IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

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

CASE NO: 6967/2014

DATE: 8/5/2015

IN THE MATTER BETWEEN

RIGACRAFT CC (Registration number 2009/184891/23)	APPLICANT
AND	
PHOLOSO JASON RAMACHELA	1ST RESPONDENT
CITY OF TSHWANE METROPOLITAN MUNICIPALITY AUTHORITY	2ND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant applies for the eviction of the first respondent, and whoever occupies the property known as 12 Flatcrown Street, Heuweloord, Extension 2 ("the property") through him, from the property.

[2] The applicant is the owner of the property and relies, *inter alia*, on the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act no 19 of 1998 ("the Act") and also commonly known as "PIE".

[3] The second respondent municipality was joined because of its interest in the matter by virtue of the provisions of PIE, but did not take an active part in the proceedings. The applicant has complied with the requirements of section 4(2) of PIE, in that proper notice of the eviction was given.

[4] Before me, Mr Vorster appeared for the applicant and Mr Ben-zeev appeared for the first respondent.

[5] A counter-application instituted by the first respondent, aimed at joining certain parties to the proceedings and at obtaining certain declaratory relief, was not proceeded with.

Brief synopsis: an eviction application with a difference

[6] The first respondent's case is that the applicant is not the true owner of the property, despite the fact that it was registered in the applicant's name, because of an earlier involvement of the so-called "Brusson scheme".

[7] The first respondent therefore argues that the applicant failed to discharge the *onus* of proving that it is entitled to evict the first respondent and those who occupy with him, and to show that it is just and equitable, in the circumstances, and in the interests of justice, for the eviction to be granted.

Background and chronological sequence of events, and more about the Brusson scheme

[8] The undisputed evidence of the first respondent, a 25 year old male, is that he has been living on the property since 1996, a period of some 19 years. Until recently, his 63 year old mother and his older sister of 29 and two younger brothers of 17 and 14 as well as a younger stepsister of 10 also lived on the property.

His late father, Mohale Rufus Ramachela ("the father") also lived on the property until his death in 2012. It is the first respondent's case that the deceased estate of the father is still the true owner of the property.

The 10 year old stepsister was staying with her grandmother in Vereeniging at the time when the opposing affidavit was signed on 25 May 2014 and the mother and three siblings had temporarily moved away from the property because the electricity had been cut off, but were planning to return to the property in June 2014. It is not clear whether this in fact happened.

[9] What follows is a brief account by the son (the first respondent) of how the father got involved with the Brusson scheme and how that involvement impacted on the family's undisturbed possession and use of the property. The property had been registered in the name of the father until he got involved with the Brusson scheme.

[10] It must be recorded right away that the first respondent's evidence in this regard is largely hearsay evidence based on what the father told him during the course of many discussions and also on information, based on notes and other documents, the first

respondent obtained from a number of attorneys, attached to the Legal Resources Centre in Johannesburg, who represented the father during the course of his involvement with the Brusson scheme. In this regard, no less than three attorneys, attached at the relevant period to the Legal Resources Centre, deposed to confirmatory affidavits, stating that they agree with the contents of the opposing affidavit.

[11] It should also be recorded that the first respondent's evidence on this subject is, by and large, undisputed. The best the applicant could do, was to offer arguments about the hearsay nature of the evidence and to make submissions about the authenticity, or lack thereof, of documents signifying the father's involvement with the Brusson scheme.

[12] In 2007 the father needed financial assistance to repair and renovate his house on the property. A friend advised him to approach a company Brusson Finance (Pty) Ltd ("Brusson") and he did so, seeking a loan of R300 000,00 which he would repay in instalments of R5 000,00 per month, the monies being debited against his account directly by Brusson.

[13] Brusson faxed the father three documents: an offer to purchase, an instalment sale agreement and a memorandum of agreement for him to sign. While he was concerned about completing blank documents he had no other option if he was to obtain a loan. Ultimately he received a loan amount of R222 000,00.

[14] At this point it is convenient to make a few remarks about the Brusson scheme which, as I will point out, has been held to amount to a simulated transaction which is fraudulent, and also void for non-compliance with the provisions of the National

Credit Act, no 34 of 2005 ("the NCA"). Brusson took advantage of home owners who did not have the financial muscle or credit record to obtain their own finance.

[15] Broadly speaking, the following can be said about the Brusson scheme:

Brusson perpetrated a mortgage fraud scheme in which it provided loans to individuals (the "**clients**") by taking their property for security and using the good name of a third party (the "**investor**") to obtain a mortgage bond from a financial institution.

The scheme operated on the basis of three documents that the clients were required to sign:

(i) an offer to purchase in which the client's property was sold to the investor;

(ii) a deed of sale in which the client's property was sold back to the client on an instalment sale agreement; and

(iii) the memorandum of agreement which governed the entire scheme.

Brusson obtained the signatures of clients in order to have the property transferred to the investor by misleading its clients as to the nature of the documents. At any rate the documents that the clients signed were only a simulation and the true intention is belied in a reading of all three of the documents together, and especially upon a reading of the memorandum of agreement, as was explained in the opposing affidavit and as was neatly summarised by Mr Ben-zeev in his comprehensive heads of argument.

It is useful to add that, according to what the first respondent says in his opposing affidavit, supported by the confirmatory affidavits of his attorneys, that the latter are inundated with queries from clients who faced the prospect of eviction as a result of their participation in the Brusson scheme. The attorneys estimate that there are approximately 900 homes throughout the country that are affected by the scheme. This translates to thousands of people that potentially face eviction as a result of the actions of the Brusson scheme. The attorneys, themselves, are handling many claims flowing from the Brusson scheme and at least three of them have been before the courts.

On 22 July 2010, the Free State High Court, in an unreported judgment of *Ditshego and others v Brusson Finance (Pty) Ltd and others*, case no 5144/2009, analysed the Brusson scheme and found it to be representative of a simulated transaction and declared it to be illegal and void. The analysis of the transaction in *Ditshego* materially corresponds with the facts of the present case.

[16] It is to these facts which I now return briefly:

Brusson misled the father into signing the documents mentioned above which the father believed he needed to sign in order to obtain a loan from Brusson.

The investor, who obviously worked in collaboration with Brusson, and who was at that stage one T K F Shadung, or Brusson on behalf of the investor, would then apply to the financial institution for a loan, which is paid immediately to Brusson. Upon obtaining this loan, Brusson would pay over a portion of the amount to the client after taking a share for itself. The client would then repay to Brusson the monthly amount set out in the written agreements (here R5 000,00 per month initially).

In the event of the client defaulting with the monthly payments, Brusson would take ownership of the property from the investor and require the clients to vacate the property. This portion of the scheme was held by the Free State court, in my respectful view quite correctly, to amount to nothing less than an unlawful *pactum commissorium*.

[17] As was held by the Free State court, and as was submitted by counsel for the first respondent before me, the entire transaction is simulated. What appears from the documents is a sale and reverse sale in instalments of the property. However, it is clear from a reading of all the documents together that the true nature of the transaction was to enter into a loan agreement that was secured against the property. The loan agreement was facilitated and managed by Brusson. What appears from the documentation is the following:

1. the offer to purchase is abnormal in that the investor (the "purchaser") in the offer to purchase does not pay transfer costs and the client (the "seller") retains occupation of the property;
2. the deed of sale is abnormal in that:
    2.1 the payments are made to Brusson and not to the seller;
    2.2 the "purchaser" pays the relevant taxes and other administrative costs to Brusson; and
    2.3 Brusson obtains a copy of any notices exchanged between the parties;

3. the memorandum of agreement has the following indications of the true intention of the parties:

   3.1 Brusson provides the investor with a guarantee on the obligations relating to bond instalments, rates and taxes and other amounts and binds itself as "surety and co-principal debtor" in favour of the client;

   3.2 in the event of a "default" by the client, the investor is required to sell the property to Brusson, as I have pointed out, and the client is required to "vacate" the property; and

   3.3 the client is permitted to sell the property where it has the prior written consent of Brusson, subject to the conditions imposed by Brusson and only if the client mandates Brusson as its agent to sell the property.

[18] As a result of the scheme the clients are led to believe that they are transacting with Brusson, when in fact their property is held as security by a party that they are unaware is a party to the transaction at all. The mortgage loan agreement with the bank is equally tainted by the absence of the consensus of the client, in this instance the father, who is the true owner of the property.

[19] Apart from the fact that the Free State court held that the transaction amounts to an unlawful *pactum commissorium*, it was also held by that court, correctly, that the transaction is unlawful and void because it flies in the face of the provisions of section 89 of the NCA because Brusson, which facilitated the scheme whereby it provided credit to hundreds of consumers, was not registered in terms of section 40 of the NCA.

[20] Moreover, the manner in which the transaction was structured, rendered it unlawful in terms of the provisions of section 90 of the NCA.

In terms of section 90(3) of the NCA, in any credit agreement, a provision that is unlawful in terms of section 90, is void as from the date that the provision purported to take effect.

[21] Over the years, and fraudulently, agents of Brusson, from time to time, informed the father that he had fallen in arrears with his payments (which Brusson was authorised to deduct from the father's bank account on a monthly basis) and threatened that the property would be sold. The father, none the wiser, increased the payments on a number of occasions. Ultimately, in exasperation, the father went to the attorneys aforementioned for assistance and this is when the existence of the Brusson scheme became known to him.

[22] In the interim period, and after the 2010 liquidation of Brusson, this court authorised the registration of a caveat over all the affected properties, or, perhaps, some of them, restraining interested parties from alienating the properties pending the outcome of the relevant disputes.

On 27 February 2013, this court, at the instance of the liquidators of Brusson, authorised the latter to cancel the caveats or interdicts authorised earlier, on 30 August 2010.

The property now under discussion was one of those in respect of which the caveat was lifted. It was declared by the court that those particular properties do not form part of the insolvent estate of Brusson. The court also stipulated that no order was made in respect of the validity of the mortgage bonds passed over the properties and some of the related loan agreements.

[23] When the caveat was lifted over the property, the creditor in terms of the mortgage bond, First National Bank, proceeded to execute.

By then, Brusson, fraudulently in terms of the "transaction", had already transferred the property to the aforesaid Shadung in 2007 and, from Shadung, it was transferred to another "investor" by the name of P J S van Eeden. This happened in 2009.

While the property was registered in the name of Van Eeden, and unbeknown to the father's attorneys, or the father for that matter, the property was sold in execution to the applicant on 15 July 2013. This was after the passing of the father. The father died intestate, and it appears that no executor has as yet been appointed to administer the estate.

[24] When the father's attorneys got wind of the sale in execution, they wrote a lengthy letter, on 30 July 2013, to the Sheriff of Centurion who conducted the execution sale. In the letter they explained the background of the case including the father's unfortunate involvement with the Brusson scheme, the finding in the *Ditshego* judgment, details of other litigation that was pending as a result of the activities of the Brusson scheme and other related facts. They requested the Sheriff not to proceed

with the execution or any eviction proceedings. They recorded that they were acting for the first respondent who was then the occupier of the property (and still is) and that this was his primary residence. They pointed out that the lifting of the caveat by this court in February 2013 did not represent any authority to sell the properties. They suggested that any efforts to evict the first respondent would have to be in terms of the requirements and provisions of PIE. There was no answer to this letter.

On the same date the first respondent's attorneys wrote a similar letter to First National Bank's attorneys. This also went unanswered.

On the same date the first respondent's attorneys wrote a similar letter to the applicant. In answer thereto, the applicant's attorney, in August 2013, responded by stating "please take note that our client will proceed to take transfer of the property mentioned".

On 6 September 2013 the first respondent's attorneys replied to the applicant's attorney by means of a lengthy letter once again dealing with the background of the case. They pointed out that the Brusson scheme was declared illegal in the *Ditshego* case and also listed the reasons for the finding by the Free State court, including that the scheme was an illegal *pactum commissorium* and also flew in the face of the relevant provisions of the NCA. They pointed out that there was pending litigation involving other victims of the Brusson scheme. They suggested that the first respondent had the right to remain on the property pending finalisation of the litigation and also that any efforts to evict the first respondent ought to take place in terms of PIE. They made it clear that such proceedings would be opposed.

It is unfortunate that this reasonable and detailed letter went unanswered. The applicant and its attorneys simply went ahead and arranged for the applicant to take transfer of the property on 12 December 2013.

What is worse, and to be frowned upon, is the fact that the applicant, in the founding papers, did not mention a single word of these involvements featuring the Brusson scheme, its impact on the father and also on the subsequent execution and sale of the property.

What is plain, is that the applicant and its attorneys were duly apprised of the real facts of the case and so was the bond holder, the First National Bank. Any suggestion by the applicant that the first respondent should have joined the latter as a party to these proceedings is, in my view, ill-founded. The first respondent is simply opposing the eviction application. If such a joinder was required, it would have been up to the applicant to do so.

[25] In concluding this introduction and chronological account of events, I make the following further remarks:

1. I have no hesitation in exercising my discretion in favour of allowing the hearsay evidence dealing, mainly, with the father's involvement with the Brusson scheme. I derive this discretion from the provisions of section 3(1)(c) of the Law of Evidence Amendment Act no 45 of 1988. It is not necessary to revisit all those provisions. The father upon whose credibility the probative value of the evidence depends cannot testify. Documentation is attached to the

opposing affidavit, emanating from Brusson, which clearly illustrates the involvement of the father. Like many other innocent home owners, the father fell victim to the fraudulent Brusson scheme. It is in the interest of justice to allow the evidence, as I do.

2. The applicant chose to approach the court by way of motion proceedings, well knowing the true history of the case after having received correspondence from the attorneys representing the first respondent. The applicant chose not to deal with this in the founding papers. This application for final relief must, in any event, be decided on the version of the first respondent together with allegations by the applicant which are not disputed. See the well-known principle laid down in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 3 SA 623 (AD) at 634E-H and 635B-D. The version of the first respondent is in any event, for practical purposes, undisputed and ought to be accepted for that reason as well.

3. For purposes of its reliance on PIE, it was argued on behalf of the applicant that its case was fortified by the provisions of section 4(7) of PIE which read as follows:

> "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, <u>except where the land is sold in a sale of execution pursuant to a mortgage</u>, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including

the rights and needs of the elderly, children, disabled persons and households headed by women." (Emphasis added.)

In my view this argument is misplaced. On my understanding of this case, the first respondent and, for that matter, his siblings and mother, are not unlawful occupiers as defined in PIE. Consequently, the rider in section 4(7), such as it is, does not serve to fortify the case of the applicant.

The *onus* in eviction applications

[26] Counsel for the first respondent referred me to the case of *City of Johannesburg v Changing Tides 74* 2012 6 SA 294 (SCA). At 314B-E the following is said:

"The implication of this is that, in the first instance, it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that it is the owner and the respondent is in occupation, because those are the only relevant facts, in others it will not. One cannot simply transpose the former rules governing *onus* to a situation that is no longer governed only by the common law but has statutory expression. In a situation governed by section 4(7) of PIE, the applicant must show that it has complied with the notice requirements under section 4 and that the occupiers of the property are in unlawful occupation. On ordinary principles governing *onus* it also has to demonstrate that the circumstances

> render it just and equitable to grant the order it seeks. I see no reason to depart from this. There is nothing unusual in such an *onus* having to be discharged."

[27] Given the circumstances of this case, and the approach to be adopted when deciding an application for final relief on affidavit, I am not persuaded that the *onus* was discharged by the applicant. Where the father was deprived of his property through a fraudulent scheme which was void *ab initio*, as illustrated, I cannot see how it can be considered to be just and equitable to evict the first respondent, who has been staying on the property for some 19 years, and his siblings and mother.

[28] More details about the legal position, under these circumstances, will be set out hereunder.

[29] Inasmuch as it was argued on behalf of the applicant that the first respondent does not have the necessary *locus standi* to resist this application (the argument may have been aimed mainly at the launching of the counter-application which has been withdrawn) I am of the view that the first respondent has a real and substantial interest in the outcome of the case, for obvious reasons, and, as such, has the necessary *locus standi* to conduct the defence.

<u>The property was never validly transferred to the investors</u>

[30] Counsel for the first respondent argued, correctly in my view, that there are two requirements for the passing of ownership of immovable property: first, at the moment of passing ownership, the transferor must have the intention of transferring ownership, and the transferee must have the intention of taking transfer of ownership.

Second, the passing of ownership must be registered in the Deeds office.

[31] The mere registration of transfer is insufficient: ownership does not pass without the requisite intention by both parties. In *Legator McKenna Incorporated and another v Shea and others* 2010 1 SA 35 (SCA) the learned Judge of Appeal sets out this two-fold test as follows at 44G-J:

> "In accordance with the abstract theory (my note: of transfer, including the transfer of immovable property) the requirements for the passing of ownership are two-fold, namely delivery – which in the case of immovable property is effected by registration of transfer in the Deeds office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (here follows a reference to some reported judgments). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement ..."

[32] In this case, although the property was registered as transfered from the father to the investor (and later, it seems, to a second "investor", Van Eeden), the father never intended to transfer the property as repeatedly stated by the first respondent, which version must be accepted, and, on the overwhelming probabilities given the nature of this case, is the correct version. Moreover, the "investor" never intended to take

ownership of the property. This much appears from the structure of the fraudulent scheme, to which I have referred in some detail. At all relevant times the father believed that he was simply entering into a loan agreement. He never contemplated the transfer and resale of the property which, as described, was a simulation, and a fraudulent, unlawful one at that.

[33] In the result, so counsel for the applicant argued, in my view correctly, the purported transfer to the "investors", and the mortgage bond that led to the execution against the property are void, and every subsequent transfer of the property must fall away. This was definitively established by the Supreme Court of Appeal in the case of *Nedbank v Mendelow* 2013 6 SA 130 (SCA) which involved the transfer of a fixed property, and subsequent registration of a mortgage bond, on the strength of a forged signature on a deed of sale.

At 135E-136A, the following is said:

> "This court has recently re-affirmed 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. In *Legator McKenna Incorporated and another v Shea and others* 2010 1 SA 35 (SCA) at paras [21] and [22] Brand JA confirmed, first, that the abstract theory of transfer of ownership applies to immovable property, and, second, 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. Thus

while a valid underlying agreement to pass ownership, such as a sale or donation, is not required, there must none the less be a genuine intention to transfer ownership. This principle was unanimously approved in *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 369 and has been followed consistently since then.

However, if the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass: *Preller and others v Jordaan* 1956 1 SA 483 (A) at 496. That principle was applied recently by this court in *Meintjes NO v Coetzer and others* 2010 5 SA 186 (SCA) paragraph [9] and *Gainsford and others NNO v Tiffski Property Investments (Pty) Ltd and others* 2012 3 SA 35 (SCA) paras [38] and [39]."

Conclusion

[34] In view of the aforegoing, it appears that the purported transfer of the father's property to the "investor" (and his successor, Van Eeden) as well as the registration of the mortgage bond had no effect and ownership did not pass to the "investors".

[35] From this it must follow that the property still belongs to the deceased estate of the father so that the executor of that estate, if and when appointed, should be entitled to vindicate the property in these circumstances where, due to fraud and the absence of a real agreement to transfer, and non-compliance with the NCA, ownership did not pass to the investors on whose behalf the bond was registered. The father never intended to

pass ownership and his purported consent to the transfer was vitiated by Brusson's fraud.

[36] As was held in *Mendelow*, because ownership had not passed, the bond registered by the bank was invalid. Similarly, the "investors" never became the true owner or owners of the property, and accordingly could not mortgage the property. Nor could Brusson do so on their behalf. The applicant cannot vindicate property where it is not the true owner thereof.

[37] Mr Ben-zeev also referred me to the recent case of *Quartermark Investments (Pty) Ltd v Mkhwanazi and another* 2014 3 SA 96 (SCA) which also involved a case where the respondent had been fraudulently misled into believing that she was applying for a loan whereas she was persuaded to sign papers leading to the sale of the property. She had no intention to transfer the property.

It was held, at 105B-D, that the aggrieved person was entitled to vindicatory relief and was not required to tender restitution.

[38] In this matter, I was not requested to deal with the issue of restitution, and refrain from doing so.

[39] In all the circumstances, I have come to the conclusion, and I find, that the eviction application must fail.

The costs

[40] I see no reason why the costs should not follow the result of the case.

The order

[41] I make the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the costs.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

6967-2014

HEARD ON: 12 FEBRUARY 2015
FOR THE APPLICANT: J VORSTER
INSTRUCTED BY: M D MITCHELL ATTORNEYS
FOR THE RESPONDENT: O BEN-ZEEV
INSTRUCTED BY: LEGAL RESOURCES CENTRE, C/O GILFILLAN DU PLESSIS