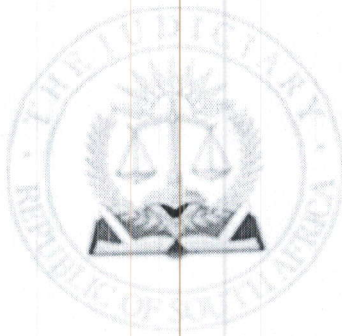




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

DATE: 11 AUGUST 2021

SIGNATURE OF ACTING JUDGE:

Case number: 20/27090

In the matter between:

SOLOMON SHOMANG

Applicant

and

JOSEPH THAPELO MOAMOGOE

First Respondent

PHETILE MELBA RAMERE

Second Respondent

MPHO THABITA SHOMANG

Third Respondent

REGISTRAR OF DEEDS, PRETORIA

Fourth Respondent

JUDGMENT

SLON AJ

1. In this application, the applicant seeks an order to the following substantive effect:

1.1. setting aside the registration of transfer by the fourth respondent ('the Registrar') under deed of transfer number T66063/2018 of an immovable property situate at Randfontein, Gauteng, ('the property') from the names of the applicant and the third respondent into those of the first and second respondents ('the respondents');

1.2. 'reviving' the deed of transfer in respect of the property under deed of transfer number T105472/2013 evidencing that the applicant and the third respondent are the registered owners of the property.

2. I need not decide whether the second prayer is competent. Suffice it to say that it seems to me, as a matter of law, that once the later deed is set aside, the position under the earlier would simply prevail. Any secretarial steps needed be taken by the Registrar as regards any endorsements on the two deeds, or other ameliorative measures to reflect this in the relevant records, would not, I apprehend, be a process which the Court would ordinarily be required to regulate by way of any particular order.

3. That, however, is the least of the difficulties in this matter. The conduct of this application has been, to put it charitably, rather peculiar. As will be seen below, both substantively and procedurally it has left much to be desired. Responsibility therefor seems to lie primarily with the relevant legal representatives involved: the litigants themselves are clearly laypersons. It is they who, in our less than perfect system, end up paying the the costs of these mistakes.

4. The third respondent is the applicant's wife, or former wife, I know not which: the applicant is not clear. She has not made any appearance in the matter. There are indications that a divorce was underway between them, but the Court is not told if that was ever finalized, or what, if anything, the impact thereof might have been on the question of the ownership of the property. She seems to have signed certain documents but there is no version from her of what happened, and nothing more is known of her position. I accept that this is not entirely the applicant's fault, but one would have expected him at least to deal in proper detail with her role in the events upon which he relies for his version.
5. It would appear from a 'Windeed' document, dated 20 July 2020 and attached to the founding affidavit, as follows:
 - 5.1. From some point in 2013 until 24 August 2018, the property was registered in the names of the applicant and the third respondent.
 - 5.2. I digress to mention that the applicant says that there was a mortgage bond registered over the property in favour of First National Bank ('FNB'), presumably with him and the third respondent as mortgagors, and that he was liable to repay the loan secured thereby. That bond is not, as far as I can make out, referred to in the Windeed document, but nothing turns on FNB's position for purposes hereof.
 - 5.3. On 24 August 2018 the property was transferred, in terms of a deed of sale (the document says 'purchase date') of 15 November 2015 (which appears to be an error – as will be seen below, the (alleged) deed of sale with which this

application is concerned is dated 15 November 2017), from the names of the applicant and the third respondent into the names of the respondents.

- 5.4. At the same time as that transfer occurred, a mortgage bond was registered over the property under mortgage number B32516/2018 in favour of SB Guarantee Co (RF) (Pty) Ltd ('the current bondholder') which I am told is in some way connected to the Standard Bank of South Africa.
6. I have no reason to doubt the factual position as set out above.
7. The material allegations presented in the founding affidavit are briefly as follows:
 - 7.1. When the applicant fell into arrears with the FNB bond over the property, he entered into a loan agreement with the first respondent to assist the applicant in paying off the FNB loan.
 - 7.2. A month later the first respondent approached the applicant, told him that he wanted to 'secure' the loan (this appears to mean, in the context in which it appears, reduce the loan agreement to writing) and presented some documents for him to sign.
 - 7.3. The applicant signed the documents but, in his own words, 'was not advised nor explained to what [he] was signing.' He was not given copies thereof. He does not say if he read or tried to understand them or, if he did either, what, if anything, they signified to him as a result thereof, save that he believed that he was signing a loan agreement.

- 7.4. At some point (it seems to have been in July 2020 when the Windeed document was obtained but one cannot be sure), the applicant's attorneys discovered that the property had, on 24 August 2018, been transferred into the name of the respondents, and the applicant 'got the shock of [his] life'.
- 7.5. The conveyancers involved in the transfer were contacted and copies of documents were furnished to the applicant's attorneys.
- 7.6. Having had sight of these documents, the applicant says that he 'unknowingly signed' certain documents which, from the attachments to the founding affidavit, can be seen to be:
- 7.6.1. a power of attorney to transfer (apparently signed also by the third respondent);
 - 7.6.2. a 'personal and solvency affidavit' (there are two of these, each apparently signed by the applicant and the third respondent before a Commissioner of Oaths at the Randfontein SAPS).
- 7.7. The applicant denies that he and the third respondent signed the offer to purchase, dated 15 November 2017, which would, if and when accepted and signed by the respondents, have become the deed of sale.
- 7.8. That document evidences a signature purporting to be that of the 'seller' but it appears not in the space designated therefor below the purchasers' signatures, but rather at the very end of the document in the section reserved for 'information' about the parties. As Mr Tshole for the respondents rightly

pointed out, it is nevertheless expressly stated therein that that section 'constitutes an integral part of this offer to purchase'.

- 7.9. The name of the third respondent does not appear, *qua* co-seller, or at all, from that document, and there is no evidence of any signature by her thereon.
- 7.10. The applicant states that, even though he signed the documents referred to above, he never had the intention of selling the property and was fraudulently induced to sign documents of whose effect he was unaware.
8. No wild leap of the imagination is required to guess what the respondents say in response to this. It is not necessary to go into detail here. They deny by way of various explanations that the applicant was deceived, claim that he signed all the necessary documents with the proper intention of selling the property and that the transfer of the property on the basis thereof was above reproach. They too do not explain how it came about that the third respondent was neither mentioned in, nor signed, the deed of sale.
9. The respondents also raise the non-joinder of the current bondholder. In my view, it undoubtedly had a real and substantial interest in the outcome of this application which, if the relief sought were to have been carried into effect, would have prejudiced it by the loss of its security for the loan granted. The submissions of Mr Mbeki, for the applicant, plainly acknowledge this. There appears to be no direct authority on these precise facts – perhaps for the reason that it is obvious. The authorities cited against a joinder of necessity by Mr Mbeki are of little assistance. I

find that the non-joinder of the current bondholder was material and would have precluded the granting of the relief claimed.

10. Apart from that problem, it need hardly be said, on the strength of the well-worn **Plascon-Evans** test there is no possible way for the applicant to escape the disputes of fact, entirely predictable as they were, on the papers. This is textbook example of when not to proceed on motion. To establish fraud on motion is, as a general rule, practically impossible.
11. The applicant then delivered a replying affidavit on or about 17 June 2021 – some six months after the answer was delivered, assiduously seeking condonation therefor. He presents, in reply, a report by a handwriting expert who comes to the conclusion that the applicant signed none of the documents dealt with in his founding affidavit as set out above. Apparently forgetting the case (such as it was) made out by him in the founding papers, he says now in reply that he did not, after all, sign any of the documents referred to above – since the expert on balance proclaims them all to have been forged. Nor, even more surprisingly, is there any explanation by the applicant for his *volte-face*.
12. It was then the turn of the respondents to cast themselves into the fray, creating thereby a last-minute and futile skirmish. This arose as follows.
13. About 2½ weeks before the matter was due to be heard, I addressed a direction to the parties and asked (among other things not now relevant) if the respondents objected to the filing of the replying affidavit; if so, on what grounds, and, if not, did they wish to make any submissions thereon?

14. A week later, on 20 July 2021, a letter arrived from the respondents' attorneys and was uploaded onto Caselines to the effect that they had 'no objection to the late filing of the Applicant's Replying Affidavit given the following reasons':

14.1. it failed to reply to the answering papers and the evidence adduced therein;

14.2. it sought to raise a new cause of action.

15. Both of those objections are obviously well-taken. But they would surely have justified the respondents' opposition to the condonation application, not an accession thereto.

16. Be that as it may, the respondents' attorney then went on to deal with the applicant's expert's report, and attached to his own letter a report from another handwriting expert, in which the findings of the applicant's expert were disputed and the signatures declared, in all probability, to be authentic.

17. All that the respondents achieved thereby was to seek, quite unnecessarily, to widen the already unbridgeable chasm between the facts relied upon by the applicant, in all their colourful and contradictory variations, and the relief sought by him.

18. When the hearing commenced, Mr Mbeki did not request that the matter be referred to evidence or trial, but got up (metaphorically speaking, since it was online) ready to argue it on the papers. When I raised the questions of the non-joinder and the insuperable disputes of fact on the papers, he submitted, upon my suggestion of a possible solution, that a referral to trial would be appropriate and belatedly sought that I should exercise my discretion to that effect. I refer in passing in this regard to *De Reszke v Maras & Others* 2006 (1) SA 401 (C) at paras [32] & [33]; 412J-413H,

dealing with the time at which counsel should properly make his or her election to request a referral to oral evidence or trial.

19. Mr Tshole submitted for the obvious reasons already canvassed above that the matter be dismissed with costs.
20. I have come to the conclusion, regrettably, that the application is beyond salvation on any basis, try as one might to have teased out any reliable version the truth in the hope of doing justice between the two competing sides. There is no remedy for the applicant's conduct in having launched the proceedings on paper, based on alleged fraud, in the first place; and for his persisting therein regardless, after the answering affidavit had been filed, attempting thus in reply to pursue the relief on the strength of two largely distinct and mutually destructive sets of facts.
21. Similarly, the respondents' attempt to put up expert evidence by way of a letter at the eleventh hour, evidence, moreover, in response to matters raised by the applicant in reply which could never have seen the light of day, is most unfortunate. My direction had asked for submissions, not fresh evidence. The costs occasioned by that report, which is not properly before the Court, must be excluded from the order I propose to make.
22. It follows that the application must be dismissed.
23. I make the following order:
 - 23.1. The application is dismissed.

23.2. The costs of the application are to be paid by the applicant, save for the costs occasioned by the engagement of the first and second respondents' expert, Mr C Greenfield, including those arising from annexures 'K' and 'R' (at pages 031-1 to 031-6 and 032-1 to 032-7) to the first and second respondents' submissions dated 20 July 2021.



B M SLON

Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was prepared and authored by Acting Judge Slon. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

HEARD ON: 3 August 2021

DECIDED ON: 11 August 2021

HANDED DOWN ON: 11 August 2021

For the Applicant:
Instructed by

Mr S D Mbeki
Ditan Attorneys

For the 1st & 2nd Respondents:
Instructed by:

Mr M E Tshole
G Malumane Attorneys