REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 29558/10

DATE: 25/03/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

NEVILLE BOOYSEN	First Applicant
AUBREY BOOYSEN	Second Applicant
MARIA MARGARETTE TYLER	Third Applicant

and

JOSEPH GERT BOOYSEN	First Respondent
LOUISA ANNE BOOYSEN	Second Respondent
MALHERBE RIGG & RANWELL INC	Third Respondent
STANDARD EXECUTORS AND TRUSTEES	Fourth Respondent
MASTER OF THE HIGH COURT, PRETORIA	Fifth Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The applicants seek an order declaring the sale of certain immovable property, Erf 649 Gladiolus Street, Reiger Park, Extension 1, Boksburg ("*the immovable property*") by Joseph Booysen, to the first and the second respondents, to be invalid. The applicants also seek to declare as invalid the Sale Agreement and the Addendum thereto in respect of the immovable property. In respect of the third respondent, the applicants seek an order interdicting and restraining the third respondent from registering the transfer of the ownership of the immovable property to the first and the second respondents.

OPPOSITION

[2] The first and the second respondent are opposing the application. They have also brought a counter-application which may become relevant later herein, if necessary. The third, fourth and the fifth respondents are not opposing the application.

BACKGROUND

[3] Some background is indispensible. This is by all accounts a family feud centering around immovable property. Joseph Booysen and Dora Booysen were married to each other in community of property. They were the parents of the first applicant, the second applicant and the first respondent. The second respondent is married to the first respondent in community of property. Dora Booysen died on 16 April 1998, and was survived by her husband, Joseph Booysen, who also died later, as indicated later herein. Their children are the first applicant, the second applicant and the first respondent.

SOME COMMON CAUSE FACTS

[4] Prior to her demise, the mother, Dora Booysen, and her husband, Joseph Booysen, executed a joint will on 1 December 1995 at Boksburg. Clauses 1 and 4 of the joint will read, respectively, as follows:

> "*1. Mits die langslewende van ons die eerssterwende van ons vir 'n tydperk van tien dae oorleef benoem ons die langslewende as die enigste erfgenaam of erfgename van die restant van die boedel van die eerssterwende van ons.*"

and paragraph 4 thereof as follows:

> "*4. As Eksekuteurs van ons boedels benoem ons die een van Standard Trust Beperk en die Standard Bank van Suid-Afrika Beperk wat eerste die benoeming formeel aanvaar en ons gelas dat ons Eksekuteurs nie verplig sal wees om in daardie hoedanigheid sekuriteit te verskaf nie. Bykomend tot hulle vergoeding vir hulle funksies in daardie hoedanigheid kan ons Eksekuteurs of enige instansie waarin hulle 'n belang, geldelik of andersins, het enige ander gebruiklike heffings, gelde en/of kommissies ten opsigte van enige dienste en/of werk wat aan ons boedels voorsien word, behou.*
>
> *Waar die Eksekuteurs dit na hulle uitsluitlike goeddunke toepaslik ag is hulle, gedurende die bereddering van die boedels in ooreenstemming met hulle normale bevoedghede, ook daartoe gemagtig om die wyse en voorwaardes van die verkoop van enige bate te betaal, opsies uit te oefen en toe te staan, regte tot beleggings op te neem, huurkontrakte aan te gaan, prospekteerregte toe te staan, verbandsbeswaarde eiendom in te koop, besighede voort te sit en die boedels te bind ten opsigte van enige laste wat noodwendig aangegaan moet word ten einde die beredderingsproses te vergemaklik*."

Upon her death in April 1998, the estate of Dora Booysens was duly reported at the offices of the fifth respondent, the Master of the Court. In terms of clause 4 of the joint will, one Elizabeth Margaret Breedt ("*E M Breedt*") of the fourth respondent, was duly appointed as the executrix of the estate of the late Dora Booysen. For some strange reason, this appointment by the Master was only made on 1 July 2008, some ten years after the death of Dora Booysen. Attached to the founding papers is the First and Final Liquidation and Distribution Account of estate late Dora Booysen, dated 5 August 2009. There is also a letter from the executrix, E M Breedt, dated 21 July 2010, which reads as follows:

> "*I … hereby confirm that the abovementioned estate has not been finalised due to a shortfall in the estate. The Liquidation and Distribution Account can only be advertised and the fixed property transferred once the shortfall has been received.*"

All of the above are common cause.

[5] It is also common cause that on or about 8 October 2007, Joseph Booysen (the surviving spouse) concluded a written deed of sale in terms of which he sold the immovable property in the joint estate to his son, the first respondent, and his wife, the second respondent. The Sale Agreement also has an Addendum which was signed by the first and the second respondents, and the seller, Joseph Booysen on 18 January 2008. Joseph Booysen, regrettably, also passed away on 8 May 2008.

ISSUE FOR DETERMINATION

[6] The sole issues for determination in this matter is firstly, whether the deceased Joseph Booysen could legally sell the immovable property to the first and the second respondents. Secondly, whether the fourth respondent, as executor in the estate of the late Dora Booysen, should have consented to the sale, and finally whether the sale of the immovable property is governed by the provisions of the Alienation of Land Act 68 of 1981 (in particular section 2(1) thereof).

THE RESPECTIVE CONTENTIONS OF THE PARTIES

[7] The applicants contend that the sale was invalid on the basis that their father, the deceased Joseph Booysen, was not the sole lawful owner of the immovable property, but the joint owner. Furthermore, that at the time of the

sale, the estate of their mother, the late Dora Booysen, had not been finalised. In addition, the applicants submit that the Sale Agreement, as well as the Addendum thereto, violate the provisions of the Alienation of Land Act in several respects. In this regard, the contention is that the Sale Agreement refers to the late Joseph Booysen as "*the seller*", as opposed to being acting in his capacity as a future beneficiary under the joint will with the late Dora Booysen; further that the Addendum refers to "*the seller*" as a widow and owner of the immovable property; that the purchase price as set out in clause 1 of the Sale Agreement, was handwritten and not initialled by the seller to indicate assent to the purchase price; that the full benefit of the purchase price was solely for the enjoyment of the seller, without any accrual to the estate of the late Dora Booysen; and finally, that the Addendum to the Sale Agreement refers to an annexure attached in the form of an acknowledgement of debt, the pages whereof were not all signed or initialled or thumb-printed by the seller to indicate his acquiescence with the alteration of the provisions of the agreement.

[8] On the other hand, the first and the second respondents have raised various defences. These include that the applicants have no *locus standi* to bring the application; that the first respondent should not have been cited but instead Ms E M Breedt (referred to above) as executrix on the letters of executorship; that the confirmatory affidavits of the second and the third applicants are defective; and that the seller, their father, was a common law owner of the immovable property and had intended that the first respondent purchase same.

[9] All of the issues raised by the first and the second respondents, except the contention that their father could lawfully sell the immovable property, are capable of disposal with relative ease. The applicants have in the replying affidavit, in my view, explained satisfactorily the discrepancy in the dates appearing on the confirmatory affidavits. Nothing material turns on this aspect. Secondly, the applicants clearly have the necessary *locus standi* to launch this application as they have a real interest in the matter as potential heirs in their father's, the seller's estate. In terms of the joint will of the late Dora Booysen and the late Joseph Booysen, the fourth respondent was appointed as executor of their estate. Ms E M Breedt was, in turn, duly nominated by the fourth respondent, even though the fourth respondent remains the executor. In the final analysis, the central issue for determination remains the question whether the Sale Agreement was validly entered into. All these points raised by the first and the second respondents are clearly red-herrings and without any basis.

SOME APPLICABLE LEGAL PRINCIPLES

[10] I consider some applicable legal principles. That the seller was possessed of an undivided half-share of the joint estate with his late wife, is undisputed. However, the issue whether he became the sole owner of the joint estate upon her death, is questionable. In *Wille's Principles of South African Law* 9th ed, at p 673, under the heading "*Title of Beneficiaries*", the following is said:

"*However, in the light of the modern system of administration of estates that replaced the common law system of universal succession, the right of the beneficiaries to inherit is no longer absolute nor an assured one: If the deceased estate, after confirmation of the liquidation and distribution account, is found to be insolvent, none of the beneficiaries will obtain any property or assets at all. In the case of a legacy the legatee will only obtain the property bequeathed to him if, first, the property belonged to the testator, for the will of one person cannot confer a real right in favour of another person over property belonging to a third person; and if, secondly, the assets of the deceased not left as legacies are sufficient to pay his debts. In any event, an heir cannot vindicate from a third person property which the heir alleges forms part of the deceased estate; only the executor has that power. It follows from the above considerations that an heir does not upon the death of the testator acquire the ownership of the assets of the deceased, but merely has a vested claim against the executor for payment, delivery, or transfer of the property comprising the inheritance; and this claim is enforceable only when the liquidation and distribution account has been confirmed. The heir, in fact, becomes owner of movable property only on delivery of it, or of immovable property upon registration. The same rules apply to a legatee. The modern position is therefore that a beneficiary has merely a personal right, jus in personam ad rem acquirendam, against the executor and does not acquire ownership by virtue of a will. The heir obtains ownership or a lesser real right, such as a usufruct, only upon delivery or transfer in pursuance of testamentary disposition or intestate succession; consequently, succession is merely a causa habilis-, or appropriate reason, for transfer of ownership.*" (footnotes omitted)

[11] The above is a fairly general and accurate exposition of the law. In Corbett, *The Law of Succession in South Africa*, 2nd ed, at p 14:

"*The heir no longer succeeds automatically to the assets and liabilities of the estate. Though the inheritance vests in the heir, he or she does not acquire dominium in individual assets nor become personally liable for the debts of the deceased. Instead, the heir acquires a right against executor to his or her share in the residue after the liquidation and distribution account has been settled.*"

At p 15:

> "*And where a man or woman who was married to his or her spouse in community of property dies, the heirs of the pre-deceased spouse do not acquire co-ownership in individual assets of the joint estate, but merely the right to claim from the executor half of the net balance of the joint estate. Nor is the survivor, despite having been during the lifetime of the pre-deceased spouse co-owner of half of the joint estate, vested with dominium of half of the assets. Like the heirs of the pre-deceased's spouse, the survivor is restricted to a right against the executor to half of the net balance.*"

In the footnote, reference is made to *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A). In regard to the legal status of both the deceased estate and the executor, the deceased estate is not a separate persona, but the executor is such person for the purposes of the estate and in whom the assets and the liabilities temporarily reside in a representative capacity. The executor only, has *locus standi* to sue or to be sued. See *Law and Estate Planning* by Ronald King, 2010 ed, as well as Meyerowitz on *Administration of Estates*, 2007 ed.

[12] From the above, it is more than plain that the late Joseph Booysen in the present matter, did not gain ownership of the whole joint estate upon the death of his wife, the late Dora Booysen. He therefore had no legal capacity to enter into the disputed Sale Agreement with the first and the second respondents regarding the immovable property. It was the prerogative of the executor, the fourth respondent, to do so. The uncontroverted evidence is that the estate of the late Dora Booysen is not finalised, and the First and Final Liquidation and Distribution Account has not been approved, for reasons

advanced by the executrix. The sale was invalid *ab initio* and calls to be set aside.

[13] However, if I am incorrect in my determination set out above, there is yet another reason why the Sale Agreement can be impugned. Section 2(1) of the Alienation of Land Act 68 of 1981, provides:

> "*(1) No alienation of land after the commencement of the section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.*"

As found above, the late Joseph Booysen had no authority to conclude the Sale Agreement. He could also not have done so as agent for the executor. In *Tabethe and Others v Mtetwa NO and Others* 1978 (1) SA 80 (D), the provisions of section 1 of Act 71 of 1969 (the precursor to section 2(1) of the current Alienation of Land Act) were debated by the Court. It was held that in order to avoid invalidity, a deed of sale involving deceased estate property must be signed by the duly appointed executor or an agent acting on behalf of the executor under the terms of a written authority. Further, that in order to comply with the provisions of section 2(1) of the Alienation of Land Act, the essential terms of the sale, including the identity of the parties must appear *ex facie* the written document embodying the sale. If evidence *dehors* the sale agreement is required to establish the identity of the seller, the agreement is invalid, as two executrixes were appointed, and only one concluded a sale agreement, the sale was held to be without force and effect. The rationale being that both executors are vested with the administration of the deceased

estate, and both must exercise their functions and duties jointly. In the instant matter, it was argued on behalf of the respondents that in the case of *Tabethe and Others*, under discussion, the Court held that a legal right to sell the immovable property could arise based on the fact that the seller was the sole and universal beneficiary. The argument has no merit as it misconstrues the basis of the decision in that case.

[14] In *Mills NO v Hoosen* 2010 (2) SA 316 (W), it was held that the deceased estate, as mentioned earlier in this judgment, has no legal persona and consists of an aggregate of assets and obligations. The estate vests in the executor in the sense that dominium of the assets passes to the executor, and singly has the power to deal with the totality of the deceased estate's rights and obligations. Further that, in terms of the Administration of Estates Act 66 of 1965, the executor is required to administer and distribute the estate according to the law and under the letters of executorship granted by the Master of the High Court. Since the executor alone has the power to deal with the assets of the estate, it follows that the executor must be a party to the sale of any immovable property of the estate. In the present matter, the argument advanced on behalf of the respondents that *Mills NO and Hoosen* is not applicable since the seller there acted in a representative capacity, is misplaced. The contrary is in fact true. The *Mills NO v Hoosen* matter deals with the legal status of a deceased estate. It was held that as the representative of the estate of the executor omitted to disclose that he entered into the contract of sale on behalf of the executor and as a consequence, parole evidence was necessary in order to establish the true identity of the

seller. The sale was held to be invalid as there was non-compliance with the Alienation of Land Act. The respondents in the instant matter, in reliance of the contention that the late Joseph Booysen was entitled to sell the immovable property, referred to *Kotze NO v Oosthuizen* 1988 (3) SA 578 (C), and *Van den Bergh v Coetzee* 2001 (4) SA 93 (T). The *Kotze NO v Oosthuizen* case dealt with the question whether the provisions of section 15 of the Matrimonial Property Act 88 of 1984 was applicable in circumstances where property in a deceased estate is transferred. On the other hand, the *Van der Bergh v Coetzee* case dealt with the question whether an executor may be held liable for latent defects in estate property where the deceased had knowledge of such defects. Both these cases referred to are irrelevant to the facts of the present matter, and of little assistance.

CONCLUSION

[15] To sum up. The applicants' parents, the late Dora Booysen and her husband, the late Joseph Booysen, were married in community of property. There is the immovable property in the joint estate which forms part of the joint estate. There is a joint will. After the death of the mother, Dora Booysen, and in accordance with the joint will, the fourth respondent was appointed as executor. The surviving spouse, the father, sold the immovable property in his own name without the consent of the executor, and in circumstances when the deceased estate of his late wife was no finalised. The deceased estate is not a separate legal persona. The executor is such a person for the sole purpose of administering the estate. The surviving spouse,

the late Joseph Booysen, had no legal authority or right to sell the immovable property to the first and the second respondents. The Alienation of Land Act 68 of 1981 is applicable to the sale of the immovable property, and non-compliance therewith renders the sale void *ab initio*. The contract of sale cannot be rectified by attaching the signature of the executor subsequently. The Agreement of Sale, and the Addendum thereto, concerning the immovable property falls to be declared invalid. It follows that the third respondent, Malherbe Rigg & Ranwell Inc, ought also to be interdicted from registering the transfer of the immovable property to the first and the second respondents. It also follows that the counter-application of the first and the second respondents falls to be dismissed. It has neither merit nor any basis. The costs of this application should follow the result. It has not been argued otherwise.

ORDER

[16] The following order is made:

1. The sale of the immovable property described as Erf 649 Gladiolus Street, Reiger Park, Extension 1, Boksburg to the first and the second respondents, and the Addendum thereto, are hereby set aside as invalid.

2. The third respondent is hereby interdicted and restrained from registering the transfer of the above immovable property to the first and second respondents.

3. The counter-application of the first and the second respondents is hereby dismissed with costs.

4. The first and the second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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