

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:

ZUKISWA VIVIAN RAYI

IDENTITY NO. [...]

First Applicant

SIMO RAYI

ID NO. [...]

Second Applicant

And

THOZAMA DORA GXABEKA

(In her capacity as executrix of

Estate No. 001457/2021)

Respondent

CASE NO. 444/2022

In the matter between:

ZUKISWA VIVIAN RAYI

IDENTITY NO. [...]

First Applicant

SIMO RAYI

ID NO. [...]

Second Applicant

And

THOZAMA DORA GXABEKA

(In her capacity as executrix of

Estate No. 001457/2021)

Respondent

**JUDGMENT IN RESPECT OF
APPLICATION FOR LEAVE TO APPEAL**

HARTLE J

[1] The applicants applied for leave to appeal against the whole of my combined judgment delivered on 16th September 2022 under the case numbers 3912/2021 and 444/2022 referred to above “on facts and points of law”.

[2] The respondent opposes the application on the basis that in both matters no reasonable prospects of success exist in the envisaged appeals. This is indeed the threshold for an application such as the present one as provided for in section 17 (1) (a) of the Superior Courts Act, No. 10 of 2013 (“SCA”). It is however also relevant to refer to the provisions of section 16 (2) (a)(i) of the SCA that provide that when at the hearing of an appeal the issues are of such a nature that the decision will have no practical effect or result, the appeal may be dismissed on this ground alone. The relevance of this provision to the present scenario will soon become apparent.

[3] In respect of the spoliation matter firstly, the applicants contend that I erred in upholding the application and in granting costs and also that I ought to have found that the non-joinder of the Master was fatally defective to the application.

[4] The applicant appears however to have misunderstood the nature of the spoliation remedy or its utility to the unique scenario that pertained.

[5] The respondent’s allegation in her founding affidavit in the spoliation application that she assumed conscious physical control of the property after her sister died was not gainsaid by the applicants. Not only did she take possession but she took steps both before and after her appointment as executor in both estates, initially in the nature envisaged by section 11 (1)(b) of the Administration of Estates Act, No. 66 of 1965 (“the Act”) with a view to obtaining and retaining possession or custody of the property that her late sister (as an executor herself in her late son’s estate and as a possible intestate heir) had assumed control and custody of, and later in terms of

section 26 (1) of the Act to manage the property in the interests of her sister and nephew's estates respectively.¹

[6] The respondent was both entitled and obliged to take the property under her protection and control in her official capacity² and indeed her possession at the relevant time was exactly the sort protected by the *mandament van spolie*.³

[7] Apart from possession having been established, the respondent also established that she (or her placeholder, the second applicant) were unlawfully deprived of their possession by being forced off the premises by the applicants on 16 December 2021.

[8] The respondent had both *detentio* of the property (the physical holding and control over it) and *animus* (the intention of securing an interest in the property in her appointed capacity as executrix).⁴ That interest was established ultimately (by the time letters of executorship were issued in her favour) by virtue of the machinery of the Act.

¹ This is, for example, evident from Annexure "F" to the founding affidavit in which the respondent's attorneys invited the applicant (among other family members) to note that she had taken occupation, that they were to refrain from taking the law into their own hands and, if they thought that any of them had "a legal claim to the property", to approach the courts and to serve her with the necessary court papers.

² See sections 11 (1)(b) and 26 (1) of the Act. See also Meyerowitz on Administration of Estates and Estate Duty, 2004 Ed, at 12.24 and 12.26; *Lockhat's Estate v North British and Mercantile Insurance Company Ltd* 1959 (3) SA 295 (A) at 302 F - G.

³ *Agha v Sukan* [2004] 3 All SA 421 (D).

⁴ *Agha v Sukan*, *Supra*, at page 433. The respondent qualified as a possessor with sufficient interest in the property to claim spoliation.

[9] The administration of a deceased estate devolves on the executor of the estate, who does not succeed to the person of the deceased. In relation to contracts, the executor's duty is not simply to take over where the deceased left off and to carry on indefinitely, but to reduce the estate into possession, pay the liabilities out of the assets, pay the legatees and transfer the residue to the residuary legatee or the administrator or as appropriate. The question what direction to take, whether to enforce the deed of sale Mr. Gxabeka had entered into before his death or not, would have been informed on the basis of what the contract itself provided together with the surrounding circumstances. In the absence of any suggestion that the contract provided for its discharge upon his death, the general principle is that the rights and duties arising from such an obligation are transmitted and enforceable by or against the executor.⁵

[10] The respondent was mindful of her duty in this respect and had taken the early step of reducing the property which had been in the possession of her sister, and before that her nephew, into her custody after her sister's death with a view to perfecting the sale by registration especially since it was common cause that her nephew had paid R160 000,00 of the purchase price provided for in the deed of sale and had been occupying the property in terms of that agreement since 2004, a clear incident arising from the transaction.

[11] It was not open to her to have ignored the terms of the deed of sale to which her late nephew had personally bound himself especially since he had paid a substantial amount in respect of the agreed upon purchase price, indeed had prepaid this sum of monies even before the deed of sale had been reduced to writing.⁶ As was stated in

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Christie's Law of Contract in SA, 7th Ed, at 12.3.6 (page 583 - 4).

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Colly v Colly's Estate,⁷ adopting the words of the Privy Council in *Agullia v Estate Trust Agencies (1927 Ltd)*:⁸

“*Prima facie* it is the duty of the legal personal representative to perform all contracts of his testator or intestate that can be enforced against him whether by way of specific performance or otherwise. In the case of an onerous contract he ought to not neglect an opportunity of coming to terms. But it can never be his duty to break an enforceable contract.”

[12] For purposes of determining the spoliation application it was unnecessary for me to have reflected upon the applicants' claimed title to of the property. The purpose of a spoliation application is (and was in the circumstances which pertained) to prevent the applicants from taking the law into their own hands and to ensure the restoration *ante omnia* of the property involuntarily taken from the respondent's possession. For one the respondent was in possession of the property and was retaining it for a statutory purpose. Additionally, she had been forcibly dispossessed of it by the applicants opportunistically asserting their registered ownership of it whereas their legal remedy lay under the auspices of the Act (by proving a claim, on their version that the deed of sale had been cancelled and that they were thus entitled to take repossession), alternatively through the court (by seeking an appropriate declarator),⁹ rather than their obvious resort to self-help.

Christie's Law of Contract *Supra* at 584. See also Kernick's Administration of Estates and Drafting of Wills, 4th Ed, at 56.1.2 (page 63); Norman's Law of Purchase and Sale in SA, 5th Ed, at 8.11 (page 71).

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1946 WLD 83.

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AC 624 (PC) 634-5.

⁹ A creditor is not precluded by the Act from instituting action in terms of his/her common law rights against the deceased estate for the recovery of a debt owed by the estate. See *Nedbank Ltd v Steyn* 2016 (2) SA 416 (SCA).

[13] There is in my view no prospect that another court will find that the respondent was not entitled to have had the possessory claim decided in her favour.

[14] Although not a ground raised before me in the present application, I accept that by the time I issued the order restoring possession of the property to the respondent, that the applicants had committed a further act of spoliation that possibly rendered my order (relative to the spoliation on 16 December 2021) moot as at the latter date.¹⁰ I am mindful that another court might find that in these circumstances I should not have issued the order which I did in prayer 1, since a lot of water had passed under the bridge so to speak, since then. For this reason, I am not inclined to grant the applicants leave to appeal in respect of this narrow issue as it will have no practical effect or result.¹¹ Academic appeals should not be encouraged.

[15] As for the costs order granted in favour of the respondent in her representative capacity, no grounds were stated why I should grant leave to challenge that order *per se*. For the reasons I have outlined above and in my judgment why the notional order of restoration was justified on the facts set out in the papers, the costs order which I granted naturally followed that result. Even if I had reflected at the time that my order restoring possession of the property to the respondent had become academic and had been overtaken by events, given the lengthy interval that interposed itself before the spoliation application could be argued, I would in my opinion still have been justified in awarding those costs in favour of the estate even without the main prayer.

¹⁰ Pursuant to the despoiling of 15 December 2021 and the launch of the spoliation application, the applicants opportunistically entrenched themselves in their occupation of the property and remained in unlawful occupation thereafter. I was further advised from the bar (by counsel when arguing the present application) that despite my order restoring possession of the property to the respondent and even after having been “ejected” by the sheriff, that the applicants had again moved back onto the premises.

¹¹ The estate has other avenues open to it in terms of the provisions of the Act. For example, it may invoke the provisions of section 26 (3) or seek a declarator that the executor is entitled to maintain control of the property in her official capacity until the applicants have pursued their claim against the estate.

[16] As for the technical point raised (surprisingly only in the spoliation application), the *mandament van spolie* remedy is an urgent possessory one and should not have concerned the Master at all. The respondent had been entitled by virtue of the provisions of section 26 (1) of the Act to take control of the property and to assert the statutory rights bestowed upon her pursuant to the issue of his letters of authority to her including obtaining and maintaining possession of the property that the deceased had purchased. The effort by her to vindicate the involuntary lost possession of the property would not in my view have required the Master's consent (already given) to take the steps deemed necessary by section 26 of the Act to jealously protect her control over the property. The consent of this court would not even have been a requirement. In deciding whether to bring or defend an action on the contract of a deceased to which he was a party (including by necessary implication the bringing of a related spoliation application), the executor is merely expected to exercise his or her discretion *boni viri*.¹² It is not understood what input the Master would have been expected to make in the relevant circumstances that would have assisted the court. Neither do the provisions of Uniform Rule 6 (9) impose any obligation on the Master to furnish a report in such urgent proceedings. Even if the spoliation application was in the wide sense of the word "in connection with the estate", I cannot imagine that another court will agree with the applicants that the failure to have joined the Master was fatal to the spoliation application.¹³

[17] Regarding the second application, I am not convinced that another court could find that the respondent was obliged to regard the agreement of sale as no longer having any force on the basis of any of the reasons suggested by the applicants. I dealt with all of these in my judgment and reasoned why I thought that the applicants'

¹² Christie's Law of Contract *Supra* at page 583.

¹³ Rule 6 (9) does not operate where the Master's involvement is neither legally necessary or of assistance to the court. *Manton v Croucamp N.O. & Others* 2001 (4) SA 374 (W) at 379.

opposition to the premise that the executor was expected to enforce the contract and perfect the sale by taking transfer was quite patently absurd and did not raise a genuine dispute of fact.

[18] Upon a consideration of the papers that were before me, it is common cause that the late Mr. Gxabeka was given possession of the property in 2004 already despite the agreement providing that vacant occupation would only be given to him on registration and that his late mother (similarly to the respondent acting in a representative capacity in the interests of his estate) continued to occupy the property for several more years after his death until her demise as well. (Mr. Gxabeka's right of occupation would have included the right to recover any fruits thereby.) It also appears to be the case that he assumed the risk in respect of the property from the date of occupation. (There is a dispute concerning what, if any agreement was reached in respect of the payment of occupational rental and whether he was "in default" of paying such monies, but that is neither here nor there for present purposes.) The suggestion that Mr. Gxabeka had been in default of paying a different purchase price than indicated in the deed of sale simply had no substance. The applicants averred that the purchase price had been increased but even on their version that payment would have related to "additional items" that Mr. Gxabeka purportedly acquired from them. If true, such a sale is suggestive of movable assets disposed of to him that would not have impacted on his strict obligations arising from the deed of sale to pay the agreed upon price to acquire and ultimately to take transfer of the immovable property. The applicants made no averment in their papers that the purchase price in respect of the deceased's acquisition of the property had been formally varied and indeed put up no proof of this. Any sale of immovable property is required to be recorded in writing in terms of the Alienation of Land Act.¹⁴ This likewise applies to

¹⁴ No. 68 of 1981. See section 2 (1).

any variation to the formal agreement in respect of price.¹⁵ There was no suspensive condition in place (presumably because the bulk of the purchase price was prepaid by the deceased), neither did the applicants suggest that the deed of sale had been extinguished on such a natural basis. Their argument, even that an increased purchase price (*sic*) had not been paid similarly had no merit on the simple basis that whatever was owing beyond the prepaid amount of R160 000,00 (which self-evidently extinguished the bond over the property that existed at that point), the balance was only payable on demand by the conveyancer and upon registration.¹⁶ This ball was in the applicants' court in this respect but it appears from Annexure B relied upon by them in their answering affidavits that it was not a ball they intended playing as they evidently no longer wanted to proceed with the transfer. That choice was however not open to them as a unilateral one to make and all the indications are that deceased did not give in to them in this respect. (Indeed why would he/his estate have continued to occupy the property for another 17 years thereafter if there had been a formal cancellation of the deed of sale?) The applicants claim that Annexure B (which by no stretch of the imagination placed the deceased regarding a clearly delineated default arising from the deed of sale on terms) preceded a formal cancellation of the agreement that on their own admission was not even communicated to the deceased was simply untenable and provided no realistic basis to depart from the clear indication that surrender of the control of the property to the respondent was certainly required (and in this respect I do not believe that another court will find differently that a basis existed for the estate to have yielded possession of the property to the respondents even against their title) on the premise that a valid and enforceable

¹⁵ The price is a material term of a deed of alienation and a variation of such a term must comply with the prescribed formalities to be valid. *Sidlali v Mpolongwana* 1990 (4) SA 212 (C), *Bailes v Highveld 7 Properties (Pty) Ltd* 1998 (4) SA 42 (N).

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"Registered" has its own unique meaning in terms of the Deeds Registries Act, No. 47 of 1937. See section 102 (1). See also section 13 which provides when registration takes place.

agreement existed that was not in the purview of the respondent's statutory duties to simply ignore or forgo compliance with.

[19] The order which I granted ultimately assumed a valid and binding sale agreement that had not been cancelled that the respondent in her official capacity was entitled to enforce going forward. The applicants chose to prove their "claim" (to cancellation) by opposing the relief sought in the interdict application on the limited assertions on which they relied, rather than filing a counter application or asserting their right to first follow the administrative processes under the Act. That was their election, though I doubt that they would be precluded from proving a claim in due course in the administration of the estate(s), in the process perhaps having another bite at the cherry.

[20] Having made that concession I expect that another court might find that it was premature to have made the order which I did before the antecedent steps necessary to get to that point had unfurled or had been allowed to unfurl under the mantle of the Act. It is a process and the circumstances under which transfer ultimately happens (if it does) follows the Master's approval of the liquidation and distribution account and specific directions resolved upon. The transfer itself would have followed as a final act and would then of necessity require the applicants to sign off on the Power of Attorney to pass transfer unless they succeed in the endeavours to have the sale agreement declared cancelled.

[21] The supposed objection raised at that hearing that the respondent had no *locus standi* to bring the application in her personal capacity was self-evidently premised on a mistake made plain in the papers. Despite how prayer 1 of the notice of motion

read, it was clear that the respondent asked for the relief which she did in her official capacity and not for the property to be transferred to her as a final resort in her personal capacity as heir. I can think of no reason why the obvious mistake in the notice of motion did not warrant a correction from the bar when the matter was argued before me, but as indicated in the preceding paragraph this relief (mandating the signing off on the transfer) may have been prematurely granted.

[22] Still the executrix would have been expected and statutorily obliged to take the steps she took at the outset to reduce the estate into her possession as a start and ultimately to take the formal steps necessary to galvanize the process along. Perhaps that is the relief I should have granted with a direction that the applicants prove their claim to cancellation in the ordinary course, failing which that they be prevailed upon at that juncture to sign off on the necessary transfer documentation.

[23] Whilst I maintain that there is no prospect of another court determining that I erred in finding that the agreement of sale was and continues to remain valid and enforceable at least as a premise for the respondent to have taken the property into her custody, I am yet of the view that another court may find that the order granted by me, though seemingly inevitable, was not competent to be made at that juncture and that it would be appropriate to grant the applicants' leave to appeal in this respect.

[24] Since we are here dealing with the administration of two consecutive deceased estates, I would however urge upon the parties to try and resolve the matter within the machinery of the Act rather than in pursuit of the anticipated appeal that will at the end of the day simply run up unnecessary costs for the two estates.

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

1. The appeal in case number 3912/2021 is dismissed, with costs.
2. The applicants are given leave in case number 444/2022 to appeal to the full bench of this division against my order that they be compelled at this juncture to sign the necessary transfer documents and to cause the transfer to the estate of the late Mr. M M Gqabeka (Estate No. 1457/2021) of the property known as Erf 715 Parsons Vlei before being afforded an opportunity to prove their claim against the estate.
3. The costs of the application in case number 444/2021 will be in the appeal.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 January 2023

DATE OF JUDGMENT: 9 February 2023

APPEARANCES:

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

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