

## SELLING THAT WHICH YOU DO NOT YET HAVE

**Tomlinson and Another v Tomlinson N.O and Others (11764/2015) [2021] ZAKZDHC 8 (19 March 2021)**

*If A sells B's property to C, the resultant legal position is that A is obliged to make B's property available to C. He will therefore attempt to obtain it. If he succeeds, he can make it available to C and the contract is performed. If B will not let him have it, he (A) fails to perform and is in breach of contract. In such circumstances C has an action against A for damages for breach of contract. How does this principle play out where a surviving spouse, who was married to her deceased husband in community of property, sells her undivided half share in the property to a third party before her husband's estate was finally wound-up? Did she own that half share and could she sell it?*

The Judgment can be viewed [here](#).

### FACTS

Mr and Mrs Tomlinson are married to each other in community of property and brought this action against Ms Tomlinson, Mr Tomlinson's sister, in her representative capacity as executor in the estate of their late mother, Mrs Tomlinson (senior). Their father, Mr Tomlinson (senior) had also passed away some time ago.

Mr and Mrs Tomlinson (senior) were married in community of property. When they were both alive, they were joint owners of a property. When Mr Tomlinson (senior) died in December 2012, he bequeathed his one half undivided share in the property to his two sons and registration of transfer of the half share to the brothers followed in November 2014, leaving Mrs Tomlinson (senior) as the owner of the remaining undivided half share in the property.

Mrs Tomlinson (senior) was never gainfully employed and was in need of financial assistance from time to time. Mr Tomlinson assisted her by way of loans.

Shortly after the death of Mr Tomlinson (senior), Mrs Tomlinson (senior) suggested to her son, Mr Tomlinson, that she would sell her undivided half share in the property to him at a price equivalent to the sum of the loans he made to her, the purchase price to be discharged by set-off. They concluded a written agreement to this effect in October 2013 and signed the transfer documents. At this point the joint estate was still under the administration of the executor in the estate of the late Mr Tomlinson (senior). Transfer was however delayed due to complications with an expired municipal clearance and then, before transfer could be registered, Mrs Tomlinson (senior) passed away.

Mr Tomlinson's sister was appointed as executrix in the estate of her mother and, in this capacity, refused to allow transfer of the half share to proceed. This dispute was at the root of the present application by Mr and Mrs Tomlinson who applied for an order directing the executor, the sister, to do all things necessary to transfer the undivided half share of Mrs Tomlinson (senior) to them.

The application was opposed by the executor, who argued, amongst other things, that the Alienation of Land Act 68 of 1981 had not been complied with as Mrs Tomlinson (senior) needed the executor of her husband's estate to be a co-signatory or the sole signatory to the agreement in which she sold her half share to her son.

### HELD

- The position in our law is as follows:
  - Upon the death of a spouse married in community of property the surviving spouse is not immediately

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and automatically vested with dominium of a half share in any property belonging to the joint estate. He/she is restricted to a right against the executor to half the nett balance available in the joint estate, which may eventually turn out to include a half share in immovable property due to the spouse by virtue of the marriage in community of property, if the property is not sold to discharge debts.

- And, where a man or woman who was married to his/her spouse in community of property dies, the heirs of the predeceased 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 nett balance of the joint estate.
- Nor is a survivor, despite having been during the lifetime of the predeceased spouse co-owner of half of the joint estate, vested with dominium of half of the assets. Like the heirs of the predeceased spouse, the survivor is restricted to a right against the executor to half of the nett balance.
- Thus, for the duration of the marriage, the survivor is a co-owner of the whole of the joint estate; but for so long as the marriage subsisted, the whole of the estate was not just undivided, but indivisible.
- It is not correct to argue that until the estate is finalised, the only person with power to sell what the surviving spouse might regard as her half share of immovable property is the executor. Rather, the position is that until the estate is finalised, the only person with power to *dispose* of property in the estate – i.e. power to deliver it into the ownership of someone else (by registration of transfer in the case of immovable property) – is the executor exercising his or her functions as such according to law. It is that power of disposal that the executor exercises when he or she delivers property to heirs or, in the case of a marriage in community of property, to the surviving spouse as to the half share due to that spouse by reason of the marriage in community of property. If it is necessary or proper, according to the laws governing the winding-up of deceased estates, to sell property with a view to delivering it into the ownership of a third party, it is the executor who has the power to do that.
- Indeed, someone can validly sell their, or anyone else's, property. It is trite that it is not a requirement for a valid contract of sale that the seller must be the owner of the thing sold. For example, if A sells B's property to C the resultant legal position is that A is obliged to make B's property available to C. He will therefore attempt to obtain it. If he succeeds, he can make it available to C and the contract is performed. If B will not let him have it, he (A) fails to perform and is in breach of contract. In such circumstances C has an action against A for damages for breach of contract.
- In the present matter, at the time when Mrs Tomlinson (senior) sold the property to Mr and Mrs Tomlinson, Mrs Tomlinson (senior) was not the owner of the half share in the property which she sold. Dominium of what she regarded as her half share by reason of her marriage in community of property had not yet passed to her. But this did not render her agreement to sell the property invalid or void. The subject of the sale was described in the agreement as "a one-half (½) share in and to Erf 110 Ifafa, ...". There is no doubt about the half share the parties had in mind.
- It was clear that Mrs Tomlinson (senior) undertook to bring about the transfer of the half share in question from herself to Mr and Mrs Tomlinson. She certainly did not purport either to act on behalf of the executor of her husband's estate.
- The defence of the executor in the estate of Mrs Tomlinson (senior) - that neither Mrs Tomlinson nor her estate actually received the half share from the estate of Mr Tomlinson yet – had to fail. (And, as far as the estate of Mr Tomlinson (senior) may not yet be finalised, there was no suggestion that it was not anticipated that a half share in the property will pass to the estate of Mrs Tomlinson (senior) by virtue of her marriage in community of property to Mr Tomlinson (senior).)

## CONCLUSION

The agreement was accordingly valid.