IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 31459/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE 2020/02/20
SIGNATURE

In the matter of:

Lakeside City Trading 286 (Pty) Ltd	Applicant
and	
Lindicento Proprietary Limited	First Respondent
First Rand Bank Limited	Second Respondent
The Registrar of Deeds, Pretoria	Third Respondent
Priscilla Mumsie Baby Samuels	Fourth Respondent

JUDGMENT

Maumela J.

1. This is an application for an order aimed towards the following: 1.1. Setting aside the transfer of the property described as Erf 1579 Midstream Estate Extension 18 Township, Registration Division J.R. Province of Gauteng held by Deed of Transfer Number T75753/14 of 29 September 2014;

   1.2. Declaring the sale agreement between the Applicant and the First Respondent fraudulent and unlawful;

   1.3. Setting aside the registration of the Mortgage Bond of R 3 000 000-00 in favour of the Second Respondent over the property described as Erf 1579 Midstream Estate Extension 18 Township, Registration Division J.R. Province of Gauteng registered on 28 August 2015 and held under Bond Number B 39771/15;

   1.4. Ordering the Third Respondent to re-register the property being Erf Midstream Estate Extension 18 Township Registration Division J.R, Province of Gauteng into the Applicants names and

   1.5. Ordering the First Respondent to pay the costs of this application on a scale as between attorney and client.

   The application is opposed.

should no longer feature as a director because she was married to her former husband in community of property. It was explained that her marital status poses a threat since shares of the Applicant could be negatively affected in the process of the division of the marital property.

3. In April 2011, Mkhize and the Fourth Respondent bought a vacant stand in Midstream Estate. The property is described as Erf 1579 Midstream Estate Extension 18 Township, Registration Division JJR, in the Gauteng Province ("the Property"). These proceedings were launched on the backdrop of attempts to evict the Applicant from this immovable property. The attempts to evict the Applicant from the Property were at the instance of the First Respondent, who contends that it has an ownership rights over the property. The Applicant contends that the First Respondent's alleged title, in relation to the Property, arises on account of fraud.

4. As such, the Applicant seeks a declaratory order declaring the alleged title to be void *ab initio* in law, and thus unenforceable. Ancillary to the declaration of invalidity, the Applicant seeks the restoration of the status *quo ante* the fraud.

THE DISPUTE.

5. The primary dispute between the parties is factual in nature. The applicant contends that signatures towards the transfer and ancillary documents were forged. The case does not raise a constitutional issue, and the Court is not required to extend and/or develop common law principles.

6. In demonstrating that the Fourth Respondent's title is tainted by fraud, the Applicant relies on the following contentions:
   (i). That the person who allegedly authorized the sale of the immovable property was manifestly not authorized to do so in law.
   (ii). That the purchase price allegedly paid in the sale transaction was manifestly far below the market value of the Property at

the time of the sale.

(iii). That there exists no credible evidence demonstrating that the alleged purchase price was ever paid; let alone to the Seller of the Property.

(iv). That the parties responsible for the alleged sale and purchase of the immovable property conducted themselves in a manner expressly prohibited by law.

FACTUAL BACKGROUND.

7. The Applicant, is a shelf company that was bought by Makhosazane Emeldah Mkhize, 'the owner'. In April 2011, she purchased Property in the form of a vacant stand. The purchase price was R500 000-00 (Five Hundred Thousand Rand). A house was erected on the vacant stand around October 2013, at a cost of R2 000 000-00 (Two Million Rand). The controlling minds of the Applicant are Makhosazane Emeldah Mkhize, (Deponent on behalf of the Applicant), and Priscilla Mumsie Baby Samuels, (the Fourth Respondent). They both served interchangeably as Directors of the Applicant, until the Fourth Respondent resigned in May 2014.

8. Ever since the resignation of the Fourth Respondent, (Priscilla Mumsie Baby Samuels), Mkhize and the Fourth Respondent's mother, (Ms Samuels), are the only persons who served as directors of the Applicant. The Property was eventually transferred to the First Respondent, pursuant to a process that commenced on the 9th of July 2014. The transfer is alleged to have been against the payment of an amount of R1 100 000-00 (One Million One Hundred Thousand Rand). The authenticity of this transfer is disputed by Mkhize.

9. On the 27th of March 2018, the First Respondent addressed a letter demanding that the Fourth Respondent vacate the premises. The First Respondent maintained that the Fourth Respondent is not in possession a valid lease agreement authorising it to occupy

the Property.

10. The Applicant spent over R2 000 000.00 (two million rand), raised by both the Fourth Respondent and Mkhize through various projects carried out over a period of about three years. The two contend that through these efforts, they secured a valuable asset for future investments. They contend that the current worth of the property as per a recently commissioned valuation conducted by Property Valuer, Mr. BN Makgakaga of Demicol (Pty) Ltd, stands at R 6 300 000.00 (six million three hundred thousand rand).[1]

11. Mkhize points out that at that time, the Fourth Respondent was undergoing a divorce in which a final order was eventually granted on the 19th of April 2013[2]. Mkhize and the Fourth Respondent agreed that the latter moves into the Applicant's property until she would have attained stability and a dwelling for herself and her children.

12. In October 2013, the Mkhize started a clothing business with her husband. Due to the nature of the business she started; also due to new commitments; which included regular overseas travelling; she resigned from her directorship of the Applicant with effect from the 26th of September 2013. This was as agreed between her and the Fourth Respondent. Mkhize then focused on her new business venture. After the First Respondent left the directorship of the Applicant, the Fourth Respondent took over and became the sole director of the Applicant from the 2nd of October 2013. She assumed directorship of the Applicant and was entrusted with its entire management until she resigned in February 2014. Mkhize contends that after this, no real changes happened regarding the tenure of the Fourth Respondent as a director of the Applicant.

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[1]. See copy of the Valuation Report attached as Annexure "MEM4".

[2]. See Annexure "MEM5".

13. The directorship of the Fourth Respondent was short-lived. However, over the time the Fourth Respondent was in charge of the Applicant, the entire management of the Applicant was in her hands, (in the hands of the Fourth Respondent). After the resignation of the Fourth Respondent, she requested that Mkhize be reappointed as the director of the Applicant because the position had become vacant. Because Mkhize understood the situation of the Fourth Respondent, also because she needed to secure her interest she, Mkhize, accepted the request to serve as a director for the second time, but she suggested to the Fourth Respondent that they consider someone else in the interim as she could only assume directorship in May 2014. This was due to other commitments she had at the time. In order to fill in the vacant directorship position, the Fourth Respondent and Mkhize agreed that the mother to the Fourth Respondent, Sibongile Veronica Samuels (Mrs. Samuels) be appointed as a director of the Applicant forthwith and that Mkhize would consequently assume ~~my~~ her directorship from May 2014. Mkhize was reappointed on the 26th of May 2014. She served uninterruptedly with Mrs. Samuels as co-directors to date.[3]

14. Mkhize stated that in February 2014, the Fourth Respondent told her that she resigned as a result of advice by the then Sheriff of Kempton Park; the late Mr. Abadul Carrim Tayob (herein referred as "Mr. Tayob"). This was because ABSA Bank Ltd had instituted a sequestration application against her. She had been warned of possibility for her assets to be attached and sold by her creditors. Considering that Tayob had insight into matters of the law, she took the advice.

15. Mkhize stated that she was shocked when on the 5th of April 2018, she received a call, followed by a letter from the First Respondent's Attorneys advising her that the property is owned by

[3] See annexure "MEM6", copy of the Applicant's Disclosure Certificate dated 16 April 2018.

warned of possibility for her assets to be attached and sold by her creditors. Considering that Tayob had insight into matters of the law, she took the advice.

15. Mkhize stated that she was shocked when on the 5th of April 2018, she received a call, followed by a letter from the First Respondent's Attorneys advising her that the property is owned by the First Respondent and that she will be evicted from the property due to non-payment of rental. Up until then, she knew nothing about the property having been sold. At all times she thought that the property of the Applicant is still safe. This was so because the Fourth Respondent was still in occupation thereof. The letter from the first Respondent is attached as Annexure "MEM7".

16. Mkhize then consulted a lawyer to investigate the fraud committed in the process through which ownership of the property was transferred to the First Respondent. On the basis of legal advice, she briefed the same lawyers to oppose this application.

17. In a meeting with the Fourth Respondent held on the 6th of April 2018, the latter told Mkhize that the transfer of ownership of the property was done on advice by the late Tayob who indicated that transferring ownership of the property would secure protection of the property in the face of the threat from possible sequestration and a possible division of property due to an impending divorce. The Fourth Respondent told Mkhize that the transfer of the property was disguised as a sale but she did not make any payment for it. The Fourth Respondent told Mkhize that she was not aware that Tayob was not acting in good faith. Mkhize stated that she could not verify rumors to the effect that Tayob died. The Fourth Respondent told Mkhize that she was under the impression that Tayob was only assisting in ensuring the safety of the property. Mkhize stated that she never suspected that ownership of the property may come under threat since the Fourth

Respondent had resigned from the First Respondent.

18. Mkhize stated that investigations conducted by the Applicant's Attorneys of record revealed that there is a document which was purportedly signed by her co-director, Mrs. Samuels on the 4th of August 2014 in Midrand and in this document, it is recorded that the property is transferred to the Fourth Respondent. Mkhize stated that when she asked Mrs. Samuels about her signature towards the transfer of the property, the latter was adamant that she never appended her signature to any document purporting to transfer the property to anyone. Due to the fraud committed in the process of the transfer of the property, Mkhize, on behalf of the Applicant, caused an investigation, and eventually this application to be instituted.

19. Mkhize stated that on the 16th of April 2018, she had an urgent meeting with the Fourth Respondent who revealed that the transfer of the property was done at the instance of the late Sheriff, Mr. Tayob. She heeded the advice by Tayob because Tayob advised that the property is under threat of getting negatively affected in the process of the division of marital property due to the impending divorce that she faced at the time. Tayob made her to understand that the transfer of the property shall not be effective since it would only be a strategy to ensure the safety of the Applicant's property.

20. Mkhize stated that during the course of the investigation, she discovered information indicating that in Midrand, her co-director, Mrs. Samuels, signed a document on the 4th of August 2014, towards the transfer of the property. She stated that Mrs. Samuels vehemently denied this upon being confronted about it. Mkhize contends that the Third Respondent was misled into registering the transfer of the property in that false information was given in order to cause a power of attorney to be wrongly issued.

21.2. Muhammed Mujtaba Tayob had been in charge of the affairs of the First Respondent since the 1st of May 2014.[5]

21.3. Muhammed Mujtaba Tayob's alleged repayment to his Uncle, Mr Ace Tayob, appear soon after the First Respondent received payments from First Rand Bank in respect of the mortgage over the Property.[6]

21.4. His Uncle, Mr Ace Tayob, received a total payment of R1 716 800-00 (One Million Seven Hundred and Sixteen Thousand, Eight Hundred Rand), which is in excess of the purchase price.[7]

CONTINUED OCCUPATION OF THE PROPERTY.

22. The First Respondent took transfer of the Property on the 9th of July 2014. The Fourth Respondent remained in occupation of the Property without any lease agreement having been concluded between the parties. The Fourth Respondent did not pay a single cent for the rental of the premises and no attempts were ever made to collect rental or to evict the Fourth Respondent from the Property until April of 2018. That was notwithstanding the fact that the purported agreement directs that occupation shall be given to the First Respondent on signature of the agreement.[8]

23. The Applicant makes the point that when viewed against the reality that the First Respondent could only afford to fund the purchase of the Property with the assistance of the Bank, it seems most unlikely that the situation would have been allowed to continue as it did.[9] The best that the foregoing state of affairs contributes is to the issue of prescription. The sale price appears to be extremely far below the market value. The amount of R1 100 000-00 (One Million One Hundred Thousand Rand) alleged to be

5. See: Motion Record Paginated Page 115.
6. See: Motion Record Paginated Page 116-117.
7. See: Motion Record Paginated Page 116-117.
8. See: Motion Record Paginated Page 147.
9. See: Motion Record Paginated Page 116-117.

the fair value of the Property, in April 2014, is patently untrue.

24. In all probabilities, the Second Respondent would not have granted a loan of R3 000 000-00 (Three Million Rand) against the property whose value was less than half of the required loan amount.

SIGNATURE OF THE TRANSFER DOCUMENTS.

25. A large number of documents relating to the transfer appears not to have been dated. The purported resolution, of the Applicant, for the transfer of the property evidently requires that signatures of each and every director of the Applicant be appended.[10] The incorporation certificate of the Applicant would have revealed that the Applicant had two directors, and as such the document ought to have been signed by two directors.[11] The alleged signature of the Fourth Respondent's mother is patently not the same as the signature appearing on the confirmatory affidavit.[12]

26. The Applicant is adamant that contents of the certificate of transfer from a company, together with the contents of a report by an independent reviewer, are patently false. Applicant states the following to substantiate its argument:
    26.1. The Property was indicated to be a vacant stand.
    26.2. The suggestion that the Property was not the only major asset or the greater part of the assets or undertaking of the Company is evidently untrue.[13]
    26.3. If at all an inspection was conducted of the register of directors as alleged, it would have revealed that the Applicant has two directors.[14]

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10. See: Motion Record Paginated Page 128.
11. See: Motion Record Paginated Page 51.
12. See: Motion Record Paginated Page 75.

13. See: Motion Record Paginated Page 132 Para 8 & Page 133 Para 7.
14. See: Motion Record Paginated Page 133 Para 4.

27. On the basis of the above reasons. The Applicant argues that it has made-out a case for the setting aside of the transfer of the immovable property because it was based on acts that amount to fraud. It contends that the registration of a mortgage bond on the Property, which was preceded by fraudulent acts stands to be set-aside. The Applicant contends that the Third Respondent should accordingly be directed to restore the status *quo ante* the fraudulent conduct.

THE VERSION OF THE FIRST RESPONDENT.

28. The First Respondent requested leave to file a supplementary affidavit asking the Court for leave to file. This was with a view to respond to allegations by the Applicant to the effect that the Fourth respondent forged the signature of "Samuels" (a director of the Applicant at the time of the sale) on all relevant documents for the sale and transfer of the property in dispute.

29. Motivating towards condonation by the Court towards filing by First respondent of a supplementary affidavit in terms of Uniform Rule 6(5)(e), the following was submitted:
    29.1. That a matter ought to be adjudicated upon all the facts relevant to the issues in dispute[15].
    29.2. That special circumstances may exist where something unexpected or new may emerge from the applicant's replying affidavit[16] and
    29.3. That it is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be allowed[17].

30. The First Respondent stated that the court has to consider the following factors:

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[15]. See *Bader v Weston* 1967 (1) SA 134 (C) at 138D; *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628F; *Cohen NO v Nel* 1975 (3) SA 963 (W) at 970B; *Dawood v Mahomed* 1979 (2) SA 361 (D) at 365H; *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892J–893A; *Dhladhla v Erasmus* 1999 (1) SA 1065 (LCC) at 1072D; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283A–H.

[16]. Afric Oil (Pty) Ltd v Ramadaan Investments CC 2004 (1) SA 35 (N) at 38J–39A.

[17]. Milne NO v Fabric House (Pty) Ltd 1957 (3) SA 63 (N) at 65A.

(a). The reason why the evidence was not produced timeously.
(b). The degree of materiality of the evidence.
(c). The possibility that it may have been shaped to 'relieve the pinch of the shoe'.
(d). The balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted.
(e). The stage which the particular litigation has reached. Where judgment has been reserved after all the evidence has been heard and, before judgment is delivered, an applicant applies for leave to place further evidence before the court, it may well be that he or she will have a greater burden because of factors such as the increased possibility of prejudice to the respondent, the need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the court.
(f). The 'healing balm' of an appropriate order as to costs.
(g). The general need for finality in judicial proceedings and
(h). The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his or her client[18].

31. The First Respondent makes the point that it provides a proper and satisfactory explanation which rules out *mala fides* or culpable remissness as to the reason for the facts or information not having been put before the court at an earlier stage[19]. The First Respondent made the point that courts have levelled heavy criticism against parties who employ the tactic where evidence is held back in the hope that the other side will first commit itself to an untruthful version, which can be resoundingly demolished in further affidavits[20]. The Applicant has not tendered such

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[18]. Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C) at 617A–E, where Davis J summarised the considerations laid down in Mkwanazi v Van der Merwe 1970 (1) SA 609 (A) at 626A–G.

[19] See Erasmus *Superior Court Practice* RS 45, 2014 Rule-B1-p47-48.

[20]. See Nick's Fishmonger Holdings (Pty) Ltd v Fish Diner In Bryanston CC 2009 (5) SA 629 (W) at 641G–642D.

explanation for its replying affidavit subsequently revealing a completely differently premised set of facts it was privy to prior to the launching of the application.

32. First Respondent submitted that the Applicant stood to suffer no prejudice as it willingly chose only to reveal facts regarding the Fourth respondent's, and not the First respondent's, forgery in reply. Thus, despite not adequately making its case out in its founding papers, that in turn prejudices the First respondent in any event, it would prejudice the First respondent inextricably if it were not able to answer the new allegations.

33. First Respondent contends that considering the circumstances in this matter as explained, that the Applicant's replying affidavit contains new facts and revelations, and the manner in which the Applicant has conducted the evidence presented in its founding and replying affidavit, and as a result of the Applicant essentially making out a completely different case in its founding affidavit compared to its replying affidavit; as per paragraph 5 hereunder, the application ought to be dismissed with costs *alternatively* the supplementary affidavit of the First respondent ought to be permitted on the premise of factors (d), (e) and (h) above.

34. First Respondent states that it has been under the false impression that the Fourth respondent was Samuels until the replying affidavit was read[21]. As is apparent from paragraph 8.1 and 8.6 of the First respondent's opposing affidavit it was presumed, albeit subsequently incorrectly, that the Applicant was accusing Mr. MM Tayob and the deceased Mr. ACE Tayob of forging the signatures, specifically if one interprets paragraphs 23.1, 23.2 and 23.4 of the Applicant's founding affidavit.

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[21]. See paragraph 5.1 of the First respondent's supplementary affidavit, paginated page 204.

35. The First Respondent argues that all the necessary allegations upon which the applicant relies must appear in its founding affidavit, as it will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit[22]. It argues that the onus is on the applicant to establish the facts on which his case is based in his founding papers, which constitute and must contain both the pleadings and evidence[23]. It is also trite that an applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought[24].

36. It was pointed out that the general rule is that the court will not permit an applicant to assert new facts in his replying affidavit which should have been set out in his founding affidavit. The court has a discretion to allow new matter to remain in a replying affidavit; this indulgence, however, will only be allowed in special or exceptional circumstances[25]. The First Respondent argues that a variety of factors can be taken into consideration by the court when exercising such a discretion. What is of overriding importance in the consideration of those factors is that the applicant should not be permitted to make a case in reply where no case at all was made out in the founding affidavit and 'none is authority for the proposition that a totally defective application can be rectified in reply'[26].

37. In the case of *Director of Hospital Services v Mistry*[27], Diemont JA said the following: *"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to*

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[22]. National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at 349A–B.

[23]. Titties Bar and Bottle Store (Pty) Ltd v. ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368 H to 269 B, Director of Hospital Services v. Mistry 1979 (1) SA 626 (A).

[24]. Business Partners Ltd v World Focus 754 CC 2015 (5) SA 525 (KZD) at par [8].

[25]. Business Partners *supra* at par [9]

[26]. Business Partners *supra* at par [10].

[27]. 1979 (1) SA 626 (A), at 635H–636B

determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas[28] *and as has been said in many other cases: "...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny". Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds for the application in the replying affidavit" (per VAN WINSEN J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board*[29] *.)*

38. The First Respondent submitted that in the premises of the circumstances of this case and the authorities cited, the application ought to be dismissed with costs. It stated that should the Honourable Court, however, permit the new facts in the replying affidavit, then the defenses raised by the First respondent are requested to be considered, as set out in the First respondent's supplementary affidavit.

THE FIRST RESPONDENT'S POINTS *IN LIMINE*.

39. The First Respondent submitted that the *point in limine* regarding a dispute of fact arising from the papers, still remains, as the authority of the Fourth respondent to sell and transfer the property to the First respondent has, upon the replying affidavit, become a factual material dispute between the parties. Both parties allege that they are *bona fide* victims of misrepresentation; (1) the Applicant holds that Ace Tayob misrepresented to the Fourth Respondent and the Applicant that the property is required to be sold to the First respondent due to the personal circumstances of the Fourth respondent so as to prevent the property falling to her spouse in her divorce; (2) the First Respondent, subsequent to the replying affidavit, holds that the Fourth respondent misrepresented

[28]. 1942 WLD 67 at 68
[29]. 1953 (3) SA 256 (C) at 260

her identity and that she had ostensible authority from the Applicant to sell and transfer the property to the First respondent.

40. The First Respondent contends that the fraud alleged does not assist the Applicant and that the authority to dispose of the asset was raised in the founding papers[30]. It argues that the Applicant should have raised the aspect of authority in its founding papers. The First Respondent makes the point that the Applicant chose to proceed on motion at its own peril. It alleged that the forgery occurred as alleged.

41. The First Respondent contends that a "Real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. According to the First Respondent, there will be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. In the premises, and on the basis of *Transnet Limited v Erf 152927 Cape Town (Pty) Ltd & others*[31], the First respondent maintains that the application ought to be dismissed with costs and not necessarily referred for oral evidence or to trial.

42. The Respondent states that the evidence regarding the deceased Mr. Ace Tayob remains hearsay and is in non-compliance with section 3(1) of the Law of Evidence Amendment Act 45 of 1988 which is clear that *if such person, person upon whose credibility the probative value of such evidence depends, does not later testify in such proceedings* and the court on further considerations

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[30]. See paragraph 21.1 and 21.2 of the founding affidavit, paginated page 18.
[31]. (798/2010) [2011] ZASCA 148 (26 September 2011).

admits the evidence, *the hearsay evidence shall not be taken into account*. In the premises, the Applicant's evidence in relation to the deceased Mr. Ace Tayob is not consistent with the Law of Evidence Amendment Act and is, therefore inadmissible and should be disregarded.

43. The Respondent states that save to point out that the Applicant states that the application is not a claim founded on a debt or damages, the Applicant does not raise any further grounds for disputing prescription, and will therefore be precluded from doing so in argument; the *point in limine* regarding prescription of the Applicant's claim for return of the property is retained and paragraph 5 of the First respondent's original heads of argument are reiterated in support hereof.

44. The point *in limine* regarding non-joinder / misjoinder of the Midstream Home Owners Association is retained and paragraph 6 of the First respondent's original heads of argument are reiterated to in support hereof. Should the Honourable Court allow the new evidence as contained in the replying affidavit and should the points *in limine* of the First Respondent not succeed, then premised on the new facts, the following *bona fide* defence is relied upon by the First respondent.

UNDUE INFLUENCE.

45. The Respondent points out that the cause of action as alleged by the Applicant, *inter alia* appears to be of undue influence in that the deceased, Mr Ace Tayob raised a false alarm about a threat against the property of the Applicant. It is alleged that this pressured the person acting on behalf of the Applicant to enter into the transaction towards the sale and transfer of the property. On that basis, the Applicant sought an order rescinding the transaction, citing undue influence purportedly made on behalf of the First respondent as the basis. It is alleged that the Fourth Respondent, as a third party acting on behalf of the Applicant,

forged the signature of Samuels and concluded the sale as a result of undue influence by the late Mr. Ace Tayob, on behalf of the First Respondent[32].

46. In this regard, it has been held that undue influence brought to bear by a third party gives the party influenced no right to rescind unless the other party to the contract was aware at the time the contract was made that undue influence had been exercised[33]. Neither the Applicant nor First Respondent was aware of undue influence by Ace Tayob at the time of the contract. The Applicant raises lack of authority, granted by the shareholders through special resolution "of the signatory of the purported Power of Attorney" and that "none of the directors participated in a resolution giving effect to the alleged sale" in the founding affidavit[34]. The First respondent alleges (via the deponent to the affidavits on behalf of the First Respondent and the sole director of the First Respondent) that it was under a false impression that the Fourth Respondent was Samuels (the material director at the time of the sale and the person whose signature was forged)[35].

47. The Respondent states that it is a general rule of our law that if the fraud, which induces a contract, does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties[36]. If the Applicant relies on the Fourth Respondent not having the authority to act on behalf of the Applicant, then the Fourth Respondent is not an agent but a third party and, therefore, her fraud has no effect on the contract.

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32. See paragraph 23 of the founding affidavit, paginated page 20.
33. *Stride v Wepener* 1903 TH 383; *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 (2) SA 528 (W) 540; *Silver Garbus & Co (Pty) Ltd v Teichert* 1954 (2) SA 98 (N) 105F.
34. See paragraph 21.2 and 21.3 of the founding affidavit, paginated page 18.
35 See paragraph 5.1 of the First respondent's supplementary affidavit, paginated page 204.
36 *Karabus Motors (1959) Ltd v Van Eck* 1962 (1) SA 451 (C) 453; *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) [18]

upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties[36]. If the Applicant relies on the Fourth Respondent not having the authority to act on behalf of the Applicant, then the Fourth Respondent is not an agent but a third party and, therefore, her fraud has no effect on the contract.

48. The First Respondent puts forward that the Fourth Respondent purported to have authority on behalf of the Applicant at the time of sale as per the Resolution, granting the Fourth Respondent (portraying herself as Samuels) authority to perform the transaction[37].

49. Ostensible authority came under discussion in the case of *Makate v Vodacom (Pty) Ltd*[38] where the court stated the following: "*It is apparent that estoppel and ostensible authority are different, even though there may be some overlap between them. Ostensible authority is the power to act as an agent indicated by the circumstances, even if the agent may not truly have been given the power. Whereas estoppel is the rule that precludes the principal from denying that she gave authority to the agent*"[39].

50. "While this kind of authority [ostensible or apparent] may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others[40]. The presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required[41]". "It is clear that, even if the party represented is not an outsider, under apparent authority the

[36] *Karabus Motors (1959) Ltd v Van Eck* 1962 (1) SA 451 (C) 453; *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) [18]
[37] See annexure "MMT10", paginated page 128.
[38]. 2016 (4) SA 121 (CC).
[39] Ad par [75]
[40]. Ad par [46].
[41]. Ad par [47].

liable in terms of the agreement[43].

52. The Respondent submitted that by purporting to be Samuels and the presentation of the mentioned Resolution authorizing "Samuels" to deal with the transaction on behalf of the Applicant, there was sufficient ostensible or apparent authority upon which the First Respondent to hold the Applicant bound to, and can rely upon same, to conclude that the sale agreement and subsequent transfer is valid, despite the apparent lack of actual authority of the Fourth Respondent.

53. The first Respondent contends that either on the points *in limine*, or the probabilities on the *bona fide* defence raised, the application ought to be dismissed with costs. The parties involved in the transaction towards the sale and transfer of the property were all in a position to be abreast with all details pertaining to the First Respondent. The First Respondent cannot rely on the notion of ostensible authority where the members acting on its behalf were in an ideal position to know that there are two co-directors in charge of the Applicant, both of whom have to be on board within the process towards the sale and transfer of the property.

EVALUATION.

54. The First Respondent contends that the she bought the property and registered it in her names. However, the proof of sale or purchase produced is beset with a number of anomalies. Evidence by Mkhize to the effect that she only resigned from directorship of the First applicant because she had to travel abroad with her husband. No explanation was provided for the fact that two different signatures attributed to the stand appended to the documents pertaining to the purported sale and transfer of the property

[43]. Ad par [55].

documents pertaining to the purported sale and transfer of the property

55. A large number of documents relating to the transfer appears not to have been dated. The alleged signature of the Fourth Respondent's mother is patently not the same as the signature appearing on the confirmatory affidavit.[44]

56. The Applicant is adamant that contents of the certificate of transfer from a company, together with the contents of a report by an independent reviewer, are patently false. The Applicant states the following to substantiate its argument:
    56.1. The Property was indicated to be a vacant stand.
    56.2. The suggestion that the Property was not the only major asset or the greater part of the assets or undertaking of the Company is evidently untrue.[45]

57. The sale price appears to be extremely far below the market value. The amount of R1 100 000-00 (One Million One Hundred Thousand Rand) alleged to be the fair value of the Property, in April 2014, is patently untrue. The Applicant avers that First Respondent's account of events leading to the transfer of the Property is less than satisfactory, much as it does not raise a genuine dispute of fact. In the case of *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*[46], the Court stated the following: *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid*

[44]. See: Motion Record Paginated Page 75.
[45]. See: Motion Record Paginated Page 132 Para 8 & Page 133 Para 7.
[46]. 2008 (3) SA 371 (SCA) at Para 10.

for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts, which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

58. The Applicant contends that apart from not raising a genuine dispute of fact, the First Respondent's version is riddled with inconsistencies and unusual occurrences which demonstrate the said aversion to be untrue. In that regard, the Applicant detailed the following examples:

    58.1. Inception of the acquisition:

    The sole director of the First Respondent, Muhammed Mujtaba Tayob, who was around 25 years old in 2014, when the transfer occurred, was informed and alerted to the Property by his late Uncle Mr. ACE Tayob, who was a Sheriff at Kempton Park, who also used to inform him of possible investment opportunities and properties available on auction, presumably during the course of his employ as Sheriff.[47] On the available evidence there is nothing that suggests that the Property would have become available for purchase, in the normal cause of events, which would have come to the

[47]. See: Motion Record Paginated Page 86 Para 7.2.

specific attention of the Sheriff of Kempton Park. The Property was not put up for sale, and it was not subject to attachment by an Order of Court. In any event, the execution of any judgment against the property would have occurred through the Sheriff of Centurion.

58.2. Payment of the purchase price:
The sale agreement was concluded between the Applicant and the First Respondent, on or about the 09th of July 2014.[48] The agreement included a provision that payment of the amounts involved would be made to Messrs Vezi & De Beer Inc.[49] Payment of the purchase price would have been made to Messrs Vezi & DeBeer Inc at best soon after the 09th of July 2014, or after the completion of the transfer process as envisaged in terms of Section 26 of the Alienation of Land Act 68 of 1981.

59. On acquisition of the Applicant, the Fourth Respondent and her former husband were on the verge of dissolving their marriage. Her former husband issued divorce summons against her in April 2011 and the divorce was finalized on the 19th of April 2013. After the divorce was finalized, the Fourth Respondent moved out of her matrimonial home with her children. Mkhize states that bearing in mind the Fourth Respondent's frustration, she then agreed with the Fourth Respondent that the latter could move into the Applicant's property with her children until she becomes financially stable to secure herself and her children a residential property. The final order of divorce is attached hereto as Annexure "MEM5".

60. Mkhize stated that she at all reasonable times she thought that the Applicant's asset is still safe, especially because the Fourth Respondent was still in occupation thereof. I refer the court to a cop of the letter from the First Respondent's Attorneys and sent to the Fourth Respondent dated 27 March 2018 attached hereto as

[48]. See: Motion Record Paginated Page 60 & 129 (last line).
[49]. See: Motion Record Paginated Page 111 Para 8.

annexure "MEM7".

61. In the wake of the said developments and in consultation with my co-director, Mrs. Samuels, I then sought an assistance of an attorney and agreed to appoint Applicant's Attorney of record, whom we instructed to assist with the investigations of the matter and to subsequently advise us on a way forward. In light of the advice I received from the Applicant's Attorneys, I then instructed them that the alleged ownership of the property by the First Respondent was acquired fraudulently and further that the Applicant is intending to bring this application and on the grounds which were succinctly highlighted therein. The court is referred to a copy of the said letter dated 6 April 2018 and marked annexure "MEM8".

62. On 6 April 2018, I arranged an urgent meeting with the Fourth Respondent in order to ascertain if she has any knowledge of the transfer of the property from the Applicant to the First Respondent. During our meeting, the Fourth Respondent acknowledged that she had knowledge of the said transfer and further advised that the transfer was instigated by the late Mr. Tayob, who induced her to avoid the property form forming part of the sequestration process and consequently attached. I was taken aback by the said revelations but I was reassured by the Fourth Respondent that the transaction was merely to place the property safe as was advised by Mr. Tayob and that the First Respondent did not make any payment to acquire same and that the transfer was only disguised as sale of the property. According to the Fourth Respondent, she did not know the Mr. Tayob had mischievous intentions. I have advised that Mr. Tayob died sometimes in February 2018 but I could not verify the correctness of this information.

63. The Fourth Respondent advised me further that she was ill-advised by the said Mr. Tayob that until the sequestration process is finalized the property will be at risk because it would be traced

to the Fourth Respondent. I was also advised by the Fourth Respondent that it was on the strength of the dishonest advice by the said My Tayob that she accepted to hand over the property documents to Mr. Tayob and agreed that the property be transferred into the First Respondent's named with an understanding that Mr. Tayob was only helping the Applicant to evade the possible loss of its property.

64. At all times I was under the impression that since the Fourth Respondent was advised to resign as a director, her sequestration application would not affect the Applicant in any way, much to my surprise, the Fourth Respondent continued to receive further advices from Mr. Tayob, which advices were not communicated to any of the directors of the Applicant..

65. During the investigation conducted by the Applicant's Attorneys of record, it was discovered that there was a document which was purportedly signed by my co-director, Mrs. Samuels on the 4th of August 2014 in Midrand. She enquired from Mrs. Samuels whether the latter signed such document and Mrs. Samuels vehemently denied having knowledge of such. Mrs. Samuels also denied that the signature appearing thereon is hers. Attached hereto as annexure "MEM9" is a copy of the purported Power of Attorney dated the 4th of August 2014.

66. Mkhize who was also in charge of the Applicant at together with the Fourth Respondent the time of the transfer of the property did not participate while the transfer was processed. No special resolution was made by the shareholders of the company, the Applicant; towards the transfer of the property. The signatory of the power of attorney on the basis of which the transfer was processed did not have authority to sell and to alienate the property of the Applicant. No valid sale and transfer of the property took place. In the light of lack of authority to authorize the transfer on the part of the person who purports to have authorized the sale,

the acts purporting to have done so amount to a nullity.

67. As indicated above, the property was originally acquired at a cost of R 500 000-00. Improvements or developments were then effected on it at a cost exceeding R 250 000-00. A valuation report compiled by Demicol (Pty) Ltd places the value of the property at R 6 300 000-00 at the time of the alleged sale and transfer. It begs the question why Mkhize, the co-owner of the property would have acceded to any overture on the part of anyone towards the sale and transfer of the property at such a price as ridiculous as to be R 1 100 000-00. The absence of Mkhize's approval of such a deal points to its lack of authenticity. Despite the improvements effected on the property at a huge cost, in the documents concerning the sale and transfer of the property, the property is still indicated to be a vacant stand.

68. Forgery of the signature of one Samuels preceded the transfer of the property in issue in this case. This forgery is not disputed. All the First Respondent submits is that it was not party to the commission of the fraud and neither was it aware of the fraud. It argues that its title as against the property should remain unaffected because it neither participated in the commission of fraud nor had knowledge of it. However, no plausible explanation is advanced for the anomalies around signatures and the apparent lack of authority on the part of the person behind the generation of the Power of Attorney that facilitated the sale and transfer of the property. Neither is there a sound reason advanced for why the property could be sold without the knowledge and participation of its co-directors. The role of the late Sheriff in the entire matter where no liquidation was underway, is difficult to understand. The court finds that the sale and transfer of the property was preceded by commission of fraud.

69. In the case of *Nedbank Limited v Ronald Mendelow No and Lazarus Ledwaba;* the court stated: *"Where the Master of the High Court*

and the Registrar of Deeds perform clerical acts that result in the registration of transfer of immovable property pursuant to a fraud, and there is no intention on the part of a beneficiary of a deceased estate to transfer ownership, registration does not effect a transfer of ownership; the person in whose name the property is registered is not the owner and cannot grant a valid mortgage bond over the property. Purely clerical acts do not amount to administrative action reviewable under the Promotion of Administrative Justice Act 3 of 2000."

70. Considering that the purported sale and transfer of the property is laden with nullity, the *status quo* as it obtained before efforts towards the sale and transfer, remains in place. In the result, the sale and the transfer of the property from the Applicant to the First Respondent dated the 29th of September 2014 stands to be set aside.

71. Having heard counsel on both side, the following order is made:

ORDER.

71.1. The transfer of the property described as Erf 1579 Midstream Estate Extension 18 Township, Registration Division J.R, Province of Gauteng, held by Deed of Transfer Number T757534/14 of 29 September 2014 is set aside.

71.2. The sale agreement between the applicant and the First Respondent is declared to be fraudulent and unlawful.

71.3. Registration of the Mortgage Bond of R3 000 000,00 in favour of the Second Respondent over the property described as Erf1579 Midstream Estate Extension 18 Township, Registration Division J.R, Province of Gauteng, registered on 28 August 2015 and held under Bond number B 39771/15 is set aside.

71.4. The Third Respondent is ordered to re-register the property being Erf 1579 Midstream Estate Extension 18 township, Registration Division J.R, Province of Gauteng into the Applicants names.

71.5. The First Respondent is ordered to pay the cost of this application on an ordinary scale.

T.A Maumela
Judge of the High court of South Africa.