

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 2011/33437

In the matter between:

**KNOX, DAVID BOYD NO (in his capacity
as executor of the late estate Knox, number 3911/04)** Applicant

and

MOFOKENG, MISHACK MHAMBI First Respondent

O'SHEA, JAMES REGINALD Second Respondent

STANDARD BANK OF SOUTH AFRICA LTD Third Respondent

FIRST RAND BANK LTD Fourth Respondent

THE REGISTRAR OF DEEDS Fifth Respondent

THE MASTER OF THE HIGH COURT Sixth Respondent

**THE SHERIFF OF THE HIGH COURT,
JOHANNESBURG EAST** Seventh Respondent

JUDGEMENT

LJ VAN DER MERWE, AJ

1. This judgement concerns the rights of *bona fide* purchasers of property at sales in execution where the judgement in terms whereof the sale in execution was effected, has been subsequently rescinded. It also concerns

the validity of the transfer of immovable property to a chain of successive purchasers, under such circumstances. The conclusion reached in this judgement is that the legal consequences of rescission of the judgement in question subsequent to the sale in execution differ, depending on whether transfer of ownership had already been effected or not.

2. It has been accepted in the case law that where a judgement is rescinded after a sale in execution had taken place but before transfer of the property to the purchaser had taken place, the owner of the property is entitled to seek an order setting the sale in execution aside and interdicting the transfer of the property to the purchaser at the sale in execution. See eg Vosal Investments (Pty) Ltd V City of Johannesburg 2010 (1) SA 595 (GSJ); Jubb v Sheriff, Magistrate's Court, Inanda District; Gottschalk v Sheriff, Magistrate's Court, Inanda District 1999 (4) SA 596 (D) at 605F-G. In the Vosal Investments-judgement (above, at paragraph 16), the South Gauteng full bench accepted the statement in the Jubb-judgement (above, at 606F-G), with reference to the judgement by McCall AJ in Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd 1992 (2) SA 665 (N), that the owner of an immovable property is entitled to restoration of his property from a *bona fide* purchaser at a sale in execution, "*where a sale of property not followed by transfer is rendered a nullity by reason of the rescission of the judgement which alone gave it validity.*" It was also accepted by the South Gauteng full bench in Vosal Investments (above, at paragraph 16) that where the purchaser of the property at the sale in execution became aware of the claims of the owner

(because he was aware of the owner's application for rescission of the judgement) prior to registration of transfer having been effected, such purchaser is also obliged to restore possession to the owner, once the judgement has been rescinded. This approach was based on the conclusion that the purchaser was aware of the attack on the judgement by the owner and on the consequent sale in execution and had knowledge that some risk might attach to his rights as buyer of the property.

3. It has further also been accepted in the case law that where a default judgement has been rescinded subsequent to the sale in execution, both the default judgement and the warrant of execution issued in terms of the judgement become null and void and of no effect, as between the judgement creditor and the judgement debtor. In such event, the judgement debtor is entitled to have the status *quo ante* restored as against the judgement creditor. The warrant of execution and the sale of execution were all dependent on the existence of the default judgement. Once the default judgement had been rescinded the warrant of execution and the sale in execution has no legal basis as between the parties to the litigation. See Lottering v SA Motor Acceptance Corporation Ltd 1962 (4) SA 1 (E) at 3H-4B; Jasmat v Bhana 1951 (2) SA 496 (D); Maisels v Camberleigh Court (Pty) Ltd 1953 (4) SA 371 (C).
4. The current matter concerns the situation where a judgement is rescinded after the property sold at the sale in execution had been transferred to a *bona fide* purchaser, who had no knowledge of the claims of the owner at

the time of registration of transfer. In the present instance, the immovable property in question has been sold and transferred (by way of registration in the name of the purchaser in the Deeds Office) to a *bona fide* purchaser following the sale in execution and has thereafter been sold and transferred by the first purchaser to a second *bona fide* purchaser. The dispute between the parties in the present matter turns on the implications of the abstract theory for the passing of ownership under such circumstances and the application of the common law adage that nobody can transfer more rights to another than he himself has ("*nemo dat qui non habet*"), which has been described as the "golden rule" of the law of property. See eg Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman's the Law of Property 73.

5. It appears from the analysis of the case law and the relevant common law principles dealt with below that the judgement debtor's entitlement to claim restoration of the property once the judgement, in terms whereof the property had been sold in execution, has been rescinded, depends on the factual circumstances present at the time of rescission. At least three factual scenarios can in general be envisaged, although other factual permutations are possible. The first scenario is where the sale in execution had not been perfected by delivery in the case of movables and registration of transfer in the case of immovables. As indicated above, in such event, the owner is in principle entitled to claim recovery of the property in question following the rescission of the judgement. See Vosal Investments (Pty) Ltd V City of Johannesburg 2010 (1) SA 595 (GSJ); Jubb v Sheriff.

Magistrate's Court, Inanda District; Gottschalk v Sheriff, Magistrate's Court, Inanda District 1999 (4) SA 596 (D) at 605F-G. The second scenario is where the sale in execution had been perfected by delivery in the case of movables or registration of transfer in the case of immovables, but the purchaser had knowledge of the proceedings instituted by the judgement debtor for the rescission of the judgement in question prior to delivery or registration of transfer. In such event, the owner is also in principle entitled to recovery of the property in question, even where transfer had already been effected. See the Vosal Investments judgement, above, at paragraph 16. The third scenario is where the sale in execution has been perfected by delivery in the case of movables or by registration of transfer in the case of immovables to a *bona fide* purchaser who had no knowledge of the judgement debtor's proceedings for the rescission of the judgement or where transfer of ownership has been effected prior to the institution of the rescission proceedings. The conclusion reached in the analysis below is that where transfer of ownership had been effected pursuant to the sale in execution by the time the judgement has been rescinded, the judgement debtor is not entitled to recover possession of the property in question, unless it can be established that the judgement and/or the sale in execution constituted a nullity. This conclusion is dictated and explained, in my view, by the application of the abstract theory for the transfer of ownership, which will be dealt with in greater detail elsewhere in this judgement.

6. I turn briefly to the factual background. The applicant is the duly appointed executor of the estate of his late mother, Mrs SMM Knox, who passed

away on 15 December 2003. The applicant seeks an order declaring the sale in execution of a property, known as erf 144, Troyeville township, Johannesburg (hereinafter referred to as "the property"), which was registered in the name of the late SMM Knox, and all subsequent sales of such property to be null and void. The applicant further seeks an order that the deeds of transfer of the property from the estate of the late SMM Knox to the second respondent and from the second respondent to the first respondent be cancelled in terms of section 6 of the Deeds Registries Act, 47 of 1937. Lastly, the applicant seeks an order directing the Registrar of Deeds to re-register the property in the name of the estate of the late SMM Knox. The Registrar of Deeds filed an affidavit in which it was stated that the Registrar has no objection to the granting of the order as prayed.

7. At the time of Mrs Knox's passing away the property was bonded to the fourth respondent, being First Rand Bank Ltd (hereinafter "First Rand Bank"). The bond fell in arrears while the applicant was in the process of finalising the estate. The full amount owing on the bond to First Rand Bank at the time of Mrs Knox's death was R96,131.90. Correspondence ensued between the applicant and First Rand Bank and the latter's claim was included in the final distribution account of the late estate. First Rand Bank was informed that its claim would be paid upon the final conclusion of the estate.
8. On the unchallenged version of the applicant, First Rand Bank had served a summons for the arrears on the bond at the late SMM Knox's *domicilium*

citandi et executandi in terms of the bond agreement, despite the fact it had been informed that the claim against the estate would be honoured upon the final winding up of the estate and with knowledge that the applicant was represented by a firm of attorneys, at whose address First Rand Bank had lodged its claim against the estate. Consequently, the applicant never received notice of the summons in respect of the arrear amounts on the bond. First Rand Bank then obtained default judgement against the applicant in his capacity as executor of the estate of the late SMM Knox on 7 May 2007. First Rand Bank thereafter proceeded to serve the writ of execution again at the *domicilium citandi et executandi* of the late SMM Knox, again with the result that the applicant did not become aware of the writ of execution. First Rand Bank proceeded to sell the property in execution to the second respondent, who in turn sold the property to the first respondent. It was only when the property had already been transferred into the name of the first respondent that the applicant became aware of the conduct of First Rand Bank and of the fact that default judgement had been taken and that the property had been sold in execution. A rescission application was launched in the North Gauteng High Court. On 16 August 2010 an order was granted for rescission of the default judgement obtained by First Rand Bank. In terms of the order, the default judgement against the estate of the late SMM Knox was set aside, the first respondent was interdicted and ordered not to sell or dispose of the property and First Rand Bank was ordered to join the first, second and

sixth respondents to its original action for the recovery of the arrear bond payments.

9. Following the rescission of the default judgement, the first respondent vacated the property and returned physical possession thereof to the applicant. At the time of the hearing, the property was still registered in the name of the first respondent. Notwithstanding the rescission of the default judgement, First Rand Bank, who had allegedly retained the entire proceeds from the sale in execution in the amount of some R271,000, did not proceed with the action and the entire matter was left in an indeterminate state. Whilst the applicant was in the process of considering the launching of a further application it came to his attention that the third respondent, Standard Bank of South Africa Ltd (hereinafter "Standard Bank"), had instituted action against the first respondent (in whose name the property was by then registered) for monies lent and advanced and secured by a mortgage bond registered against the property in favour of Standard Bank. Standard Bank had obtained a writ of execution and the Sheriff of the High Court, Johannesburg East was instructed to sell the property in a sale of execution on 21 July 2011. Notwithstanding attempts to explain the legal position to Standard Bank, the latter insisted that it was entitled to proceed with the sale of execution. Consequently, the applicant was obliged to launch an urgent application to stay the sale in execution, which was granted on 21 July 2011. The applicant was ordered to launch an application within 30 days of the granting of the order for the re-transfer of the property to the deceased estate.

10. Standard Bank (the third respondent) is the only party who oppose the application. Standard Bank raises two defences, namely that the application was launched out of time and that the first respondent remained the owner of the property by virtue of the fact that the property was registered in his name. When I indicated to counsel on behalf of Standard Bank that the applicant would in any event be entitled to condonation, which was sought in the alternative, the defence that the application was not launched within the 30 day period stipulated in the previous order, was abandoned.
11. Ms Strydom, appearing on behalf of the applicant, contended that the sale of the property in execution, following the default judgement obtained by First Rand Bank, was invalid since the judgement in terms whereof the property was sold and subsequently transferred to the second respondent had been rescinded. In addition, she contended that, since the order in terms whereof the property had been declared to be specially executable in terms of High Court rule 46(1) has been rescinded, the rescission of the default judgement had retroactive effect. Consequently, she contended, the writ of the execution and the subsequent sale of the property by the Sheriff to the second respondent was void for want of compliance with the provisions of rule 46(1), because there was no longer an order in existence in terms whereof First Rand Bank was entitled to attach the property and to have it sold in execution.

12. Ms Strydom relied primarily on the judgement in Menqa v Markom 2008 (2) SA 120 (SCA), where the sale of a property in execution and the transfer thereof, as well as subsequent sales and transfers of the property, were declared null and void. The judgement in Menqa v Markom (above) was based on the ground that the warrant of execution, pursuant to which the sale had taken place, had been issued by the clerk of the Magistrates' Court without judicial supervision, thereby impairing the judgement debtor's constitutional rights in terms of section 26(1) of the Constitution that accords everyone the right to have access to adequate housing, in accordance with the judgement by the Constitutional Court in Jafftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC) and the subsequent judgement in Gundwana v Steko Development 2011 (3) SA 608 (CC). Ms Strydom also relied on the judgement in Campbell v Botha 2009 (1) SA 238 (SCA), where the court found that a sale in execution of a property and the subsequent transfer thereof to a purchaser who acted in good faith, had no legal force and effect, by virtue of the fact that the sale in execution was null and void. The judgement was rescinded in an earlier judgement by the High Court on the grounds that the judgement debtor was a minor at the time when judgement was obtained against him and the judgement creditor failed to cite him as being assisted by his father. The Supreme Court of Appeal then found in the subsequent proceedings that the sale in execution was null and void because neither the warrant nor the notice of attachment was served on or brought to the notice of the

judgement debtor. Consequently it was declared that the judgement debtor retained ownership of the property.

13. In the alternative, Ms Strydom argued that the sale in execution to the second respondent was invalid for non-compliance with the requirements of section 30 of the Administration of Estates Act, 66 of 1965. This provision *inter alia* stipulates that a property in the estate of a deceased person which has been attached, whether before or after his death under such writ or process, may not be sold in execution unless the court otherwise directs or unless the person charged with the execution of the writ could not have known of the death of the deceased person.

14. Mr Vorster, appearing on behalf of Standard Bank (the third respondent), relied on the subsequent judgements by the Supreme Court Of Appeal in Legator McKenna Inc v Shea 2010 (1) SA 35 (SCA) and Meintjes NO v Coetzer 2010 (5) SA 186 (SCA). In the judgement of Legator McKenna Inc v Shea (above) the Supreme Court of Appeal held that a property had been validly transferred, notwithstanding the fact that the transfer was effected by virtue of an invalid agreement of sale (*inter alia* for non-compliance with the writing requirements of section 2(1) of the Alienation of Land Act, 68 of 1981). The court held that the abstract theory of transfer applies to the transfer of both immovable and movable property. Since there was no defect in the real agreement, the property was validly transferred to the second respondent. (See paragraph 21-24 of the judgement.) In Meintjes NO v Coetzer (above) the Supreme Court of Appeal held that the transfer

of ownership of the property was invalid under circumstances where the respondents (children of a deceased person) had fraudulently obtained the transfer of property into their names by virtue of a falsified deed of sale and falsified transfer documentation. The court held that the obligation-creating agreement as well as the real agreement were invalid due to the fraudulent conduct of the defendants and that the deceased had accordingly never lost her rights of ownership, notwithstanding the fact that the property had been registered in the names of the respondents.

15. Mr Vorster argued that the real agreements in the present instance could not be challenged and that the property had accordingly validly been transferred, firstly to the second respondent pursuant to the sale in execution and thereafter to the first respondent in terms of the agreement of sale between the second respondent and the first respondent. He also contended that the earlier judgements in Menga v Markom (above, reported in 2008) and Campbell v Botha (above, reported in 2009) failed to take the principles of the abstract theory for the passing of ownership into account, since the invalidity of an underlying agreement was irrelevant to the validity of the transfer of ownership. As such, he contended, these judgements were in conflict with the approach reflected in the subsequent judgements of the Supreme Court of Appeal in Legator McKenna Inc v Shea (above, reported in 2010) and Meintjes NO v Coetzer (above, reported in 2010), where it was for the first time expressly confirmed by the Supreme Court of Appeal that the abstract theory of transfer applied to the transfer of immovable property (see Legator McKenna Inc v Shea at

paragraph 21) and where the Supreme Court of Appeal accepted that the transfer of immovable property could validly be effected notwithstanding the invalidity of the underlying obligation-creating agreement. Other recent judgements where these implications of the abstract theory for the passing of ownership were expressly accepted by the Supreme Court Of Appeal are Du Plessis v Prophitus 2010 (1) SA 49 (SCA) and Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC 2011 (2) SA 508 (SCA). In paragraph 12 of the judgement in Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC (above) Shongwe JA held as follows:

"It is trite that our law has adopted the abstract system of transfer as opposed to the causal system of transfer. Under the causal system of transfer, a valid cause (iusta causa) giving rise to the transfer is a sine qua non for the transfer of ownership. In other words, if the cause is invalid, e.g. non-compliance with formal requirements, the transfer of ownership will also be void -See Carey Miller 'Transfer of Ownership' in Feenstra & Zimmerman Das Römisch-Holländische Recht 537; 'Transfer of Ownership' in Zimmerman & Visser Southern Cross: Civil Law and Common Law in South Africa 727 at 735-9. Under the abstract system the most important point is that there is no need for a formally valid underlying transaction, provided that the parties are ad idem regarding the passing of ownership: Meintjes NO v Coetzer 2010 (5) SA 186 (SCA)."

16. Mr Vorster contends, correctly in my view, that immovable property validly sold in execution at judicial sales cannot, as a general rule, after registration of transfer be vindicated from a *bona fide* purchaser. Thus it was held by Van den Heever JA in Sookdeyi v Sahadeo 1952 (4) SA 568 (A) at 571G - 572B that it was a principle of the common law that a perfected sale in execution should after transfer or delivery of the subject

matter not be lightly impugned and that the reluctance to rescind perfected sales in execution has been received in our case law. The remainder of the contentions advanced by Mr Vorster on behalf of the third respondent disregards, however, the common law authorities and case law where it was held that vindicatory proceedings are not excluded in respect of property sold in execution where the essential formalities and statutory requirements for a sale in execution had not been complied with, resulting in a nullity. The common law principles in this regard have been examined by McCall AJ in Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd 1992 (2) SA 665 (N), where it was held that the owner of property, which had been transferred pursuant to a sale in execution to a *bona fide* third party, can recover such property from the purchaser under circumstances where the sale in execution was a nullity for non-compliance with the peremptory provisions of High Court rule 46(3) regarding notice in writing by the Sheriff to the owner of the property. See also, regarding the common law principles, the judgement by Cloete JA in Menqa v Markom 2008 (2) SA 120 (SCA) at paragraph 31-42, especially at paragraph 30. Other judgements where the same approach was applied include Van der Walt v Kollektor (Edms) Bpk 1989 (4) SA 690 (T) at 696B-H; Jones v Trust Bank of Africa Ltd 1993 (4) SA 415 (C); Kaleni v Transkei Development Corporation 1997 (4) SA 789 (TkS) and Absa Bank v Van Eeden 2011 (4) SA 430 (GSJ).

17. The common law principles are also reflected in Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman's the Law of Property 261 in the following terms, with reference to the relevant common law authority:

"Property sold at judicial sales cannot, after delivery in the case of movables or registration in the case of immovables, be vindicated from a bona fide purchaser. Even when an article is sold by mistake as belonging to a judgement debtor, the true owner cannot vindicate it from a bona fide purchaser (though Matthaeus states that he or she can do so on refunding the purchase price to the purchaser). Thus, section 70 of the Magistrates' Courts Act provides that the sale in execution by the Sheriff of the court will not, in the case of movable things after delivery thereof or in the case of immovable things after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect."

In footnote 192 on the same page, the authors qualify the general statement by stating that *"[t]he sale, however, has to be a valid sale complying with the applicable rules of court and statutory measures: see Van der Walt v Kolektor (Edms) Bpk 1989 (4) SA 690 (T); Joosub v JI Case SA (Pty) Ltd 1992 (2) SA 665 (N) at 679B."*

18. It follows that the first common law principle to be applied in the present instance is that, as a general rule, property sold at a sale in execution in terms of a valid, existing judgement cannot be vindicated from a *bona fide* purchaser once the property had been transferred to the purchaser, provided the sale in execution was not a nullity. This implies that even where a valid judgement has been rescinded after the sale in execution had taken place, the property cannot be vindicated from a *bona fide* purchaser who had taken transfer of the property, merely on the ground that the judgement had been rescinded. The second relevant common law

principle is that the first principle only applies where a valid judgement was in existence at the time of the execution sale and where a valid execution sale complying with the essential applicable rules of court and statutory measures had taken place. Where there was no judgement or where the judgement was void *ab initio* or where the essential statutory formalities pertaining to the sale of an immovable property had not been complied with, the immovable property in question can in principle be vindicated, even from a *bona fide* purchaser who had taken transfer of the property. The reason for the second rule is that where the sale in execution was invalid, the Sheriff had no authority to conduct the sale and to transfer the property to the purchaser. The result is not only that the underlying sale agreement concluded at the sale in execution is invalid but also that the real agreement is defective, since the Sheriff does not have authority to transfer the property to the purchaser. The Sheriff only has such authority where a valid sale in execution had taken place.

19. The principles of the common-law pertaining to the abstract theory for the passing of ownership have been stated as follows by Brand JA in Legator McKenna Inc v Shea (above) at paragraph 22 (and referred to with approval by Shongwe JA in Meintjes NO v Coetzer (above) at paragraph 8):

"In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer

ownership and the intention of the transferee to become the owner of the property. ... Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement."

This implies that the transferor must be legally competent to transfer the property, the transferee must be legally competent to acquire the property and that the golden rule of the law of property that no one can transfer more rights than he himself has also apply to the real agreement. See Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman's the Law of Property 73

20. When these basic principles of the common-law are applied to the cases of Menqa v Markom (above), Campbell v Botha (above), Legator McKenna Inc v Shea (above) and Meintjes NO v Coetzer (above), it is evident that there is no conflict between them and that the implications of the abstract system for the transfer of ownership have been adhered to in all these judgements, even though there was no express reference to the abstract theory of transfer in the earlier judgements in Menqa v Markom and Campbell v Botha . In the case of Menqa v Markom the sale in execution was void because the warrant of execution was issued without the required judicial oversight. Since the sale in execution was void the Sheriff had no authority to transfer the property in terms of the real agreement with the *bona fide* purchaser. Since the real agreement was defective, the property could be vindicated in principle from the *bona fide* purchaser. Thus, in

Menqa v Markom (above, at paragraph 24) Van Heerden JA stated as follows:

"The Sheriff derives his or her duty and authority to transfer ownership pursuant to a sale in execution of immovable property from rule 43(13) of the Magistrates' Courts rules. If the sale in execution is null and void because it violates the principle of legality, as in the present case, then the Sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property in his or her name."

It is accordingly evident that the judgement in Menqa v Markom is consistent with the abstract theory for the passing of ownership, although no express reference was made to the abstract theory.

21. In Campbell v Botha (above) the sale in execution was void because neither the warrant nor the notice of attachment was served on the judgement debtor. Since the sale in execution was void, the Sheriff had no authority to transfer the property in terms of the real agreement with the bona fide purchaser. Since the real agreement was defective, the property could be vindicated in principle from the *bona fide* purchaser. Again, the judgement is consistent with the abstract theory of transfer of ownership, although no express reference was made to the abstract theory. In Legator McKenna Inc v Shea (above), the underlying agreement was invalid, *inter alia* for non-compliance with the formalities required by section 2(1) of the Alienation of Land Act, 68 of 1981 and because the *curator bonis* of a person who had suffered brain injuries entered into an agreement for the sale of an immovable property, prior to his letters of curatorship having been issued by the master in terms of section 72(1)(d) of the Administration

of Estates Act, 66 of 1965. By the time transfer of the property had been effected, however, the *curator bonis* had received his letters of curatorship. Consequently, by the time the real agreement was entered into, the *curator bonis* was properly authorised to enter into the real agreement. Since the real agreement was valid the property could not be vindicated from the *bona fide* purchaser. (See paragraph 25 of the judgement.) In Meintjes NO v Coetzer (above) the sale agreement as well as the transfer documentation had been falsified. Consequently both the underlying agreement of sale as well as the real agreement was invalid and the property could be vindicated from the purchasers.

22. It is accordingly evident that the principles of the abstract theory of transfer have been applied consistently in the case law referred to above. Immovable property which had been transferred to a *bona fide* purchaser could, notwithstanding registration in the name of the purchaser, be vindicated from the purchaser where the real agreement was defective, irrespective of the validity of the underlying transaction. Where the requirements for a valid real agreement were present the transfer of ownership to a *bona fide* purchaser was valid and the property could not be vindicated. See also in this regard Du Plessis v Proffitius 2010 (1) SA 49 (SCA) and Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC 2011 (2) SA 508 (SCA), where the same principles were applied. Whilst the purpose of the abstract theory of transfer of ownership is to introduce greater certainty regarding the ownership of property than the

causal system, the abstract theory does not and cannot serve as a guarantee of ownership.

23. Applying the basic principles of the common law to the present matter, it is evident that the contentions on behalf of Standard Bank, to the effect that the property could not be vindicated by the owner from the first respondent because the property had been transferred to and registered in the name of the first respondent, who was a *bona fide* purchaser, cannot be accepted without qualification. The reasoning presented on behalf of Standard Bank would only be valid if there was no defect in the real agreement in terms whereof transfer was effected. It follows that the validity of the real agreement in terms whereof transfer was effected must be examined in the present matter in order to determine whether the applicant is in principle entitled to the relief sought.

24. The contentions presented on behalf of the applicant, to the effect that the applicant was entitled to vindicate the property once the judgement in terms whereof the property was sold in execution, had been rescinded, can also not be accepted without qualification. Whilst it has been accepted in the case law that, where the judgement has been rescinded, property sold in execution can be vindicated prior to the transfer of ownership (see Vosai Investments (Pty) Ltd V City of Johannesburg 2010 (1) SA 595 (GSJ), paragraph 16; Jubb v Sheriff, Magistrate's Court, Inanda District; Gottschalk v Sheriff, Magistrate's Court, Inanda District 1999 (4) SA 596 (D) at 605F-G), this is not the legal position where transfer of ownership

had taken place. I am not aware of any authority in terms whereof property can be vindicated from a *bona fide* purchaser who had received transfer of the property, merely because the judgement in terms whereof the sale in execution had taken place, had been rescinded. In such an event, the sale in execution would have taken place in terms of a valid judgement existing at the time of the sale. If the required statutory formalities had been complied with, the Sheriff would ordinarily have had authority to enter into the real agreement regarding the transfer of the property to the *bona fide* purchaser. The fact that a judgement which had been validly granted is subsequently rescinded after transfer had been effected, cannot, in my view, retroactively affect the validity of the real agreement in respect of the transfer of the property. To hold otherwise, would introduce, in my view, an unacceptable degree of legal uncertainty pertaining to the purchase of property at sales in execution. It appears from decisions such as Sookdeyi v Sahadeo 1952 (4) SA 568 (A) at 571H-572A and Jubb v Sheriff, Magistrate's Court, Inanda District; Gottschalk v Sheriff, Magistrate's Court, Inanda District 1999 (4) SA 596 (D) at 604D-E that the common law reluctance to rescind the consequences of sales in execution applied to sales which had been perfected by delivery (in the case of movables) or transfer (in the case of immovable). The distinction regarding the legal consequences of rescission of the judgement in question, pertaining to the judgement debtor's entitlement to recover possession of the property in question, in instances where transfer of ownership had been effected and where transfer had not been effected, is accordingly based on recognised

principles of the common law and on rational policy considerations. It follows that rescission of the judgement in terms whereof a sale in execution had taken place will only be entitled a judgement debtor to recover the property from a bona fide purchaser who had received transfer, if the real agreement in terms whereof transfer was effected was defective. The mere fact that the judgement is rescinded subsequent to transfer of the property, does not, in my view, has the legal consequence that the real agreement in terms whereof transfer was effected, becomes invalid.

25. Once again applying the established principles of the common law, the validity of the real agreement in terms whereof transfer was effected must accordingly be examined in order to determine whether the applicant is entitled to the relief sought in the current matter. The applicant contends that the sale in execution was proceeded with in contravention of the provisions of section 30 of the Administration of Estates Act, 66 of 1965. Section 30 provides as follows:

"30 Restriction on sale in execution of property in deceased estates

No person charged with the execution of any writ or other process shall-

(a) before the expiry of the period specified in the notice referred to in section 29; or

(b) thereafter, unless in the case of property of a value not exceeding R5000, the Master or, in the case of any other property, the Court otherwise directs,

sell any property in the estate of any deceased person which has been attached whether before or after his death under such writ or process: Provided that the foregoing provisions of this section shall not apply if such first-mentioned person could not have known of the death of the deceased person."

26. In Gounder V Absa Bank Ltd 2008 (3) SA 25 (N) it was held that the court order declaring immovable property to be executable could never amount to the required direction by the court for the purposes of section 30(b). A specific and pertinent direction from the High Court is required. The court also held that it was only in exceptional cases that leave to sell any estate asset through a process of execution should be entertained before at least the first liquidation and distribution account has been approved, lain for inspection and the period for objection has expired without any objection. In De Faria v Sheriff, High Court, Witbank 2005 (3) SA 372 (T) it was held that non-compliance with the provisions of section 30 resulted in a nullity as the wording contained in section 30 was clearly couched in peremptory and negative language. The court took into account that a criminal sanction was imposed in section 102(1)(h) in the event of the provisions of section 30 not being adhered to and that recognition of a sale in contravention of the section would give legal sanction to the very situation which the legislature sought to prevent. The court found that the purpose of the provision was to ensure that every creditor and heir received what they were entitled to without preference. If sales in contravention of section 30 were not visited by nullity, those intentions would be frustrated, the Master would have no control over the liquidation and distribution process and the statutory procedures would be circumvented. Accordingly, the court held that the sale in execution in contravention of section 30 of the act was invalid. (See paragraph 34 and 35 of the judgement.) in Wright v Westelike Provinsie

Kelders Bpk 2001 (4) SA 1165 (C) it was held that the provisions of the Administration of Estates Act displaced the common law right to proceed against a debtor. The provisions of section 30 gave expression to public policy in that execution of a judgement against a deceased was required to be completed by means of a claim against the executor appointed under the Act. Accordingly, judgement obtained against the deceased was not executable against any property which formed part of the estate, unless the Master or the Court otherwise directed. (See paragraph 49 of the judgment.)

27. It is evident from the facts in the present matter that the property fell within the estate of the late SMM Knox and that the sale in execution took place in contravention of section 30 of the Administration of Estates Act. It is evident that the Sheriff (being the person charged with the execution of the writ) could have known of the death of the late Mrs SMM Knox, as the applicant was cited in the summons in his capacity as executor of the estate of the late SMM Knox. In any event, there was no denial of the applicant's allegation in the founding affidavit that the sale in execution constituted a contravention of section 30 of the Administration of Deceased Estates Act. It follows that the sale in execution of the property constituted a nullity and that the Sheriff had no authority to enter into the real agreement for the transfer of the property to the second respondent pursuant to the purported sale in execution of the property. Since the transfer of the property to the second respondent was invalid, the subsequent sale and transfer of the property by the second respondent to

the first respondent was also invalid, because the second respondent was not the owner of the property. The principle that no one can transfer more rights to another than he himself has, applies to the real agreement in respect of the second sale as well. See e.g. Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC 2011 (2) SA 508 (SCA) at paragraph 26, where Harms DP found that the old adage *nemo plus iuris ad alium transferre potest quam ipse haberet* applies to such a situation.

28. I am accordingly of the view that the applicant is in principle entitled to claim vindication of the property. In Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd) 1992 (2) SA 665 (N) at 680G-H and 681H, the court found, after considering the relevant Roman Dutch texts, that it was not clear whether the common law remedy of the owner was the *rei vindicatio* or *restitutio in integrum* and whether the owner was obliged to restore the price to the purchaser or was obliged to do so only if the latter could not recover it from the seller. In that matter, the issues were decided on exception and the court found it not necessary to decide the issue.
29. In Menqa v Markom (above) the Supreme Court of Appeal considered the appropriateness of an order directing the Registrar of Deeds to re-register the applicant as owner of the property in question under similar circumstances. Van Heerden JA held that theoretically, the owner was entitled to recover the property in vindicatory proceedings. The court then took into account that the owner appears to have been unjustifiably

enriched at the purchaser's expense since the purchaser had paid the purchase price for the property and the owner's mortgage bond indebtedness to the bank had been extinguished. The court indicated that it did not appear fair under the circumstances to direct the registrar of deeds to re-register the property in the owner's name, although an order declaring the sale in execution as null and void, together with all subsequent sales of the property, was issued. The court held that it would be much fairer to the parties if such claims were dealt with in future proceedings. (See paragraph 25 of the judgement.)

30. A *bona fide* purchaser would under appropriate circumstances be protected by the doctrine of estoppel where the owner knowingly did not correct erroneous entries in the deeds register. Thus, it was held in Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC that an owner was estopped from vindicating his property when he was aware of the fraudulent transfer of his property to another and failed to take urgent action to rectify the entries in the deeds register. The court held at paragraphs 13 and 28 of the judgement that, although the effect of registration is not the guarantee of any right, the public is entitled to rely on the correctness of entries in the deeds office. The *bona fide* purchaser who is prejudiced by the vindicatory action of the owner may in theory be able to recover the purchase price paid from the seller or may have a claim for damages against the judgement creditor (who proceeded with the sale in execution in disregard of the statutory prohibition in section 30 of the Administration of Estates Act, 66 of 1965) on the grounds of breach of a

duty of care. The *bona fide* purchaser may also have a claim for enrichment against the applicant in appropriate circumstances. The potential causes of action referred to above are not intended to be exhaustive. I also express no opinion on the prospects of success of such actions, but mention them in order to demonstrate that the *bona fide* purchaser (such as the first respondent) or any other *bona fide* party (such as Standard Bank) are not necessarily without a remedy even where the sale in execution was a nullity. In the present matter, none of the respondents raised the defence of estoppel, the issue of enrichment or any of the other potential claims in response to the relief sought by the applicant. Standard Bank opposed the application exclusively on the basis that the first respondent was the registered owner of the property.

31. It appears from the judgement in Menqa v Markom at paragraph 25 that the applicant's remedy under the current circumstances is to institute vindicatory proceedings. A consequence of the recognition of this cause of action is that the applicant is entitled to the relief sought in the notice of motion. In the absence of objections based on issues such as estoppel or enrichment by any of the respondents, either on affidavit or during argument of the matter, the applicant is not only entitled to a declaratory order but also to the remainder of the relief sought. As indicated above, this does not necessarily mean that the *bona fide* purchaser or any other party who had suffered a loss as a result of the invalidity of the sale in execution is left remediless. This judgement does not preclude any of the respondents from instituting proceedings to recover any losses suffered or

to enforce any other rights they may have. It is evident from the affidavits filed (and in the absence of opposition by any of the respondents, save the third respondent) that the respondents elected to raise none of these issues in the current proceedings. The court should be slow, in my view, to introduce issues which the parties, for reasons known to themselves, have elected not to raise in the proceedings before the court. It follows that the applicant is entitled to the relief sought in the notice of motion, including an order for re-registration of the property into his name. I am fortified in this conclusion by the judgement in Vosal Investments (Pty) Ltd v City of Johannesburg 2010 (1) SA 595 (GSJ), where the full bench ordered retransfer of an immovable property in the alternative, under similar circumstances, without requiring that the judgement debtor should compensate the purchaser for the purchase price. The applicant only sought a cost order against such of the respondents who oppose the application. Consequently, the applicant is only entitled to a cost order against the third respondent.

32. I make the following order in terms of prayers 1,2 and 3 of the notice of motion:-

32.1. The sale in execution of the property known as Erf 144, Troyeville Township, Registration Division IR, Province of Gauteng, being 18 Andries Street, Troyeville, Johannesburg ("the property"), previously held under the title deed number T29359/1995, purportedly held on 12 July 2007 at Braamfontein, and all

subsequent sales of the property thereafter, are declared to be null and void;

32.2. The deeds of transfer of the property, purportedly from the late estate of the late SMM Knox to the second respondent and from the second respondent to the first respondent are cancelled, in terms of section 6 of the Deeds Registries Act, 47 of 1937;

32.3. The fifth respondent is directed to re-register the property in the name of the estate of the late SMM Knox.

32.4. The third respondent is directed to pay the costs of the application.

LJ VAN DER MERWE, AJ
ACTING JUDGE OF THE HIGH COURT
30 January 2012.

Applicant's Attorneys: Geo Isserow & TL Friedman Inc, Johannesburg.

Third Respondent's Attorneys: Blakes Maphanga Inc, Alberton.

Applicant's Counsel: Ms M Strydom.

Third defendant's Counsel: Mr SPM Vorster.