

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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H. LOUW 24 May 2024

CASE NUMBER: 2022/19768

In the matter between:

TINTSWALO NKWASHU

Applicant

and

MASTER OF THE HIGH COURT OF SOUTH AFRICA

First Respondent

REGISTRAR OF DEEDS

Second Respondent

LEFA LEBELO N.O

Third Respondent

MOKGADI LINDIWE MAAKE

Fourth Respondent

CERTUS PROPERTY SOLUTIONS CC

Fifth Respondent

NCHUPETSAG INC.ATTORNEYS

Sixth Respondent

MASINA ATTORNEYS

Seventh Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 24 May 2024

JUDGMENT

LOUW H AJ:

[1] This application has its origin in the passing away of Anastachia Shibe Lebelo (“the deceased”) on or about 7 February 2006. At the time of her passing away her daughter, the current applicant was 9 years of age and the third respondent, her son being a 13 years of age, they being the only surviving children of the deceased also falling under the care and guardianship of their maternal grandmother, Msesi Lephina Lebelo.

[2] The deceased passed away without a Will and was the sole owner of the property described as Unit [...] V[...] S[...], Johannesburg (“the property”) situated at 1[...] R[...] Road where the applicant and third respondent resided, they being the only apparent heirs of the deceased estate. The applicant currently residing there with her uncle, Lesetja Albert Lebelo with the third respondent being admitted to Tara Hospital in Johannesburg in the psychiatric ward suffering from schizophrenia.

[3] The first respondent, the Master of the High Court (“the Master”) is cited as a public official appointed in terms of section 2 of the Administration of Estates 66 of 1965. The second respondent is the Registrar of Deeds cited as a public official appointed in terms of section 2 of the Deeds Registry Act 47 of 1937 is to bring responsibility to, amongst others, attest or execute and register deeds of transfer of land.

[4] The fourth respondent, Mokgadi Lindiwe Maake was cited herein in that she had acquired the property by way of a sales transaction at a public auction on 28 July 2024 at a purchase consideration of R 1,200,000.00.

[5] the fifth respondent is Certus Property Solutions CC having been nominated, constituted and appointed by the third respondent by way of an Irrevocable Special Power of Attorney granted on or about 25 January 2018 to, amongst other appoint any estate agent to affect the sale of the property to give effect thereto.

[6] The sixth and seventh respondents are firms of attorneys having participated in and giving effect to the sale transaction.

Background

[7] Because of an eviction application seeking the eviction of Lesetja Lebelo from the property during or about 2018 it was discovered by the applicant that the third respondent was appointed as the Executor of the deceased estate on 8 of December 2016.

[8] On investigation of the matter the applicant eventually discovered, on a perusal of the files of the Master that a Nomination Form had been signed by her nominating the third respondent to be appointed as the Executor of the deceased estate bearing a signature not of the applicant, it being a forgery and also supported by a copy of a fraudulent identity document purporting to be that of the applicant.

[9] The applicant then, on or about 10 February 2020 informed the Master of the improper appointment based upon fraudulent documents, disputed the appointment and requested the Master to change the executorship and Letter of Authority to both her and the third respondent which was not given effect to by the Master but for addressing correspondence to the third respondent requesting him attend to the Master's offices on 19 February 2020 and in the event of his failure to do so, decision could be made by the Master binding the third respondent in his absence, also requesting the return of the original Letter of Executorship in his favour.

[10] The Master further advised that the applicant contact the legal representatives of the third respondent, they being the sixth respondent which she did. The

representatives of the sixth respondent advised her to complete the necessary forms to report the Estate to the Master which she did, the sixth respondent then informing her that they would submit the necessary documents to the Master and make representations that she also be appointed as an executor to the estate. In addition, she was further informed by the sixth respondent that they were in possession of the original Letters of Executorship and that it would not be possible for the third respondent to use it without their knowledge and consent.

[11] The applicant also instituted proceedings against the third respondent during 2022 under case number 096/3/2022 which matter is still pending.

[12] On or about 30 October 2021 Lesetja Lebelo received a letter of eviction via email from the fourth respondent's legal representatives, JM Claasens Attorneys informing her that the fourth respondent had purchased the property which was registered in her name.

[13] Subsequent thereto and on 3 December 2021 the fourth respondent commenced with eviction proceedings out of the Randburg Magistrate's Court under case number 29332/2021 which was supposed.

[14] The applicant further requested a copy of the Liquidation and Distribution Account from the Master which was not on file and she, as an apparent beneficiary not having received any of the proceeds of the sale of the property in the amount of R 1,200,000.00, neither the sixth nor the seventh respondents providing any information to the applicant.

[15] The applicant expressed the view that the sale, transfer and registration of the property was premised on fraud requiring appropriate relief, essentially a declaration that the sale and transfer to be null and void without effect.

[16] The applicant commenced with application proceedings seeking following relief:

1. *Declaring the appointment of the 3rd respondent as the Executor of the estate of late Anastacia Shibe Lebelo under Estate Number 028454/2016 by the 1st Respondent null and void,*
2. *Directing the 1st Respondent withdraw and cancel the Letters of Executorship sued under estate number 0028454/2016 on the names of the 3rd Respondent,*
3. *Directing 1st Respondent to appoint both Applicant and the 3rd Respondent and joint Executors of the state of late Anastacia Shibe Lebelo under Estate Number 028454/2016,*
4. *Declaring the sale of the Immovable Property described as Unit [...] V[...] S[...] Johannesburg invalid,*
5. *Declaring 1st Respondent cancel and reverse the Deed of Transfer issued under number T70249/2022, in terms of section 6 of the Deeds Registry Act 47 of 1937, and re-registering the Immovable Property described as Unit 2 Villa Sheugnet Johannesburg, situated at To the names of both the Applicant and the 3rd Respondent,*
6.,
7.

In Opposition thereto

[17] the fourth respondent opposed the relief sought filing an Answering Affidavit, filed late for which condonation was granted. Neither of the other respondents including the Master and the Registrar entered into the proceedings and did not file any affidavits before Court.

[18] The fourth respondent raised the two defences, firstly, the Letters of Executorship were not withdrawn by the Master from the third respondent in circumstances where any act performed by him was constituted an administrative action in accordance with the Administration of Estates Act, which actions and legal consequences remain until set aside in circumstances where ownership of the immovable property had passed which cannot be set aside, and secondly that the applicant be estopped in the proceedings in that she did not exercise all remedies

available to her to remove the third respondent as Executor and prevent damages for by the Executor in such capacity.

[19] The fourth respondent could not comment on the allegations of fraud put forward by the applicant and alleged that she was a bona fide purchaser of the property for value and had fully performed under the sale agreement and was therefore entitled to a transfer of the property in her name, and in circumstances where the Master had appointed the third respondent as executor who had been formed an administrative act.

[20] It was argued on the behalf of the fourth respondent that until such time as the administrator's approval is set aside by court proceedings for judicial review, it exists in fact and its legal consequences cannot simply be overlooked. It was further argued with reference to the matter of *Oudekraal Estates (Pty) Limited v the City of Cape Town*¹ that "*the proper functioning of a modern state would be considerably comprised before administrative could be given or ignored depending upon the view the object takes of the validity of the act in question. No doubt it is for this reason that our law has always recognize that even an unlawful administrative act capable of producing legally valid consequences.*"

[21] It was further argued on behalf of the fourth respondent that once a decision of an administrator is set aside, it is only a court of law that has the necessary authority to re-assess the decision and exercise its discretion in determining how to address the invalid administrative act and to make an appropriate order regarding consequent actions performed during the intervening period. With further reference to *Retail Motor Industry Organization v Minister of Water and Environmental Affairs*² it was suggested that a factor to be considered by the Court is "*whether any rights or benefits have been granted-thus it would be unfair to deprive a person of an entitlement that has already vested.*"

¹ 2004 (6) SA 222 (SCA) at paragraph 26

² 2014 (3) SA 481 (CC) at paragraph 26

[22] Similarly, in the *Oudekraal Estates* matter³ it was stated that “*it will be apparent from that analysis that is the extent of the ability or inability of the administrative act will seldom have relevance in isolation of the consequences that it is said to have produced - the ability of the aggressive act might be relevant in relation to some consequences, or even relation to some persons, and not in relation to others - for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.*”

[23] Mr Claassen arguing on behalf of the fourth respondents and suggested that the consequences to be considered were that the fourth respondent had paid the purchase consideration in the amount of R1,200,000.00 and that the property had been transferred into her name conferring rights upon her, she being a *bona fide* purchaser for value who would lose the purchase price and other costs associated with the sale and registration transaction of the property into her name.

[24] On the issue of estoppel it was argued that applicant should have challenged the first and third respondents by setting aside the appointment of the third respondent as executor to protect the Estate and prevent damages from occurring.

[25] Because of the applicant not taking these steps there was a clear and unambiguous representation by the applicant leading to a reasonable belief that the third respondent was entitled to represent the Estate and the fourth respondent relied upon such representation to her detriment. In addition, due to the omission by the applicant she misrepresented to the fourth respondent that the executor was entitled to act on behalf of the Estate inducing the fourth respondent to act, which conduct was sufficient for the applicant to be estopped from raising the third respondents' lack of authority as a ground for setting aside the sale and transfer of the property.

³ paragraph 38

[26] Mr Claassens further argued that because of the unclean hands of the third respondent the relief sought in the Notice of Motion to his benefit was both suspicious and inappropriate requiring the setting aside of the application, with costs.

Considerations

[27] In terms of s 3 of the Deeds Registries Act all real rights in respect of immovable property are registrable. To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied: i) the intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and ii) the nature of the right or condition must be such that the registration of it results in a '*subtraction from dominium*' of the land against which it is registered.⁴

[28] A real right is adequately protected by its registration in the Deeds Office and once registered it is maintainable against the whole world.⁵ We have a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs and third parties cannot place absolute reliance thereon.⁶

[29] The South African law, as provided for in *Legator Mckenna Inc and another v Shea and others*⁷ has adopted the abstract theory in respect of the passing of

⁴ *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* (60/99) [2001] ZASCA 28; [2001] 3 All SA 321 (A) (19 March 2001) at [12]; *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) at 885B

⁵ *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582A

⁶ *Knysna Hotel CC v Coetzee NO* 1998 (2) SA 743 at 753A-D; *Barclays Nasionale Bank Bpk v Registrateur van Aktes* 1975 (4) SA 936 (T); and *Standard Bank van S.A. Bpk v Breitenbach* 1977 (1) SA 151 (T) at 156C-E

⁷ 2010 (1) SA 35 (SCA); *Commissioner of Customs and Excise v Randles, Brothers & Hudson, Ltd* 1941 AD 369 at 398 Watermeyer JA said in respect of the passing of ownership of movable property: "Ownership of movable property does not in our law pass by the making of a contract. It passes when delivery of possession is given accompanied by an intention on the part of transferor to transfer ownership and on the part of the transferee to receive it. . . . If the parties desire to transfer ownership and contemplate that ownership will pass as a result of the delivery, then they in fact have the

ownership of immovable and movable property with there being two requirements that must be met for ownership of immovable property to pass from one person to another; Firstly, there must be a real agreement between the parties with the essential elements being the intention to pass transfer and the intention to receive transfer. The transferor must thus be legally competent to transfer the property and the transferor can only transfer property owned by the transferor. The event of the transferor selling property in his personal capacity property is not owned by the transferor, the transferor will first have to acquire the property to pass transfer to another. Secondly, the property is delivered to the transferee by way of registration in the Deeds Office.

[30] In the event of the underlying sale agreement of the property being defective or invalid and the transferor has delivered the property to the transferee by way of registration, ownership will not pass to the transferee.⁸

necessary intention and the ownership passes by delivery.” This decision was followed in *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 (4) SA 281 (A). At 301 *in fine*-302A Trengove AJA said: “Volgens ons reg gaan die eiendomsreg op roerende saak op ander oor waar die eienaar daarvan dit aan ander lewer, met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak.”

⁸ Silberberg and Schoeman *The Law of Property* 6th Edition 2019, *Quatermark Investments Proprietary Limited v Mkwanzani and another* 2014 (3) SA 96 (SCA) at [24] and [25]: [24] This court, in *Legator McKenna Inc & another v Shea & others* confirmed that the abstract theory of transfer applies to movable as well as immovable property. According to that theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction. However, the passing of ownership only takes place when there has been delivery effected by registration of transfer coupled with what Brand JA, writing for the court in *Legator McKenna*, referred to as a ‘real agreement’. The learned judge explained that ‘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’. [25] As has already been mentioned, a valid underlying agreement to pass ownership, such as in this instance, a contract of sale, is not required. However, where such underlying transaction is tainted by fraud, ownership will not pass despite registration of transfer. The high court correctly found that the contract of sale between Ms Mkhwanazi and Quartermark was tainted by fraud. It follows from this and the fact that Ms Mkhwanazi had no intention to transfer ownership to Quartermark that the purported registration of transfer to Quartermark has no effect and Ms Mkhwanazi remained the owner of the property.

[31] It is apparent from the facts of the matter that the appointment of the third respondent was not due to an unlawful decision by the Master but rather because of the third respondent's fraud and misrepresentations with the application of the principle of fraud unravelling everything.⁹

[32] In *Firststrand Bank Ltd t/a Rand Merchant Bank and Another v The Master of the High Court, Cape Town*¹⁰ the court considered the effect of a fraudulent misrepresentation by an attorney to the Master in an application to hold an enquiry in terms of section 417 and 418 of the Companies Act, 61 of 1973. The court held as follows at paragraphs [20] to [22]:

"[20] It is trite that the effect of fraud is far-reaching. In Farley (Aust) Pty Ltd v JR Alexander & Sons (Qld) Pty Ltd [1946] HCA 29; (1946) 75 CLR 487 the High Court of Australia, per Williams J, said this:

'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'

[21] And in Lazarus Estates Ltd v Beasley [1956] 1 QB 702 (CA) at 712 one finds Lord Denning's well known remarks:

'No court on this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.'

[22] In South Africa the 'insidious effect of fraud permeates the entire legal system'. It renders contracts voidable. It is one of the elements of delictual liability. It constitutes a crime. Fraud excludes the effect of an ouster clause in

⁹ *Lazarus Estates Ltd v Beasley* [1956] 1 Q.B. 702 (24 January 1956); *Firststrand Bank Ltd t/a Rand Merchant Bank and Another v The Master of the High Court, Cape Town* case no: 679/13 (11 November 2013), ZAWCHC, 2013, 173

¹⁰ case no: 679/13 (11 November 2013), ZAWCHC, 2013, 173, also referred to in *Moseia and others v Master of the High Court: Pretoria and others* (36201/2018) [2021] ZAGPPHC 37

legislation. See Narainsamy v Principal Immigration Officer 1923 AD 673 at 675. It also nullifies a contractual exemption clause which purports to exclude a party from the consequences of fraudulent conduct. See Wells v SA Alumnite 1927 AD 69 at 72.”

[33] Consequently, the fraud perpetrated by the third respondent on the Master vitiates his appointment as such by the Master. This would further have the effect that any actions taken by the third respondent as a result of this fraud is similarly tainted and has no legal effect.

[34] The question then to be considered is the effect of the order resulting in the transfer of the property to the fourth respondent as *bona fide* purchaser considering the abstract theory in respect of the passing of ownership of immovable property with the two requirements that must be met for ownership of immoveable property to pass; firstly, the real agreement between the parties with its essential elements the intention to pass transfer and the intention to receive transfer and secondly, the property is delivered to the transferee by way of registration in the Deeds Office.

[35] In *Nedbank Limited v Mendelow NO*¹¹ Lewis JA held in paragraph [12]:
“...it is trite that were registration of a transfer of immovable property is effected pursuant to fraud or a forged document ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds registry. Registration is intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office. And it is a source of information about those rights. But registration does not guarantee the title, and if it is affected as result of a forged power of attorney or fraud, then the right apparently created is no right at all.”

¹¹ 2013 (6) SA 130 (SCA)

[36] The Third Respondent, due to his fraud and misrepresentation was never authorised to represent the late estate and as a result he could not in his capacity as “*representative*” of the late estate form an intention on behalf of the estate to transfer the property. Only a true representative or executor of the deceased estate could form an intention to transfer the property, there therefor being no real agreement to transfer and the transfer to the fourth respondent being void *ab initio*,¹² fraud unravels all subsequent transactions, also rendering the real agreement defective which is required to pass ownership.

[37] In the premises, the Applicant is entitled the relief sought in setting aside the transfer of ownership of the immoveable property.

ORDER

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

1. The appointment of the Third Respondent as the Executor of the estate of late Anastacia Shibe Lebelo under Estate Number 028454/2016 by the First Respondent null and void,
2. The First Respondent is directed to withdraw and cancel the Letters of Executorship issued under estate number 0028454/2016 on the names of the Third Respondent,
3. The First Respondent is directed to appoint the Applicant as the Executor of the estate of late Anastacia Shibe Lebelo under Estate Number 028454/2016,
4. The sale of the Immovable Property described as Unit 2[...] V[...] S[...], situated at 1[...] R[...] Road, Athol Garden, Johannesburg is void and invalid,
5. The First Respondent is directed to cancel and reverse the Deed of Transfer issued under number T70249/2022, in terms of section 6 of the Deeds Registry Act 47 of 1937, and re-registering the Immovable Property

¹² *Sterling v Fairgrove (Pty) Ltd and Others* 2018 (2) SA 469 GJ, *Nedbank Limited v Mendelow NO supra*; *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* at paragraph [24]

described as Unit [...] V[...] S[...] situated at 1[...] R[...] Road, A[...] G[...], Johannesburg to the estate of late Anastacia Shibe Lebelo under Estate Number 028454/2016,

6. The Fourth Respondent is to pay the costs of the application.

H. LOUW

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 26 March 2024

Judgment: 24 May 2024

Appearances

For Applicant: M Hlungwane

Instructed by: Legal Aid South Africa
Alexandra Local Branch

For Respondent: JM Claassen

Instructed by: JM Claassen Attorneys