



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)

Case number: **1817/2017**
 Date heard: **16/02/2018**
 Date delivered: **02/03/2018**

In the matter between:-

CHARLES AREND FISCHER N.O.
JENNIFER ANNE FISCHER N.O.
NEIL CARLISLE CURRIE N.O.

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT

AND

LEFIFI STEPHENS MAHLABE

RESPONDENT

Coram: Stanton AJ

JUDGMENT

STANTON AJ

INTRODUCTION:-

- [1] The applicants, CA Fischer, JA Fischer and NC Currie, the trustees of the Charles Fischer Farming Trust (IT 2014/1997) ("the Trust"), filed an application, requesting that the respondent, Mr LS Mahlabe, be ordered to

remove his cattle and/or livestock from the immovable properties known as the farm Vaalboshhoek, Windsorton and the farm Vaalkop, Barkly West District ("the immovable properties").

- [2] The respondent opposed the granting of the relief on the merits. In addition, the respondent raised a point *in limine*, namely that a dispute of fact exists pertaining to the validity of the transfer of the immovable properties into the name of the Trust.

FACTS NOT IN DISPUTE:-

- [3] It is not in dispute that:-

- 3.1 the Dirisanang Small Farmers Communal Property Association ("the CPA") was the registered owner of the immovable properties until 14 December 2012 when it transferred the ownership thereof to Lerospot (Pty) Ltd ("Lerospot") in terms of deed of transfer T3466/2012;
- 3.2 on 23 June 2014, Lerospot sold the immovable properties to the Trust in terms of a written sale agreement ("the sale agreement"). The immovable properties were registered in the name of the Trust on 31 October 2014 in terms of deed of transfer T2110/2014;
- 3.3 during September 2014, the Trust granted the respondent two years to remove his cattle from the immovable properties; and
- 3.4 the respondent, has to date, not vacated the immovable properties.

APPLICATION AND ACTION:-

- [4] Before I deal with the merits of this application, it is appropriate to briefly refer to the preceding application and the pending action, issued in this court.

- [5] On 22 May 2013, under case number 767/2013, the CPA obtained an interim order that prohibited Lerospot and three others (not the Trust) from transferring the immovable properties to Lerospot, pending the finalisation of an action to be instituted for the setting aside of the transfer under deed of transfer T3466/2012. The action had to be instituted within thirty days of 09 August 2013, in the event of the rule *nisi* being confirmed.
- [6] On 07 June 2013, the rule *nisi* was discharged by agreement. An order was also granted that, pending the final determination of an action to be instituted by the CPA within thirty days for an order setting aside the transfer of the immovable properties under deed of transfer T3466/2012, the parties were prohibited from withdrawing or transferring the funds held in the CPA's name.
- [7] On 16 July 2013 and under case number 767/2013, the CPA instituted action against Lerospot and seven other defendants, in terms of which it, *inter alia*, claimed an order to declare the transfer of the immovable properties to Lerospot on 14 December 2012 unlawful and void *ab initio* ("the action").
- [8] Lerospot defended the action and filed its plea on 08 November 2013. In addition, and also on 08 November 2013, Lerospot filed a notice in terms of Rule 7 of the Uniform Rules of Court, in terms of which it placed the authority of the CPA's attorney to act on behalf of the CPA, in dispute. The CPA did not respond to the Rule 7 notice.
- [9] Since 08 November 2013, no further steps have been taken to finalise the action.
- [10] Neither the Trust, nor the respondent, were cited as parties in the application or the action.

- [11] Mr Ehrlich, on behalf of the respondent, submitted that the Trust should have taken the necessary steps to join the action and, thereafter, to bring it to finality. In my view, this submission is without merit.

REI VINDICATIO:-

- [12] The Trust relies on the *rei vindicatio* as the basis for the granting of the relief. It is trite that an owner of immovable property who claims possession of his/her immovable property with the *rei vindicatio*, must allege and prove:¹-

12.1 ownership of the land; and

12.2 that the respondent is in possession of the land.

- [13] If a respondent claims, as a defence to the claim for eviction, some or other right to possession, the onus is on the respondent to prove the existence of that right.²

OWNERSHIP:-

- [14] The first issue that requires determination, is the ownership of the immovable properties.
- [15] It is trite that proper proof of ownership is effected by the production of the relevant title deed.³
- [16] As proof of its ownership of the immovable properties, the Trust, initially relied on the deeds search printouts. The respondent disputed that the

¹ GOUDINI CHROME (PTY) LTD V MCC CONTRACTS (PTY) LTD [1993] 1 ALL SA 259 (A) AT 261

² CHETTY VS NAIDOO [1974] ALL SA 304 (A) AT 309

³ GOUDINI CHROME (SUPRA) AT 261

printouts are conclusive proof of ownership, whereafter the Trust attached a copy of the title deed to its replying affidavit.

- [17] On 14 February 2018, the respondent served a notice in terms of Rule 35 (12) on the Trust, requesting it to produce for inspection, the original, or a duly certified copy of the deed of transfer T2110/2014. On 15 February 2018, the Trust provided the respondent with a certified copy of the deed of transfer.
- [18] At the commencement of the proceedings, Mr Ehrlich conceded that the Trust, by complying with the Rule 35 (12) notice, has provided sufficient proof that it is the registered owner of the immovable properties.
- [19] In view of the concession made by Mr Ehrlich and the production of the title deed, it is indisputable that the Trust is the registered owner of the immovable properties.

RIGHT TO POSSESS:-

- [20] It is not denied that the respondent is in occupation of the immovable properties. As I understand the respondent's case, he has a right to occupy the immovable properties, based on the following, namely:-

- 20.1 Lerospot acquired the immovable properties in fraudulent circumstances, of which the First Applicant was aware;
- 20.2 the transfer of the immovable properties from the CPA to Lerospot was consequently unlawful and void;
- 20.3 as a result, the Trust could not obtain valid transfer of the immovable properties from Lerospot;

20.4 the pending action prohibits the Trust from requesting the relief in *casu*, and

20.5 the respondent has a "historical right" to occupy the immovable properties as he has, over the past nineteen years, as a member of the CPA, grazed his cattle on the immovable properties.

[21] Mr Ehrlich contended, on behalf of the respondent, that Lerospot acquired the immovable properties from the CPA under "seemingly fraudulent circumstances" and that this casts doubt over the Trust's ownership of the immovable properties. He argued that, as a result of the fraud, the ownership of the immovable properties was not lawfully transferred to Lerospot and consequently, the Trust could not have acquired ownership thereof.

[22] In support of his argument, Mr Ehrlich relied on paragraph 5.2.2 of the deed of sale, attached to the founding affidavit, as proof of the fact that the Trust was aware of the alleged fraudulent transaction. Paragraph 5.2.2 of the written deed of sale, however, provides as follow:-

"Die Koper boekstaaf dat die Koper daarvan bewus is dat die Verkoper tans in 'n regsgeding betrokke is met die onregmatige okkupeerders van die Dirisanang Small Farmers Communal Property Association ter afsetting van die onregmatige okkupeerders en die afwysing van 'n aksie deur die Dirisanang Small Farmers Communal Property Association."

[23] Mr van Niekerk, on behalf of the applicants, correctly submitted that the answering affidavit does not contain a single allegation that the Trust acted fraudulently in acquiring the immovable properties from Lerospot. He added that any averments in the answering affidavit that relates to fraud, are limited to the transaction between the CPA and Lerospot. In my opinion, paragraph 5.2.2 of the written deed of sale confirms the absence of fraud by the Trust.

- [24] With regard to the effect of fraud on the transfer of an immovable property, Mr van Niekerk and Mr Ehrlich both relied on the judgment in *Nedbank Ltd v Mendelow NO and another*,⁴ where Lewis JA confirmed that:-

"Where registration of a transfer of immovable property is affected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds register. Registration is intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office. And it is a source of information about those rights. But registration does not guarantee title, and if it is effected as a result of a forged power of attorney or of fraud, then the right apparently created, is no right at all.

This Court has recently reaffirmed the principle that where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect."

- [25] In *Legator McKenna Inc. v Shea*,⁵ Brand JA, with reference to the judgment in *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd*,⁶ confirmed, in the first instance, that the abstract theory of transfer of ownership applies to immovable property, and, secondly, that if there is any defect in what he termed the "real agreement" – that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively – then ownership will not pass, despite registration. This principle was unanimously approved and has been followed consistently since then.⁷

⁴ [2013] JOL 30797 (SCA) PAGE 6

⁵ *LEGATOR MCKENNA INC V SHEA* 2010 (1) SA 35 (SCA) PARAS [21] AND [22]

⁶ 1941 AD 369

⁷ *KNYSA HOTEL CC V COETZEE NO 1998 (2) SA 743 (SCA) AT PAGE 753*

APPLICATION OF THE LAW:-

- [26] In the absence of any allegation that the transaction between Lerospot and the Trust was tainted by fraud, I can arrive at no other conclusion that it was the intention of Lerospot to sell the immovable properties to the Trust and that the Trust intended to obtain ownership thereof. I accordingly find that the underlying agreement and the registration of the transfer of the immovable properties to the Trust, are valid.
- [27] With regard to the defence of an "historical right", I find that any right the respondent may have had to occupy the immovable properties, ceased to exist when the CPA divested of its ownership of the immovable properties.
- [28] Based on the foregoing, I find that the respondent failed to establish that he was vested with some enforceable right that entitles him to remain in occupation of the immovable properties.

DISPUTE OF FACT:-

- [29] According to the respondent, the Trust ought to have foreseen an intractable dispute of fact relating to the validity of the sale of the immovable properties by Lerospot to the Trust, which dispute cannot be resolved on the papers. Mr Ehrlich submitted that the application should be dismissed on the basis that the Trust failed to seek a referral to oral evidence or a trial to determine the alleged underlying impropriety.

[30] In view of my findings in respect of the merits, I am not persuaded that the respondent raised a real, genuine or *bona fide* dispute of facts that cannot be resolved on the papers, as envisaged by the Plascon-Evans rule.⁸

COSTS:-

[31] Neither party requested a cost order on a punitive scale. There is no reason why the costs of this application, should not follow the result.

IN THE CIRCUMSTANCES, I MAKE THE FOLLOWING ORDERS:-

1. The respondent, Mr LS Mahlabe, is ordered to remove his cattle and/or livestock from the immovable property known as the farm Vaalboshhoek, Windsorton, within 10 (ten) calendar days of the grating of this order;
2. The respondent, is ordered to remove his cattle and/or livestock from the immovable property known as the farm Vaalkop, Barkly West District, within 10 (ten) calendar days of the grating of this order;
3. The applicants, CA Fischer, JA Fischer and NC Currie, in their capacities as trustees of the Charles Fischer Farming Trust (IT2014/1997), are authorised to remove the cattle and/or other livestock from the farm Vaalboshhoek, Windsorton and the farm Vaalkop, Barkly West District, and to take the animals to a shelter, should the respondent fail to adhere to the orders set out in paragraph 1 and 2 hereof;
4. The applicants are authorised to approach the Court, on the same papers, as amended, if necessary, to claim payment of the costs incurred in terms of paragraph 3 hereof; and

⁸ PLASCON-EVANS PAINTS LTD V VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) 623 (A) AT 634E – 635C

5. The respondent is ordered to pay the costs on a party and party scale.



A STANTON

ACTING JUDGE

Northern Cape Division, Kimberley

On behalf of the Applicant:

Adv J.G Van Niekerk(Haarhoffs Inc.)

On behalf of the Respondent:

Adv D Ehrlich (Engelsman Magabane Attorneys)