

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, EAST LONDON CIRCUIT DIVISION)**

Case no. EL 365/16
ECD 865/16

In the matter between:

DAVID THOMAS GROUSE

Applicant

and

NOMAWETHU BARBARA MDYOGOLO

First Respondent

THE REGISTRAR OF DEEDS

Second Respondent

JUDGMENT

MBENENGE J:

[1] Not everything that begins well, ends well. The facts of this case demonstrate just how true that is. The applicant is an Irish citizen who is currently staying in East London. The first respondent is a citizen of South Africa. The two met and fell in love during the first respondent's sojourn in Ireland, where she had been working.

[2] In the course of time, the applicant and the first respondent moved to South Africa and settled in East London. They lived together in the house which is the subject of these proceedings¹ until their relationship was beset by acrimony which resulted in the applicant moving out of the Property and staying with friends in the Property's neighborhood.

¹ House no 7 Koch Street, Amalinda, East London, located on Erf 2193, Buffalo City Metropolitan Municipality, Division of East London, Province of the Eastern Cape (the Property).

[3] The Property was purchased by the applicant for R1.1million, but is registered in the name of the first respondent.

[4] According to the applicant the only reason why the Property was registered in the first respondent's name was that the first respondent had told him that, because the first respondent was not a South African Citizen and did not have permanent residence in South Africa, he was not legally able to purchase and register immovable property in his own name in South Africa. The Property, so goes the applicant's case, was purchased not as a gift, but rather as a means to secure a roof over his head in a strange country with the full and honest belief that he would have entitlement thereto. The applicant says he has found this to have been false and callous misrepresentation by the first respondent which he acted upon to his detriment.

[5] The first respondent has evinced a settled determination to sell the Property and to utilize the proceeds of the sale for herself, as she has the sole rights to the Property. The applicant is not opposed to the sale on condition that it is sold at a reasonable market related price with him being allowed to make an input in the selling price and involved therein, including but not limited to the disbursement of the funds realized.

[6] The applicant is bent on launching an action with a view to securing his alleged rights over the Property.² As safeguard thereto, the applicant has resorted to the

² A copy of the unsigned version of the relevant particulars of claim annexed to the applicant's founding papers sums up the applicant's case in the relevant part as follows:

- "3. During or about the period November 2013 to April 2014 and at East London and the [R]epublic of Ireland, the Defendant represented to the Plaintiff that due to the plaintiff not being a South African citizen, he is unable to register movable and immovable property in his own name.
4. When making the representations, the Defendant knew it to be false in that she knew that the Plaintiff was in fact entitled to register movable and immovable property in his own name.
5. When the Defendant made the representations, she intended the Plaintiff to act thereon and accordingly the Plaintiff and Defendant entered into the following agreement:
 - 5.1 the Plaintiff would purchases immovable property [the Property]...
 - 5.2 the Plaintiff would pay the purchase price of the immovable property and related costs;
 - 5.3 the Plaintiff would cause the immovable property to be registered in the name of the Defendant;
 - ...
 - 5.4 the Plaintiff and the Defendant would reside together in the immovable property;
6. The plaintiff was induced by the representations to purchase the immovable property ... in the name of the Defendant
7. Had the Plaintiff known the true facts, he would not have purchased and registered the immovable property ... into the Defendant's name.
8. At the time of entering into the agreement, the representations made by the Defendant were, to the knowledge of the Defendant false.
9. The Defendant was aware that the Plaintiff did not know of the falsity of the representations and the Defendant had a duty to inform the Plaintiff that the representations made by her were false.
10. Despite this duty, the Defendant intentionally failed to inform the Plaintiff of the falsity of her representations.

instant application and is in effect seeking an order restraining the first respondent from disposing of the Property, pending the launch of the action. In the event of the Property having already been sold, the applicant seeks an order restraining the second respondent from registering the Property in the name of any other person, pending the launch of the action.³

[7] The first respondent's opposition to the application is premised primarily on the contention that she is the registered owner of the Property which the applicant bought freely and voluntarily for her; the applicant has no protected rights over the Property. She denies ever having misrepresented any facts to the applicant prior to the purchase of the Property. The first respondent has summed up her basis for opposing the application as follows:

“...the lack of the protectable right in law does not afford the applicant the relief he is seeking and the lack of his substantial and direct interest in the Property [deprives] him of any *locus standi* to bring this application.”

[8] The dispute of fact in relation to the circumstances in which the Property was purchased and registered in the name of the first respondent is a matter resolvable at the intended trial. All that the applicant must establish in order to succeed in his quest for the grant of the subject interlocutory interdict is a *prima facie* right, a well-grounded apprehension of irreparable harm and absence of any other satisfactory remedy.⁴

[9] It is trite law that the *prima facie* right that the applicant must establish is one that may even be “*open to doubt*.”⁵ It is trite law that parties have the freedom to

11. As a result of the Defendant's misrepresentations, the Plaintiff cancelled the agreement between the parties alternatively cancels it herewith.

12. In the premises, the Defendant was enriched at the Plaintiff's expense.”

³ In the intended action the plaintiff seeks the following prayers:

“1. Cancellation of the oral agreement;
2. That the Defendant does all things necessary and sign all documents to effect transfer of the immovable property into the name of the Plaintiff within 30 days of date of judgment;
...
4. In the event of the Defendant failing to comply with prayers (2) and (3) above, authorising the Sheriff of the High Court to do all things necessary and to sign all documents to effect transfer of the immovable property ... into the name of the Plaintiff;
5. Alternatively to prayers (2) and (3) above, payment in the sum of R (purchase price of immovable property).”

⁴ *Setlogelo v Setlogelo* 1914 AD 221; *Maccsand CC v Macassar Land Claims Committee and Others* [2005] 2 All SA 469 (SCA); *South African Informal Traders Forum and others v City of Johannesburg and others*; *South African National Traders Retail Association v City of Johannesburg and others* 2014 (6) BCLR 726 (CC).

⁵ *Webster v Mitchele* 1948(1) SA 1186 (W) at 1189; See also *Pinzone Traders 8 (Pty) Ltd v Clublink (Pty) Ltd* 2010 (1) SA 506 at 513A-C.

contract.⁶ There is thus nothing precluding two persons from agreeing that the one will buy an immovable property to be registered in the name of the other, rendering the latter a mere nominee.

[10] It is also available to one to challenge a sale giving rise to the transfer of immovable property induced by fraudulent misrepresentation as being of no force.⁷ Subject to his version being truthful, the applicant is not precluded from asserting the contractual right he intends contending for. His case that the Property paid for by him and registered in the name of the first respondent resulted from fraudulent misrepresentation accords him a direct and substantial interest in the Property and what should eventually become thereof.

[11] Purely at a *prima facie* level, the first respondent's version that the Property, worth R1.1million was a gift, is, in the circumstances of this case, hard to believe.

[12] The first respondent has not come forth stating what she intends doing with the proceeds of the contemplated sale of the Property. She intends selling the Property and accessing the proceeds of the sale without recourse to the applicant. Were that to happen, the applicant would surely be prejudiced. I am satisfied, on the facts of this case, that the applicant has a well-grounded apprehension of irreparable harm if the interlocutory interdict is not granted and he is eventually successful in his action to be founded on fraudulent misrepresentation.

[13] In my view, the balance of convenience also favors the grant of the order sought. The applicant stands to lose a substantial amount of money, were the intended sale to proceed. He paid no less than R1.1million towards the purchase of the Property. The first respondent is on record as having paid nothing. She stands to suffer nothing, were the interim relief to be granted.

⁶ In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para [57] Ngcobo J, writing for the majority, held:

“On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.”

⁷ *Absa v Moore* 2016 (3) SA 97 (SCA).

[14] There does not appear to be any other satisfactory remedy available to the applicant, save the interdictory relief he is seeking. The first respondent has pointed to none.

[15] The application must succeed. There is no reason why costs should not follow the result.

[16] The applicant has annexed particulars of the intended claim to show his *bona fides*. The applicant is thus on record as being ready to launch the action. There is nothing militating against him launching the action within 14 days from the date of the order sought herein being granted.

[17] In the result, it is ordered that:

- (a) The first respondent is interdicted and restrained from selling or in any manner whatsoever disposing of Erf [2.....], Buffalo City Metropolitan Municipality, Division of East London, Province of the Eastern Cape presently held under titled deed T2286/2014, first transferred by Deed of Transfer number T1267/1964 with diagram number 9502/1961 relating thereto and held under Deed of Transfer number T6247/2005 convoly known as [... K. S.], Amalinda, East London (the Property), pending the launch and finalization of action proceedings by the applicant against the first respondent in relation to the Property.
- (b) In the event that the Property has been sold to a third party, the second respondent is restrained and interdicted from allowing registration of the Property in the name of the third party, pending the launch and finalization of the proceeds referred to in paragraph 1 above.
- (c) Should the action not be launched within 14 days from the date of service of this order on the applicant, sub-paragraphs (a) and (b) of this order shall immediately have no force or effect.
- (d) The first respondent shall pay the costs of this application.

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the applicant : Mr J J Bester
Instructed by Andre Schoombie Attorneys
EAST LONDON

Counsel for the 1st respondent : Mr S Y Malunga
Instructed by Godongwana Ngonyama Phakade Attorneys
EAST LONDON

Date heard : 12 May 2016

Date delivered : 25 May 2016