

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO. 3912/2021

In the matter between:

THOZAMA DORA GXABEKA
(In her capacity as executor of
Estate No. 001457/2021)

First Applicant

XOLISA REGINALD HOKO
ID NO. [...]

Second Applicant

and

ZUKISWA VIVIAN RAYI
IDENTITY NO. [...]

First Respondent

SIMO RAYI
ID NO. [...]

Second Respondent

CASE NO. 444/2022

In the matter between:

THOZAMA DORA GXABEKA
(In her capacity as executor of
Estate No. 001457/2021)

Applicant

and

ZUKISWA VIVIAN RAYI
IDENTITY NO. [...]

First Respondent

SIMO RAYI
ID NO. [...]

Second Respondent

JUDGMENT

HARTLE J

[1] The applicant¹ brought two applications in succession, the first one for a spoliation remedy, and the second for a *mandamus*. Both concern certain immovable property described as Erf [...] [...] Vlei, in the municipality and administrative district of Port Elizabeth, situate at [...] [...] Street, [...], Port Elizabeth (“the property”).

¹ There were two applicants in the first application, but the second applicant’s interest (initially as a tenant in occupation of the property at the time of the alleged spoliation) became moot after he vacated under duress. Unless I refer to the second applicant specifically, any reference herein to the applicant is to Ms. Gxabeka acting in her official capacity as executrix in the estate hereinafter referred to.

[2] The respondents opposed both applications which were argued simultaneously before me.

[3] In both matters she acts in her official capacity as the appointed executrix in the estate of her late nephew, Michael Mtunzi Gxabeka (“the deceased”). The Master’s appointment letter in her favour is dated 7 December 2021.

[4] The property in question was ostensibly purchased by the deceased from the respondents for an amount of R165 000.00 in terms of a written deed of sale dated 1 August 2003, ostensibly drawn by Harry Lamprecht Attorneys of Gqeberha who, according to the transfer clause, were expected to attend to the conveyancing of the transaction. It is common cause that registration of transfer was never effected.²

[5] It is further common cause, despite the agreement stating that occupation would be given only on registration of transfer, that the deceased took occupation of the property in December 2003 and lived in it with his mother, Mimi Monica Gxabeka, until he died on 11 February 2014. Subsequent to his death she continued to reside in the property. She was initially appointed executrix of her son’s estate but evidently did not take any formal steps to effect transfer of the property from the respondents to his estate either.

² The applicant alleged that the respondents had refused to sign the transfer documents to complete registration of transfer, an allegation that was baldly denied by them.

[6] On 9 February 2021 the applicant's sister also passed away. The applicant was appointed as the master's representative of her estate on 16 February 2021.³

[7] It appears that even before the formal conclusion of the sale agreement referred to above the deceased pre-paid the sum of R160 000.00 to the respondents comprising two payments that were made to their home loan account on 9 May 2022 as reflected in a handwritten receipt forming part of the papers. In it the respondents, who signed the documentation in confirmation of its contents, record that "the whole amount" paid is for the purchase of the property and that on the day of the payment the "ultimate transfer" of the property *was still being processed*.

[8] On 30 May 2005 the respondents' mortgage bond over the property in the sum of R113 000.00 was cancelled, probably as a result of the pre-payment by the deceased.⁴

[9] After her sister's death the applicant took control of the property.

[10] It stood vacant until 1 December 2021, from which date according to her the second applicant and his family were given permission to occupy it,

³ The property is not listed among the assets referred to in her section 18 (3) appointment letter, but since she continued to reside in the property after her son's death without demur from anyone, it is probable that it would have devolved on her, if not by the will of the deceased, then upon intestate succession.

⁴ The most likely inference to be drawn is that the bond was cancelled as a result of the deceased's direct payment to the respondents' home loan account.

purportedly pursuant to a deed of sale concluded between her and him.⁵ She explained in this regard that in the intervening period the property had been burgled and water pipes had been stolen, necessitating her giving the second applicant early occupation pending transfer of the property to him.

[11] On 7 December 2021, she was officially appointed as executrix of the deceased's estate which confirmed her lawful authority to be in possession and control of the property but by then, the second applicant and his family, as indicated above, were already occupying it at her behest.⁶

[12] She avers that on 16 December 2022, whilst the second applicant and his family were in peaceful and undisturbed possession of the property (an allegation the second respondent confirmed in his affidavit), the first respondent and her children "stormed" it, broke padlocks at the gate, forced their way in and took up residence in the house. The second applicant invoked the assistance of the South African Police Service to vindicate the situation, but to no avail. Despite the threat of violence to him and his family, the police adopted a hands-off approach, claiming that they do not interfere in civil matters.

⁵ The purported sale would have preceded the applicant's appointment as executrix but I accept for present purposes that she was taking steps both to protect the property as claimed by her and in anticipation of selling it out of the estate.

⁶ Section 26 of the Administration of Estates Act, No. 66 of 1965.

[13] The respondents declared that they would stay put in the property because it belonged to them. It appears that they have remained in occupation since.

[14] The applicant revealed that after her sister's death the respondents had also tried their luck by breaking into the property and forcing themselves in, but she had dealt with the situation at that time by changing the locks. In anticipation that this might happen again after placing a tenant in the property, she caused a letter of demand to be addressed to the respondents (it is dated 2 December 2021) in which she informed them unequivocally that the deceased had successfully bought the property and warned that they should refrain from trespassing on it or taking the property by stealth. In the formal demand the respondents were advised to approach a court should they purport to assert any lawful claim to the property.

[15] The demand was personally handed to the respondents by the second applicant on 16 December 2021 when they trespassed on the property, but they ignored its contents and continued to camp inside the house under the same roof as the second applicant and his family until he gave in to their threats of harm lest he vacate. Ultimately they succeeded in the standoff. The second applicant and his family left the property under duress on 17 December 2021, leaving their movables behind.

[16] The applicant launched the spoliation application on the basis of urgency the following day and the duty judge entertained the matter on Sunday, 19 December 2021. The respondents filed a notice to oppose and were granted

time to file answering affidavits. These were filed late without any application for condonation. It is unclear why the matter dragged on afterwards in one of the clearest cases where the possessory remedy was immediately warranted to restore the *status quo ante* the illegal action. Even for a moment accepting the respondents' version that they had purportedly cancelled the sale to the deceased, they clearly took the law into their own hands and indeed admitted the material allegations for a spoliation, namely: (1) that the applicants were in possession and (2) that they had deprived especially the second applicant of his possession quite evidently forcibly and wrongfully against the first applicant's consent.⁷

[17] Although a spoliation application serves a unique purpose and decides no rights of ownership, the respondents purported to make out a case in the first respondent's answering affidavit filed in the spoliation application that the sale of the property to the deceased had been cancelled. This version was repeated in the second application that was evidently necessitated by the respondents' defence adopted in the spoliation application. In the second application the applicant claims that the estate is entitled to take transfer of the property by virtue of its purchase by the deceased in terms of a valid deed of sale prior to his death and that the respondents must be compelled to get on with it, sign the documents, and take the necessary steps to complete the transfer.

⁷ See Erasmus, Superior Court Practice, D7 Mandamentum van Spolie at D7 - 6 where the requisites for a spoliation order are set out, including footnote 42 in which the author has collated all the case law dealing with the requirements for the remedy. In this instance the applicants have in my view certainly established "possession of a kind which warrants the protection accorded to the remedy and that (they) were unlawfully ousted". *Yeko v Qana* 1973 (4) SA 735 (A) at 739.

[18] The respondents aver that some dispute arose concerning the transaction between the deceased and themselves and that they had increased the purchase price to R185 000.00 with the sale of additional items to him. However, no written variation of the deed of sale was proffered in support of this allegation despite a non-variation clause in the deed of sale.

[19] They concede having given him occupation (this despite the claimed “dispute”) pending transfer “with occupational rental applicable”, although they did not (in the spoliation application) aver what amount. The agreement itself does not provide for any payment in this respect. (In the second application the first respondent claimed that it was R500.00 a month.)

[20] According to them the deceased struggled to pay transfer costs (no detail was given concerning when and how demand for such costs was made) and also fell into arrears with the occupational rental. (The extent of the arrears was never suggested.)

[21] They assert that this led in 2005 to them dispatching a letter of demand to the deceased placing him on terms with a subsequent cancellation of the deed of sale.

[22] The demand put up in support of this averment however in no form or manner records a cancellation or any invocation of the sale agreement’s breach provisions. To the contrary the letter, on the face of it dated 15 August 2005,

merely informs the deceased of the respondents' decision ("again") that they "are no longer selling the house to him". (As an aside they had by then had the benefit of him paying off their bond and were evidently no longer inclined to proceed with the transaction, but that was no lawful ground to cancel.)

[23] The first respondent alleged that they agreed with the deceased to settle their claimed dispute "out of (court)" but in the process he passed away. Purportedly after his death they sought to "engage" with his mother, but she too supposedly refused although they made attempts to pay back the purchase price. The first respondent suggests that the negotiations were unsuccessful because they wanted to pay the purchase price "short of the amount due (by the deceased) to the local municipality for rates and taxes". This however runs contrary to their answering affidavit filed in the second application in which they purport to rely on the breach clause by asserting an entitlement to retain *all* the monies received as damages for the breach.

[24] Concerning their opposition to the merits of the spoliation application the respondents purported to justify why and how it happened that they "took possession of the property" around August 2021. Notably the first respondent did not in her answering affidavit assert pertinently that they repossessed the property because they are its lawful owners. To the contrary, one gets the distinct impression that they were making capital of the fact that the property is still registered in their name, giving credence to the applicant's surmise that they were being opportunistic in the whole scheme of things by this happenstance.

[25] Although the respondents claim that the property was vacant when they took possession of it, this was superceded - according to the applicant's unchallenged testimony in this respect, by her having changed the locks in November 2021. Still the respondents maintain that on 4 December 2021 they returned from their son's *Umgidi* and found the property, which they claim they rather than the second applicant were in undisturbed possession of, "burglarized". They purportedly laid a criminal complaint with the police although concerning what offence and against whom this cannot be discerned from Annexure "ZVR 6" put up by them in support of this allegation. Even though the criminal complaint may well have caused the second applicant to beat a hasty retreat from the property with his family, this does not trump the applicant's claim that the second applicant and his family had taken occupation of the house and moved in with their furniture by 1 December 2021.

[26] It is clear that by this date the applicant had been entitled to take control of the deceased's estate⁸ and cannot be faulted for having responsibly placed a tenant in the house to avoid any further "burglaries" or vandalism.

[27] The respondents' claim that they had merely slipped out for the weekend for their son's *Umgidi* (as if to suggest that they were instead in occupation of the property at the date when the second applicant moved in) rings hollow against the applicant's unchallenged claim that the spoliation only happened on 16 December 2021 when the first respondent arrived to oust the second

⁸ See section 26 of the Administration of Estates Act.

applicant and his family from the property. The latter date is the critical date for present purposes.

[28] That the second applicant was well settled in the house by then is coincidentally confirmed in the supplementary affidavit of the first respondent's brother, Sizizo Xego, which the respondents sought leave to introduce late after filing their answering affidavits. Although the obvious objective of the affidavit was to point out that the second applicant no longer had any quarrel with the respondents for unceremoniously putting him and his family out, the reasons stated for such an impression gleaned by Mr. Xego confirms the applicant's version that (by and through her authority) the second applicant had in fact been in *possession of the property* at the relevant time. Indeed, in this respect Mr. Xego asserted that the second applicant had "found alternative accommodation and (had) arranged to move all of his possessions on the premises to his new place of abode". He further states that:

"Whilst I was there, a truck arrived, and the Second Respondent (together with some helpers) started to load his possession on the truck and onto his bakkie."

[29] Further he confirms that the second applicant had cancelled his offer to *purchase* the property from the first applicant and had already set in motion an application to buy another property. Implicit in this is the suggestion that when he took occupation of the property on 1 December 2021, he did so in the contemplation of enjoying occupation *inter alia* and quite evidently was in *de facto* possession of the property at the time of being despoiled.

[30] I am accordingly satisfied that the applicant (and the second applicant until he fell out of the picture) met the requirements for the spoliation remedy and indeed it is unthinkable to my mind that the respondents have been permitted to ply their machinations in this respect over a period of some eight months now taking serious advantage of the delay in the hearing of the spoliation application.

[31] With regard to the second application, also brought by the applicant in her official capacity as executrix, although she asks in the notice of motion for the court to order the transfer of the property “in her name”, it is plain that she prays for such relief in her official capacity.

[32] I am satisfied that the respondents’ opposition to this application too raises no real dispute to the true facts that the deceased acquired the property by purchasing it from them in terms of the deed of sale. The admitted agreement (in respect of the stated purchase price) has not been cancelled nor varied in writing. Whatever difference of opinion there is concerning the R5 000.00 discrepancy on the purchase price that remains possibly unpaid still, the applicant in terms of the valid agreement of sale will only be obliged to pay this “in cash on date of registration of transfer”.

[33] The payment of transfer costs too will only require to be made when a conveyancer is instructed to finally pass transfer and these estimated costs are

called for.⁹ The applicant has in any event tendered to pay what is necessary to effect transfer into the name of the estate.

[34] The respondents' opposition to the second application is quite patently absurd and does not raise a genuine dispute of fact. There is no variation of the agreement of sale in their favour regarding an increased purchase price, no evident breach of the agreement, and no proof of cancellation or restitution made of the R160 000.00 that was paid to cancel the respondents' mortgage bond loan. The impugned sale agreement appears on the face of it to be valid and binding. If it was cancelled as claimed in 2005, it is highly unlikely that the deceased and his mother would have continued to reside in the property (free of charge on the respondents' version) for some nineteen years. At most the 2005 letter put up by the respondents confirms that after the cancellation of their bond they were having second thoughts about parting ways with the property and/or were trying to re-negotiate the terms of the sale to possibly extract more by way of a purchase price. (This co-incidentally fits in seamlessly with the applicant's complaint that they were dragging their heels in giving transfer.) In any event the first respondent says that the purported actual cancellation was never communicated to the deceased because they learnt that he had passed on.

[35] Quite evidently however the deceased was not in breach of the sale agreement settled between him and the respondents on 1 August 2003.

⁹ The applicant has indicated that her attorneys of record should be mandated to attend to the conveyancing. I am satisfied that unless this control over the transfer is permitted (which request I am inclined to accede to), that there may be cause for further delay.

Certainly, this does not suggest itself from the 2005 letter put up by the respondents in an attempt to resile from it.

[36] I am satisfied that the applicant had made out a case for the *mandamus* relief prayed for in her official capacity, and that it is essential that such an order be granted to ensure the proper administration of the deceased estate without further delay. I am however not inclined to include the wide relief indicated in prayers 3, 4 and 5 of the notice of motion in the absence of any factual basis therefor. It follows in any event that the respondents must give effect to the first sale.

[37] Prior to concluding, the respondents raised certain preliminary objections to both applications. The first, in the spoliation application, is that the applicant ought to have complied with the provisions of Uniform Rule 6 (9) by serving the application papers on the Master.

[38] The second is that First National Bank as the mortgagee of the property ought to have been joined as an interested party.

[39] The third point is that the applicant ought reasonably to have anticipated that there would be glaring disputes of fact, which would render the matter incapable of determination by way of affidavit without resort to “some form of oral evidence”.

[40] The fourth point is some form of criticism that the applicant sought to obtain the relief prayed for in the notice of motion (described as a hybrid of an interdict although disguised as a *mandament van spolie*)¹⁰ on an *ex parte* basis in breach of the uniform rules of court, although which rules the applicant purportedly breached were not stated.

[41] In the second application the dispute of fact specter was held up again as a reason to dismiss the application outright.

[42] It was also submitted that the applicant had no *locus standi*. The latter objection seems to have been premised on the supposition that the applicant was asking for an order that transfer of the property be given in her name, but it is abundantly plain from the fact that she moved the application on behalf of the estate in her official capacity and that this was a mere oversight.

[43] Concerning the anticipated dispute of fact raised, it is ironic in my view for the respondents to have insisted on a preliminary basis that there is a dispute of fact before revealing (in respect of the merits) what that dispute was. As it turned out, however, I find no real dispute of fact in either application for the reasons indicated above.

¹⁰ The parties seemed to be *ad idem* that the interdict relief claimed by the second applicant concerning the threat to his person and property had become moot by the time the matters were argued before me.

[44] The plea of the lack of joinder of First National Bank was abandoned, quite properly so. It was mischievous for the respondents to have taken it in the first place, in the knowledge that it was the pre-payment of the deceased in the sum of R160 000.00 that in effect cancelled their bond over the property.

[45] As for the lack of citing the Master, the applicant was authorized by letters of appointment to take charge of the estate and was/is doing what an executor is supposed to do.¹¹ I do not agree that either application warranted a report from the Master on the basis contemplated in Uniform Rule 6 (9).

[46] There is accordingly no merit in any of the formal objections raised.

[47] In the result I issue the following order:

In case no. 3912/2021:

1. possession of the property situate at Erf [...] [...] Vlei is to be restored to the first applicant in her official capacity as executrix in the Estate Late Michael Mtunzi Gxabeka (Estate No. 001457/2021); and
2. the respondents, jointly and severally, the one paying the other to be absolved, are directed to pay the costs of the application

¹¹ See section 26 (1) of the Administration of Estates Act.

including the costs of the appearances on 19, 21 and 22 December 2021.

In case no. 444/2022:

1. The first and second respondents are compelled to sign all the necessary transfer documents and to take all the necessary steps to cause the transfer to the Estate Late Michael Mtuni Gxabeka (Estate No. 001457/2021) (“The Estate”) of the property known as Erf [...] [...] Vlei, situated at [...] [...] Street, [...], Gqeberha (“the property”) at the applicant’s attorneys of record within five (5) days from the date of the order.
 2. In the event that the first and second respondents fail or refuse to sign the transfer documents in paragraph 1 above, the third respondent, Sheriff North, is authorized to sign and take all the necessary steps, in the place of the first and second respondents, to effect transfer of the property into the name of the Estate.
 3. The first and second respondents, jointly and severally, the one paying the other to be absolved, are directed to pay the costs of the application.
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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 19 August 2022

DATE OF JUDGMENT: 16 September 2022*

*Judgement delivered by email to the parties on this date.

APPEARANCES:

For the applicants: Mr. MPG Notyawa instructed by Simpiwe Jacobs & Associates, Gqeberha (ref. S Jacobs).

For the respondenst : Mr. ME Menti instructed by N E Mbewana Attorneys Inc., Gqeberha (ref. Rayi/000586/IM).