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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LORD INVESTMENTS

(PROPRIETARY) LIMITED APPELLANT

and

MOCASTA INVESTMENTS

(PROPRIETARY) LIMITED RESPONDENT

CORAM : RABIE, CJ, JANSEN, VILJOEN, HEFER
et SMALBERGER, JJA

HEARD : 24 FEBRUARY 1986

DELIVERED : 24 MARCH 1986

J U D G M E N T

VILJOEN, JA

In/.....

In 1967 Habibourham Ebrahim Mota ("Mota") and his wife Katy Mota wished to acquire two properties, lots 237 and 238, in Fordsburg, Transvaal. A company, Mocasta Investments (Proprietary) Limited (the present respondent) was formed to purchase these two properties. That purchase was duly effected. For reasons which are not now relevant Mota had to resort to a nominee ship for the purpose of holding his share in the company. His nominee was one P A van Tonder. Two shares in the respondent were issued, one to van Tonder, and the other one in the name of Katy Mota.

Mohamed Ismail Cassim ("Mohamed"), (the third respondent in the Court a quo) was, as far

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as the matters of the respondent were concerned,
the Motas' confidant and trusted adviser. Their
trust was misplaced, however, because in 1970,
by a series of fraudulent manoeuvres Mohamed, in
an endeavour to gain control of the respondent,
caused the one share which van Tonder held, to be
transferred into the name of one I N Verwey and
a third share to be issued to his brother, one
C T Verwey. Both brothers acted as his nominees.
When Mota discovered this he instituted an action
in the Witwatersrand Local Division to get his
share back and to have the share issued in the name
of C T Verwey cancelled so that he and his wife could
regain control of the company. After a lengthy

trial/.....

trial Eloff J who heard the matter delivered a judgment in favour of Mota on 17 October 1980 and made an order declaring Mota to be the beneficial owner of the share in the respondent previously held by van Tonder. He further ordered the defendants (i e Mohamed and the two Verweys) to ensure that such share be transferred into the name of Mota and that the third share in the name of C T Verwey be cancelled. To mark his displeasure at the fraudulent conduct of Mohamed and the two Verweys he ordered them jointly and severally, one paying the other to be absolved, to pay all the costs of the plaintiff on an attorney-and-client basis up to and including the first

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day of the trial. He ordered the further costs to be paid on the party and party scale. An appeal against the judgment of Eloff J was heard in this Court on 11 March 1983 and was, by judgment delivered on 29 March 1983, dismissed.

Thereafter, at the beginning of April 1983 C T Verwey forwarded to the offices of the Motas' attorney books of account, bank statements, the memorandum and articles of association of the respondent, as well as share certificates and share transfer forms. This was done, the Motas believed, in pursuance of the judgment of Eloff J which was upheld by this Court and they felt secure that they were now properly re-vested with the control of the

respondent/.....

respondent. Their belief was short-lived, however, because shortly after the judgment of this Court they were rudely shocked and shaken out of their complacency when they discovered that the respondent had, by a further series of fraudulent transactions perpetrated, they suspected, by Mohamed and C T Verwey in the period between the judgment of Eloff J and the dismissal of the appeal by this Court, been stripped of its only assets. It is common cause that on 28 October 1981 a transfer of the properties was effected from the respondent to C T Verwey for an alleged consideration, as stated in the Deed of Transfer, "in settlement of a debt of R21 000 owing by the company to the said Cornelius Tobias Verwey",

and/.....

and that on 9 February 1983 a further transfer of the properties was effected from C T Verwey to the appellant, it being alleged in the Deed of Transfer that "the property was sold on the 21st day of May, 1982, for the sum of R75 000".

On the same day a bond was registered in favour of Verwey securing an alleged indebtedness of the appellant to Verwey of R50 000. For the purposes of this judgment it is not necessary to unravel the whole tangled skein of chicanery which resulted in the said transfers. Suffice it to say that when the Motas discovered that their company, the respondent, had been denuded of its assets and when no heed was given to their

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demand to have the properties retransferred to the respondent, Mota was obliged, once more, to resort to legal proceedings, this time not on his own behalf but on behalf of the respondent. This was done in the form of an application on Notice of Motion before the Witwatersrand Local Division.

The matter was set down for hearing on 27 September 1983 and was heard by Coetzee J on 30 September 1983.

It was brought against appellant, as first respondent, C T Verwey as the second respondent, Mohamed as the third respondent and the Rand Townships Registrar as the fourth respondent.

On the day of the hearing the learned

Judge a quo made the following order:

"1. Directing/.....

- "1. Directing the First Respondent to sign and execute all such documents as may be necessary to enable transfer of the immovable properties, stands 237 and 238 Fordsburg, Johannesburg to be registered in the name of the Applicant.
2. Authorising the Deputy Sheriff to sign and execute all documents referred to in paragraph 1 above in the event of the First Respondent failing to do so within a period of seven days after having been directed to do so, by this Court.
3. That the First and Second Respondents jointly and severally pay all such necessary costs as may be incurred in order to effect transfer of the said immovable properties in the name of the Applicant.
4. Cancelling the mortgage bond number B2649/83 registered in favour of the Second Respondent in respect of the immovable properties, stand numbers 237 and 238 Fordsburg, Johannesburg.

5. Directing the First and Second Respondents to pay the costs of this application jointly and severally on the party and party scale."

The learned Judge added that reasons for this order would be given by him upon request of any of the parties. There was such a request by the appellant and the learned Judge gave reasons which were followed by an application for leave to appeal, which was dismissed. This appeal is before us, however, by virtue of leave granted by this Court.

When the matter was called before Coetzee J the learned Judge had before him the founding affidavit, answering affidavits by C T Verwey and Mohamed and replying affidavits made by Mota

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on behalf of the respondent. Although the Notice of Motion and accompanying affidavits had been properly served upon the appellant at its registered address, that of a firm of auditors, and a notice of intention to defend had been served by attorney Sader on behalf of the appellant, no affidavit on its behalf was timeously filed. When the case was called the appellant was represented by counsel who tendered and handed up from the bar an affidavit made by one Abdul Samed Cassim ("Abdul") on behalf of the appellant. Counsel said he would apply for condonation of the late filing and informed the Court that the affidavit contained the reasons for the late filing of the affidavit and also dealt with the merits. The application for condonation was not immediately fully argued because counsel for the respondent first argued a preliminary point.

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From the reasons which the learned Judge furnished at the request of the appellant it appears that he did not allow the affidavit. He says:

"Regarding Lord's application for leave to file the answering affidavit, I was, to put it mildly, very unimpressed with the explanation of the first respondent of its omission to file and felt that it had not made out a case for the exercise of my discretion in its favour. I did not allow the affidavit. Hence the first respondent's counsel had nothing meaningful to say in support of his client's case in the absence of any opposing affidavit on the merits."

Leave to appeal was sought on the ground, principally, that the learned Judge had not afforded the appellant's counsel an opportunity of addressing argument and

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making submissions on the application for condonation or on the merits of the application. This implication the learned Judge greatly resented and, in his judgment refusing leave to appeal, he dealt at length and in considerable detail with what, as he recalled events, happened when he heard the application. From this judgment it appears that during the lunch hour adjournment the learned Judge considered the point in limine taken by counsel for the respondent. He quickly decided that the point had no merit and spent the rest of the lunch hour reading the papers and written argument handed up by counsel for the respondent. When the Court resumed he, without announcing what his decision was

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on the preliminary point, called upon counsel for all the parties to address him on the "merits", by which he meant, presumably, everything excluding the point in limine which was a law point. It would, therefore, include the issue as to whether the affidavit concerned should be allowed. From the narrative given by the learned Judge in his judgment the impression is gained that counsel for the appellant was completely dumbfounded and had nothing or very little to say. Counsel for Verwey and Mohamed, when called upon in turn thereafter by the learned Judge to address the Court, intimated that they were not opposing. Counsel for Verwey admitted that his client was a socius criminis and had to pay the costs and counsel for Mohamed merely urged that his client

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should not be ordered to pay costs. When counsel for the respondent (applicant in the Court a quo) told the learned Judge that he was not asking for costs against Mohamed that was, as far as the learned Judge was concerned, for practical purposes the end of the matter and he proceeded to make the order.

The argument on appeal was directed mainly against the learned Judge's refusal to allow the affidavit made on behalf of the appellant. It was contended that the learned Judge committed an irregularity by disallowing the affidavit tendered on behalf of the appellant without affording appellant's counsel an opportunity to address the Court. The appellant was, accordingly, not afforded a

proper/.....

proper hearing. The order of the Court a quo should, it was urged, therefore be set aside and the matter remitted to the Court a quo for hearing before another Judge; in the alternative, if the order of the Court a quo be not set aside in toto then the learned Judge's decision to disallow the appellant's affidavit should be set aside and the matter remitted to the Court a quo for further hearing on the basis of the appellant's affidavit having been admitted; in the further alternative, if the matter be not remitted as aforesaid, then either the application should be dismissed because the respondent had failed to make out a case against the appellant or the matter should be

remitted/.....

remitted for trial or for the hearing of oral evidence.

The submission that the respondent (applicant in the Court a quo) had failed to make out a case against the appellant (first respondent in the Court a quo) is based on the allegation in Mota's founding affidavit that it was Mohamed who had been responsible for the flotation of the appellant and for the transfer of the properties from Verwey to it whereas, as appears from the affidavit which was not allowed, it was another Cassim, Abdul, who was responsible for the appellant's incorporation. Abdul alleges in his affidavit that he was completely unaware of the involvement of his brother Mohamed in a court case concerning the properties. There was

no denial of that fact, it was pointed out, and if the affidavit be allowed, as it should have been, the appellant's title to the properties would be unassailable, it was submitted.

It is true that it appears from Mota's founding affidavit that when inquiries were instituted and it was learned that a Cassim had been involved in the flotation of the appellant, Mota assumed that it was Mohamed. But that appears to me to be immaterial for the purposes of the respondent's case.

Abdul deals in his affidavit with the reasons for the late filing thereof. Although I am, like the learned Judge a quo

unimpressed/.....

unimpressed with the explanation by Abdul for his failure to file the affidavit timeously, I do not find it necessary to deal therewith. Nor do I find it necessary to decide whether counsel for the appellant was deprived of the opportunity to address the Court. I do not agree that, if Mota laboured under a mistake about the two Cassims, that destroyed his case against the appellant. A very strong case of fraud was made out against Mohamed and Verwey. That is, as I shall presently show, as far as the respondent needed to go. As far as the case against the appellant is concerned the position is, therefore, exactly the reverse of that contended for by the appellant - it was the appellant

which/.....

which failed to make out a defence against the respondent and not the respondent which had not made out a case against the appellant. In his judgment on the application for leave to appeal the learned Judge dealt fully, although belatedly, with the veracity of the contents of Abdul's affidavit. He said:

"If ever there was a case where one could say with complete confidence that deponents were lying 'on paper', this is it. It is the first time in my experience on the bench that, in the words of an illustrious ex-colleague, 'the typewriters lied'. At a furious pace, I might add."

I am inclined to agree.

I do not/.....

I do not, however, find it necessary to consider whether Abdul lied on paper. I shall accept his allegations at face value and deal with the matter on the assumption that Abdul was bona fide in his dealings with Verwey.

It is quite clear from the history of the matter and the judgments in the proceedings before Eloff J and before Coetzee J in the Court a quo that both Mohamed and Verwey acted throughout in a highly fraudulent manner and that neither of them ever obtained a good title to the properties. The learned Judge dealt as follows with the deceit perpetrated by Mohamed and Verwey:

"Verwey says that whatever he did was done as nominee of Cassim and that he was instructed

by/.....

by the latter to do whatever was done by him. There was never R21 000 owed to him by Mocasta, nor is he entitled to the R50 000 in respect of which the bond was registered. These amounts, he says, were, according to Cassim, owing to him and he, Verwey, figures solely as the latter's nominee. I repeat in parenthesis that throughout the history of this litigation, which includes the trial before Eloff, J, Verwey had taken up this attitude, namely that nothing was due to him eo nomine - as Eloff, J put it, 'Cassim emerged as the real disputant' and this was also common cause as far as Cassim was concerned.

Turning now to Cassim's affidavit. This 'real disputant' now denies that he was in any way 'privy or a party to the transfer of the immovable properties'. He asserts that the R21 000 was indeed a debt owing to Verwey, that the latter acted on his own in transferring the properties to the First Respondent, that he had nothing to do with the latter's incorporation with whom he 'is in no way connected'. He distances himself utterly and completely from the whole affair and pretends that his nominee acted as a principal in these transactions.

Against/.....

Against the background which I briefly summarised, and which is common cause, this scenario, if it were not so riddled with fraud and deceit, would be hilarious and fit for treatment by masters of comedy of the ilk of such as Gilbert and Sullivan. Imagine these two main dramatis personae, who are the central characters in the web of deceit right from the beginning, now running away as fast as they can from their so-called assets, from their so-called bonds and from the First Respondent in whose lap they had deposited the properties, each loudly proclaiming his own innocence and putting the blame on the other."

The learned Judge concluded:

"As far as the merits are concerned very little further need be said. The Applicant relies on these facts which I have dealt with, for its assertion, that through the fraud of the Respondents, it had been deprived of its property. It is evident and there is no doubt whatsoever that these so-called transfers in 1981 or in 1983 were no more than simulated transactions in fraud of the company Mocasta and the

Applicant/.....

Applicant is clearly entitled to restitutio in integrum, that is to the return of its property, be it by declaration that these transfers are void or as is presently prayed, an order that they be re-transferred— free of bonds."

In his affidavit Abdul does not deny that Mohamed and Verwey fraudulently deprived the respondent of its properties. He merely says:

"I emphatically deny that the conduct of Lord Investments or of myself was in any way whatsoever fraudulent. I have no knowledge of the conduct or motives of second respondent or others, and respectfully submit that applicant should not impute the motives of others to me."

Counsel for the appellant relied on two propositions for contending that, even though Verwey might have been fraudulent, the appellant, if it

were/.....

were bona fide, acquired good title to the properties. One is that our law in this respect is based on the so-called abstract theory which means, if applied to the present case, that the effectiveness of the act of transfer from Verwey to the appellant must be determined separately from any preceding causa; all that was necessary is that both parties intended that ownership should pass. The second proposition is that the appellant could rely on the deeds register which showed that Verwey was the registered owner.

It /.....

It may be our law that the so-called abstract theory applies, a subject which is discussed by Prof J E Scholtens, Justa Causa Traditionis and Contracts induced by Fraud, 74 SALJ (1957) at 280 - 295 and Professor C G van der Merwe, Sakereg at 204 - 210. For the reasons which follow this theory does not, however, assist the appellant and accordingly I do not find it necessary to consider it.

For ownership to pass the parties

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to a contract of sale must at least have the animus transferendi and the animus accipiendi dominii (Van der Merwe, op.cit. 202) but another essential requirement for the passing of ownership is that the transferor must be competent in law to transfer ownership. With certain exceptions (none of which is present in this case) nobody can transfer more rights than he himself has: Nemo plus juris ad alium transferre potest quam ipse habet. Subject to certain limitations (see Van der Merwe, op. cit. 245) the owner can vindicate his property from a third party whether the latter be mala or bona fide (Van der Merwe, op. cit. 236). None of the limitations applies in this case.

In the/.....

For present purposes this Court need not consider whether the contract between Verwey and the appellant is void or voidable. Nor are we concerned with fraud inducing a contract. The fraud perpetrated by Verwey was much more fundamental because he appropriated properties to which he had no title whatsoever. He in fact stole the properties. Whether he did so with the collaboration or connivance of Mohamed is immaterial. The transfer to him was a complete nullity.

But, it was argued, the properties were registered in the name of Verwey and a bona fide purchaser for value from a seller in whose name property is registered in the deeds register

acquires/.....

acquires an indefeasible title. Reliance was placed on a number of decided cases, but more particularly on two : Milne N O v Singh N O and Others 1960 (3) S A 441 (D) at 446 D - E, 449 D - 450 G and 451 G - 452 B and on Swanepoel v Keeley and Coleman 10 G H C 48.

While the registration in the deeds register goes some way towards protecting an owner's right in his property and may be relied on by a third party who enters into a transaction with such an owner, it does not go the length of providing absolute security for the latter in his dealings with a person who has fraudulently succeeded in having the property registered in his name. (See

Van der Merwe, op. cit. 232) In Singh's case,

supra, Maduray was half-owner of the property

with his wife during her life-time and the

property was properly and lawfully registered

in his name. The case is, therefore, distinguish-

able from the present case. In Swanepoel's

case Lange AJP said at 49 in fine:

"When once a bona fide purchaser has obtained title in the Land Registry of the Colony he cannot be ousted from his title by one who alleges fraud on the part of the seller to him."

It was submitted by Professor Scholtens

(op. cit. 293) that Swanepoel's case was wrongly

decided. In Mare v Grobler NO 1930 TPD 632 Tindall J

doubted,/.....

doubted, at 640, the correctness of the judgment.

I have no hesitation in saying that the judgment

was wrong. The other cases relied on do not

support the appellant - least of all does the

decision in the matter of Mngadi N O v Ntuli and

Others 1981 (3) SA 478 (D) do so. See the

remarks of Page J at 484 F - 485 B.

Estoppel was initially relied on by

the appellant but was, in the course of the argument,

abandoned. Estoppel was not pleaded and it is

difficult to conceive how, on the facts, estoppel

could ever be relied upon. It was contended, however,

that, if the appellant were bona fide, this would be a

compelling consideration of fairness within the

broad/.....

broad concept of the exceptio doli which should

be taken into account. For this proposition reliance

was placed on paragraph (b) of the following dictum

from the judgment of Holmes JA in Oaklands Nominees

(Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd

1976 (1) SA 441 at 452 A - C:

"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only -

(a) where the person who acquired his property did so because, by the culpa of the owner, he was misled into the belief that the person from whom he acquired it, was the owner or was entitled to dispose of it; or

(b)/.....

(b) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the exceptio doli.

See Grosvenor Motors (Potchefstroom) Ltd v Douglas, 1956 (3) S A 420 (A D) Johaadien v Stanley Porter (Paarl) (Pty) Ltd, 1970 (1) S A 394 (A D) at p 409."

In my view, the circumstances that the appellant is now registered as the owner in the deeds register and that he acquired the properties bona fide can certainly not, standing by themselves, be the compelling considerations contemplated by the learned Judge of Appeal.

The appeal is dismissed with costs,

including/.....

