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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 25793/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

08/05/23

In the matter between:

PHAE PIET MARISHANE 1st Applicant

MAMEETSE SARAH MARISHANE 2nd Applicant

MAMESWANE MASEMOLA 3rd Applicant

and

CATHERINE MAITE MARISHANE 1st Respondent

CATHERINE MAITE MARISHANE 2nd Respondent

LESHABA SEBOYA EPHRAIM 3rd Respondent

THE REGISTRAR OF DEEDS PRETORIA 4th Respondent

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

5th Respondent

**THE MEC OF HUMAN SETTLEMENTS GAUTENG
PROVINCE**

6th Respondent

Summary: Declaratory relief

O R D E R

1. The application dated 17 May 2021 is dismissed with cost.

J U D G M E N T

VAN HEERDEN AJ

INTRODUCTION

2. This is an application seeking a declarator that the transfer of the subject property i.e. Erf [...], Section U, Mamelodi to the first and second respondents and all subsequent transfers be declared null and void.
3. This application accordingly seeks the following relief:
- 3.1 That the property known as Erf [...], Section U, Mamelodi, Pretoria, (the subject property), be declared as the property of the estate of the applicant's deceased parents;

- 3.2 That the transfer of ownership of the abovementioned property into the names of the applicants' late brother being Morwamokwena Gilbert Marishane and the second respondent be declared null and void;
- 3.3 That the sale of the abovementioned property by the first and second respondents to the third respondent be declared null and void *ab initio*;
- 3.4 That the Title Deed that was registered in the name of the Third Respondent be declared null and void;
- 3.5 That the fourth respondent be ordered to deregister the Title Deed;
- 3.6 That the fifth and sixth respondents be obligated to conduct an inquiry on the subject property in accordance with Section 2 of the Conversion of Certain Rights into Leaseholds or Ownership Act, 81 of 1988 or in the alternative in accordance with the resolution of housing disputes and the transfer of residential properties; and
- 3.7 That the ownership of the property reverts back to the sixth respondent pending the outcome of the aforementioned.

BACKGROUND FACTS

- 4. The applicants allege that the property was their childhood home where they resided with their now deceased parents being Malebe Albert Marishane and

Mamotabo Marishane, which property was allegedly allocated to their parents in the 1960's, for the purposes of a dwelling house.

5. At the time of the first applicant's mother's death in 1995, the full title of the property had not yet been transferred into her name, and as such the property was still registered in the name of the fifth respondent i.e. the municipality.
6. During 2004, the property was transferred directly from the municipality into the names of the second respondent and her now deceased husband, Morwamokwena Gilbert Marishane, being the brother of the applicants.
7. The applicants contend that during or about 2020, preceding the applicants' late brother's death, the first applicant discovered that full title of the property had allegedly been fraudulently registered in the name of the late brother.
8. The applicants also stated that they are unsure as to how their late brother obtained ownership of the property. The brother passed away on or about 13 March 2020, and after the death of the applicants' late brother, they were informed that their late brother was married in community of property to the second respondent, and furthermore learned that the property was registered into the name of the second respondent.
9. On the applicants' conceded version, the property was never transferred into the name of their parents. They confirmed that the property was transferred for the first time from the municipality, into the name of their deceased brother and his wife, being the second respondent.

10. On or about 22 October 2020, the third respondent purchased the property from the second respondent, who acted in her capacity as executrix of the estate of the deceased brother, as well in her capacity as owner of the property. Up to date hereof, the third respondent is unable to move into the subject property as a result of the first applicant's continued occupation thereof.

APPLICANTS' FAILURE TO PROVE THEIR CASE ON THE PAPERS

11. The applicants failed to attach a will, nor did they place any facts before this Court in proof of the submission that they were the lawful heirs of the subject property. The applicants similarly failed to confirm whether their parents' estates were dealt with in terms of a will, alternatively by means of intestate.
12. The applicants' entire case is based on the alleged fact that the applicants were the purported lawful heirs of the subject property and due to purported fraud, that the transfer to the respondents ought to be reversed. However, the applicants' failure to prove that they were the lawful heirs is a ruinous flaw in the applicants' papers.
13. Further, the applicants have failed to show in their papers how the purported fraud took place, as save for a bold allegation, no facts and/or proof is placed before this Court. The applicants' contention that the property was transferred through fraud is, at best for the applicants, speculation.
14. Save for the purported confession of the applicants' deceased brother, and a letter from the second respondent (which is not under oath and which is in

any event disputed by the third respondent), no facts or proof of the purported fraud was submitted.

15. In these circumstances, the **Plascon-Evans Rule**¹ is relevant to the facts in relation to the allegations made by the first applicant in his founding affidavit. According to **Plascon-Evans**, a guide to determine which party's version of the events should prevail when disputes of facts are found in motion proceedings, the following:

“when factual disputes arise in circumstances where the Applicant seeks final relief, the relief should be granted in favour of the Applicant only if the facts alleged by the Respondent in their Answering Affidavit, read with the facts it has admitted to, justify the order prayed for.”

16. Moreover, a denial by the respondent of a factual allegation in the applicants founding affidavit must be real, genuine, and *bona fide* before it can be prohibitive to the applicant being granted final relief.
17. In the matter of **Islam v Kabir**² the Court touched on the **Plascon-Evans Rule** and found that:

*“When in application proceedings where there is a dispute of facts which has to be resolved on papers and on the basis of the principle enunciated in the **Plascon-Evans Paints matter** the court can only reject the version of the Respondent if the absence of bona fides is abundantly clear and manifest and substantially beyond question.”*

¹ **Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 620
² (CA 280/2010) [2011] ZAECHC 9 (11 April 2011)

18. Accordingly, the applicants have clearly failed in passing the test of **Plascon-Evans**.
19. The applicants have, resorted to bold and sketchy allegations, without any substantiation and have not attached any proof of the allegations made.

AUTHORITY

20. In **Firststrand Bank Ltd t/a Rand Merchant Bank and Another v The Master of the High Court, Cape Town**³, the Court considered the effect of a fraudulent misrepresentation by an attorney to the Master in an application to hold an enquiry in terms of section 417 and 418 of the Companies Act, 61 of 1973. The Court held as follows at paragraphs [20] to [21]:

*“[20] It is trite that the effect of fraud is far-reaching. In **Farley (Aust) (Pty) Ltd v JR Alexander & Sons (Qld) (Pty) Ltd** [1946] HCA 29; (1946) 75 CLR 487 the High court of Australia, per Williams J, said this:*

*‘Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, **and if clearly proved** (own emphasis added) spread to and infects the whole transaction.’*

*[21] And in **Lazarus Estates Ltd v Beasley** [1956] 1 QB 702 (CA) at 712 one finds Lord Denning’s well-known remarks:*

³ Case no: 679/13 (11 November 2013, ZAWCHC, 2013, 173

‘No Court on this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.’

21. In the ***Firststrand Bank-matter (supra)*** the fraud was proven by the applicants and constituted a common cause fact. It is for this reason that the Court found in the applicants’ favour and ordered the transfer to be reversed.
22. The present case however, differs substantially, in that not only is the fraud disputed, but the fraud has not been proven on the papers at all, especially in circumstances where the onus to do so is on the applicants, in motion proceedings.
23. In this regard, the Court in ***Quartermark Investments (Pty) Ltd v Mkhwanazi and Another***⁴ had to deal with the question whether the first respondent has established a case of fraudulent misrepresentation entitling her to cancel the two agreements. In paragraph 13, the Court held that:

“I deal first with the question whether Ms Mkhwanazi has established a case of fraudulent misrepresentation entitling her to cancel the two agreements. It is trite that in motion proceedings affidavits fulfil the dual

⁴ (768/2012) [2013] ZASCA 150 (01/11/2013)

role of pleadings and evidence.⁵ They serve to define not only the issues between the parties, but also to place the essential evidence before the court.⁶ They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out.⁷ Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit⁸.

24. In the case of ***Moseia and Others The Master of the High Court: Pretoria and Others***⁹, one of the issues the Court wanted to determine was whether the third and fourth respondents were considered as *bona fide* purchasers of the property that was fraudulently obtained by the misrepresentation on the part of the second respondent, who then later sold the property to the third and fourth respondents. The Court in this instance held that in light of the third and fourth respondents' denial that they were aware of the fraudulent conduct of the second respondent, the first applicant's bald allegation that the third respondent knew about the fraud without any facts and evidence to substantiate the allegation is not sufficient to prove the allegation.¹⁰
25. The present facts are poignantly similar in respect of the bold solitary allegation that the third respondent was aware of the fraud. The applicants

⁵ ***Transnet Ltd v Rubenstein*** 2006 (1) SA 591 (SCA) para 28

⁶ ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*** 1999 (2) SA 279 (T) at 323F-G; ***MEC for Health, Gauteng v 3P Consulting (Pty) Ltd*** 2012 (2) SA 542 (SCA) at para 28

⁷ ***Lecuona v Property Emporium CC and Others*** 2003 (4) SDA 207 (C)

⁸ ***Swissborough Diamond Mines (Pty) Ltd*** at 323J-324A

⁹ (36201/2018) [2021] ZAGPPHC 37 (26 January 2021)

¹⁰ At para 46

simply state that the third respondent was invited to various meetings with the assistance of SANCO.¹¹

26. The applicants however failed to take the Court into their confidence by giving any further information of these purported calls to meetings, nor are there any affidavits attached in support of this bold allegation.
27. By virtue of the **Moseia**-judgment *supra*, together with the third respondent's positive denial, the third respondent cannot be regarded as anything but a *bona fide* third party purchaser.
28. Further to the above, our law provides for an abstract theory of transfer which was explained in **Quartermark Investments (Pty) Ltd v Mkhwanazi and Another**¹² as follows at paragraph [24]:

*“This court, in **Legator Ms Kenna Inc and Another v Shea and Others**¹³ confirmed that the abstract theory of transfer applies to movable as well as immovable property. According to that theory the validity of the transfer is not dependent upon the validity of the underlying transaction.¹⁴ However, the passing of ownership only takes place when there has been delivery effect by registration of transfer coupled with what Brand JA, writing for the court in **Legator McKenna**, referred to as a ‘real agreement’. The learned judge explained that ‘the essential elements of the real agreement are an intention on the part of*

¹¹ At para 4, 16 of the Founding Affidavit

¹² 2014 (3) SA 96 SCA

¹³ **Legator McKenna Inc and another v Shea and Others** 2010 (1) SA 35 (SCA) para's 20-22

¹⁴ Ibid para 20

*the transferor to transfer ownership and the intention of the transfer to become owner of the property.*¹⁵

29. On the strength of the aforesaid authority and since the purported fraud was not proven by the applicants, the second respondent in her capacity as representative of the deceased estate and owner of the property had at all relevant times the intention to transfer the property to the third respondent whom, on his part, in his personal capacity had the necessary intention to become the owner of the subject property.
30. In this regard, not only has the applicants failed to prove their entitlement to the alleged inheritance, but they have further failed to prove the purported fraud.
31. In summary, the applicants have accordingly failed to make out a case for the relief sought on the following basis:
 - 31.1 On their own version the immovable property was never transferred into the names of their deceased parents;
 - 31.2 They failed to produce evidence or even allege if their parents died testate or intestate;
 - 31.3 The only evidence before Court was that the subject property was transferred from the municipality to the deceased brother and the second applicant by virtue of the Title Deed;

¹⁵

Ibid para 22

31.4 No evidence regarding any alleged fraud was put before Court;

31.5 It is apparent that the third respondent is a *bona fide* third party who lawfully purchased the subject property from the second respondent, or from the deceased estate.

32. The application should, as a result, fail.

COSTS

33. It is trite in our law that the purpose of costs is to indemnify a party who has had to bring court proceedings to obtain relief or to insulate a party that has been unnecessarily dragged to Court against the expenses incurred from the legal proceedings.¹⁶

34. There are some general rules that are applicable to the granting of costs, the most pertinent ones here being that the successful party is entitled to their costs, that the successful party is determined by looking at the substance of the judgment and not merely its form.¹⁷

35. The third respondent opposed the application on good grounds and in circumstances where the applicants have failed to make out a proper case for the relief claimed against the third respondent, costs should follow the result.

ORDER

¹⁶ ***Texas Co (SA) Ltd v Cape Town Municipality*** 1926 AD 467

¹⁷ *Erasmus Superior Court Practice* Vol 2, Van Loggerenberg, p D4-7, [Service 11, 2019], [Juta : Claremont]

36. The application is dismissed with costs.

DJ VAN HEERDEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 6 February 2023

Date of judgment: 8 May 2023

APPEARANCES

For the applicant:

Adv AE Malange
Instructed by:
GW Mashele Attorneys

For the respondents:

Adv J Schoeman
Instructed by:
Van der Walt Attorneys