with in the pleading as it stands. Consequently, the relief for transfer of the fixed property into the name of the plaintiff is – on the authority referred to in the preceding paragraphs – plainly bad in law and renders the particulars of claim excipiable. At the heart of the matter, it cannot be established if the plaintiff seeks full dominium of the property by its transfer into her name in her personal capacity (as consequence of the testate or intestate administration of the estate *supra*) or whether she requires possession of the property to fulfil her administrative role as executrix for the benefit of heirs and/or legatees. In these circumstances the prevailing uncertainty renders the contention that she relies on a vindicatory claim, legally unsustainable.

⁹ (2013/62385) [2016] ZAGPPHC 1187 (27 October 2016) at paragraph [31]

¹⁰ Heads of argument paragraphs 13-14

¹¹ *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) at 995I; *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 297E; *Sorvaag v Pettersen and Others* 1954 (3) SA 636 (C) at 639G

¹² *Unimark Distributors supra* at 996B-D; also *Chetty v Naidoo supra* at 20B; *Vulcan Rubber Works supra* at 297E; *Sorvaag v Pettersen and Others supra* at 639G

- [13] A further issue arises from non-compliance with Rule 18(4) of the uniform rules of court. The rule requires every pleading to contain a clear and concise statement of the material facts on which the pleader relies with sufficient particularity to enable the opposite party to plead to it.
- [14] Exactly what it is that the plaintiff contemplates by use of the word ‘transfer’, is vague.
- [15] Whether formal transfer or mere restoration of possession is contemplated is not pertinently pleaded with sufficient particularity. For this reason, it cannot be expected of the first and second defendants to speculate on what the plaintiff’s case is. The omission results in embarrassment that cannot be cured other than by raising an exception to eliminate the prejudicial effect of the inherent uncertainty as regards the pleader’s intention. It is furthermore unclear how the first and second defendants, who are alleged by the plaintiff to be in unlawful possession of the property, are competent to effect any form of transfer.
- [16] Concurrent with the claim for transfer of the property into her name, the plaintiff seeks a declaration that the deceased is the owner thereof. On a plain construction of the particulars of claim the relief sought is mutually conflicting and once again creates uncertainty as regards the pleader’s intention. The uncertainty renders it unclear at whose instance is the *rei vindicatio* being invoked. The remedy is clearly not available to a deceased person (assuming that is the objective of the declaratory relief) as such a person lacks legal standing to exercise rights in relation to property – nor for reasons already dealt with is the remedy available to the plaintiff.

[17] In the circumstances the submission for the first defendant that the abovementioned issues undermine the cause of action, as pleaded, is not without merit.

Eviction

[18] In argument for the first defendant it was submitted that the provisions of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹³ have not been complied with. For the plaintiff it was contended that an eviction order is consequential relief in respect of actions *rei vindicatio* of fixed property.¹⁴ While the correctness of this proposition is not doubted, it is trite that provided the procedural requirements of the legislation have been met, a landowner is entitled to approach the court on the basis of ownership and the other party's unlawful occupation (*Ndlovu v Ngcobo*; *Bekker v Jika*¹⁵). However, elsewhere in this judgment it has been shown why the vindicatory claim on the pleaded facts is not competent. That being the case, the exception is upheld on a point of law and the consequential relief is deemed insupportable.

[19] Accordingly, I make the following order:

1. The first defendant's exception is upheld to the extent set out in this judgment.
2. The plaintiff is granted leave to amend the particulars of claim to remedy the defect/s, if so advised; such amendment shall be effected within twenty (20) days from the date hereof.

¹³ Act 19 of 1998

¹⁴ Paragraph 14.5

¹⁵ 2003 (1) SA 113 (SCA) at paragraph [19]

3. The plaintiff is ordered to pay the first defendant's costs, either as taxed or agreed.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

APPEARANCES:

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Date heard:

4 August 2022

Date Delivered:

1 November 2022

