

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

Case No: 4463/2013

In the matter between:-

MOTLADIILE FRANK KITSA NO
MOTLADIILE FRANK KITSA

First Applicant
Second Applicant

and

DIKELEDI VICTORIA PALLY MATHIBELI
MANGAUNG METROPOLITAN MUNICIPALITY
MASTER OF THE HIGH COURT, BLOEMFONTEIN
REGISTRAR OF DEEDS, BLOEMFONTEIN

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

JUDGMENT BY: VAN DER MERWE, J

HEARD ON: 29 MAY 2014

DELIVERED ON: 24 JULY 2014

- [1] This application is a sequel in an on-going dispute between brother and sister over the right to immovable property known as [...] M[...] Street, B[...], Bloemfontein, also described as erf [...], M[...] Extension 4 (the property).

- [2] The applicant and the first respondent are two of nine children of their late parents Sedio Jacob Kitsa (Mr Kitsa) and Mittah Kitsa (Ms Kitsa). The second respondent is the Mangaung Metropolitan Municipality (the municipality).
- [2] On or about 22 December 1977 the legal predecessor of the municipality issued a site permit in respect of the property to Mr and Ms Kitsa. At the time the property was vacant land. In terms of the laws of the time, the holders of a site permit only had a right to occupy the property. The ownership thereof remained with the municipality.
- [3] On 31 May 2000 Mr and Ms Kitsa executed a joint will which *inter alia* provided that upon the death of the first-dying of them, the property is bequeathed to the survivor and that on the death of the survivor, it shall devolve upon the applicant, or failing him, the son of the applicant. Mr and Ms Kitsa of course did not at any stage obtain ownership of the property, but I accept that it was intended to bequeath the rights to the property. This may have played an important role in an inquiry in terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988. Mr Kitsa passed away on 22 May 2005, whereafter this will was accepted by the Master of this court. The applicant was appointed the executor of the deceased estate.
- [4] Despite this, the property was sold by the municipality to the first respondent in terms of a deed of sale dated 4 August 2005. Pursuant hereto, the property was registered in the name of the first respondent by the Registrar of Deeds, Bloemfontein on 27 November 2009.

- [5] How this came about, can be gathered from the following documents. The first is a deed of donation purportedly executed by both Mr and Ms Kitsa on 18 August 2004, in terms of which they unconditionally donated their rights to the property to the first respondent. On 1 October 2004 Mr and Ms Kitsa purportedly also ceded all their rights to the property to the first respondent. The document used for this purpose appears to be a standard form required by the municipality and refers to the deed of donation as the basis thereof. On the strength of these documents the first respondent applied for a site permit in respect of the property, which was granted by the municipality on 22 October 2004. It is not clear whether the deed of sale was preceded by an inquiry and determination in terms of section 2 of Act 81 of 1988, but it can be accepted that but for the deed of donation, the deed of sale would not have been entered into and the property would not have been registered in the name of the first respondent.
- [6] Ms Kitsa passed away on 14 March 2013. The applicant was also appointed the executor of her estate. In that capacity as well as in his personal capacity, he essentially asks for an order declaring that in law the ownership of the property did not pass to the first respondent and that the registration of the property in the deeds registry be rectified to reflect that the property vests in the deceased estate of Ms Kitsa. The application is opposed by the first respondent and the municipality.
- [7] The applicant's case is squarely based thereon that the deed of donation is a fraudulent document. He relies on affidavits made by Ms Kitsa on 9 June 2006 and 22 July 2008 respectively, in which she stated that she and Mr Kitsa had no intention to donate the property or

any rights in respect thereof to the first respondent and that her thumb print on the deed of donation was obtained by the false representation by the first respondent that the document related to insurance of the property. The first respondent denied that Ms Kitsa would make any such statement but did not object to the admissibility of the statements as such. The statements are in my view admissible in terms of section 34 of the Civil Proceedings Evidence Act 25 of 1965 and it is not necessary to consider whether they should be admitted in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988. The weight of this evidence must of course be considered in the light of all the circumstances of the case, as is mentioned in section 35 of Act 25 of 1965.

- [8] On behalf of the applicant it is argued that if the deed of donation was fraudulent, there was no real agreement to transfer ownership to the first respondent and that ownership did not pass despite the registration in the name of the first respondent. This argument may be accepted on the strength of the principle that where the underlying agreement is tainted by fraud, ownership does not pass. See **Nedbank Ltd v Mendelow NO** (686/2012) [2013] ZASCA 98 (5 September 2013) paras [12] – [14] and **Quartermark Investments (Pty) Ltd v Mkhwanazi and Another** 2014 (3) SA 96 (SCA).

- [9] But the question is whether a finding can be made on the papers before me that the first respondent obtained the deed of donation by fraud. This is vehemently denied by the first respondent. She states that the reason why her parents donated the property to her and allowed her to obtain the site permit in respect thereof, was that she provided all the

finances for the erection of the dwelling on the property during the late 1970's and early 1980's. She says that this was confirmed at a family meeting held during October 1999. In both respects she is supported by a confirmatory affidavit of her brother, Mr Pule Patrick Kitsa. That these averments are at least not recent fabrications, appear from the fact that they were made in a letter written on behalf of the first respondent by Legalwise to Mr Kitsa dated 20 April 2004.

[10] There is therefore a factual dispute on the material question whether the deed of donation was obtained by fraud. There are probabilities on the papers that tend to support the applicant's case, but factual disputes in motion proceedings cannot be decided on probabilities. It is trite that the version of the first respondent must be accepted for purposes determination of the application unless it is so clearly untenable or farfetched that it can be rejected out of hand. For the reasons mentioned, this is not possible. After an adjournment to take specific instructions on this point, counsel for the applicant informed me that the applicant does not ask that the issue be referred for the hearing of oral evidence.

[11] It follows that the application must be dismissed. Costs should follow the result. There is no justification for the special order of costs asked by the first respondent and the municipality.

[12] In the result the following order is made:

The application is dismissed with costs.

C. H. G. VAN DER MERWE, J

On behalf of applicant:	Adv. D. R. Thompson Instructed by: SMO Seobe Attorneys Inc BLOEMFONTEIN
On behalf of first respondent:	Adv. D. M. Gruwer Instructed by: Vosloo Attorneys BLOEMFONTEIN
On behalf of second respondent:	Adv. W. A. van Aswegen Instructed by: Phatshoane Henney Attorneys BLOEMFONTEIN

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