IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3222/2013

In the Application of:

WILHELMINA MADIKA MOGOERA Applicant

and

THABO DAVID BOSAALETSE 1st Respondent
LAURENCE NGOAFELA LEKOATSA N.O 2nd Respondent
MPHO LORRAINE LEKOATSA N.O 3rd Respondent
TSHWEU PETER TSOTETSI N.O 4th Respondent
MANGAUNG METROPOLITAN MUNICIPALITY 5th Respondent

CORAM: DAFFUE, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 26 JUNE 2015

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[1] This is an application for leave to appeal my judgement of 20 February 2015 in terms whereof I dismissed applicant's application with costs.

[2] As arranged with the legal representatives of the parties in accordance with rule of practice 16(5) of this division I considered

the application for leave to appeal in chambers after having received the parties' heads of argument.

[3] I have reflected dispassionately upon my decision to dismiss applicant's application, but I am of the view that no reasonable prospects exist that a court of appeal may disagree with my findings of fact or the law. I refer to my judgment and do not intend to unnecessary repeat any findings. I shall just briefly deal with the aspects raised in the application for leave to appeal and applicant's heads of argument. Most of these arguments have been canvassed fully in my judgment.

[4] The first issue is whether rectification as claimed by applicant could be granted. I stated in paragraph [20] of my judgment read with paragraphs [10] and [11] that no valid deed of sale was concluded and therefore rectification was not possible as a nullity cannot be revived by way of rectification. However I made it clear that even if the document relied upon embodied a valid agreement capable of rectification, two further aspects had to be considered, i.e. both parties must have had an identical intention as to the terms to be embodied in their proposed written agreement and innocent third parties shall not be unfairly affected thereby. There was a serious dispute between applicant and first respondent, the contracting parties, particularly pertaining to whether or not the full purchase price had been paid and whether such acknowledgment of full payment should have been inserted as a term of the agreement to be amended. Applicant alleged that rectification should also entail the insertion of an additional term stipulating that the full purchase price had been paid. First

respondent denied this and averred that an amount of R10 000.00 was outstanding at the stage when the agreement was entered into and that this amount remained outstanding.

[5] It must also be remembered that rectification was sought after the property had been registered in the names of 2nd to 4th respondents as trustees of the Lekoatsa Family Trust and that these trustees where not immediate parties to the agreement. I could not find that the trustees were not innocent third parties and that the proposed rectification would not unfairly affect them. In my view there is no reasonable possibility that a court of appeal would find otherwise.

[6] Applicant relies on 1st respondent's alleged non-compliance with s 19 of the Alienation of Land Act, 68 of 1981 in so far as he as seller was supposed to strictly comply with the notice requirements contained in the section, but failed to do so. Section 19 is contained in chapter 2 of this Act, which chapter specifically deals with the sale of land in instalments and contracts relating thereto. A contract for purposes of chapter 2 and s 19 of the Act in particular is defined as follows:

> **"Contract –**
> (a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over the period exceeding one year;
> (b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take."

It is thus clear that chapter 2 and s 19 in particular do not deal with all deeds of alienation. If it was the case, the parties thereto should have complied with s 6 of the Act which *inter alia* provides for a recording of the contact by the Registrar of Deeds in the Deeds Registry in terms of s 20. There is no merit in applicant's submissions in this regard.

[7] The next aspect to be considered is the validity of the real agreement between 1st respondent and 2nd to 4th respondents. The judgment of the Supreme Court of Appeal in **Lupacchini NO and Another v Minister of Safety and Security** 2010 (6) SA 457 (SCA) is distinguishable. The power of attorney signed by 1st respondent as seller, instructing his conveyancer to register the property in the name of the trustees, was signed prior to the letters of authorisation being issued to the trustees in terms of s 6(1) of the Trust Property Control Act, 57 of 1988. It was signed on the date when the deed of sale between these parties was entered into. I found that the deed of sale, the underlying agreement, was invalid due to the trustees' lack of authority. However, registration of transfer was effected on 20 August 2012, some eleven months after the deed of sale was entered into and long after compliance with s 6. It is accepted as stated in **Quartermark Investments (Pty) Ltd v Mkhwanazi & another** 2014 (3) SA 96 (SCA) at para [24], relying on the judgment of Brand JA in **Legator McKenna Inc** that passing of ownership in immovable property only takes place when there has been delivery effected by registration of transfer, coupled with a real agreement; the essential elements of this real agreement being an intention on the part of the transferor to transfer ownership and

an intention by the transferee as purchaser (the trustees *in casu*) to become the owner of the property. However the **<u>Quartermark Investments</u>** judgment is totally distinguishable from the present matter. In that case Mrs Mkhwanazi had no intention to pass transfer and she was also fraudulently induced to sign the deed of sale, the underlying agreement. I found that the date on which the intention of the parties had to be determined could only be the date of transfer and I'm of the view that another court may not reasonably come to a different conclusion. It might be argued that the intention was formed a short while earlier, e.g. when the purchasers fully complied with all their contractual obligations such as payment of the purchase price, the signing by the parties of all other transfer documents whereupon the conveyancer was instructed to lodge the transfer documents for registration. Judicial notice is taken of the fact that it takes a week for transactions to be registered in the Free State from date of lodgement of the relevant documents.

[8] The last point taken on behalf of applicant is the issue of double sales and the doctrine of notice. I found that in the absence of *mala fides* the trustees as purchasers who had received transfer of ownership were protected. Although there was communication between applicant and 2nd respondent after the deed of sale had been entered into (the underlying agreement which I found to be invalid), the respondents did not have actual knowledge of the first transaction and were at all times *bona fide*. In this regard I had no reason to reject 2nd respondent's version of the events, as supported by 1st respondent.

[9] Consequently the following order is made:

The application is dismissed with costs.

J.P. DAFFUE, J

On behalf of applicant: Adv. N. Snellenburg
Instructed by:
Bahlekazi Attorneys
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On behalf of the 2nd, 3rd & 4th respondents: Adv. P. Loubser
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