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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 94127/2016

Case No: 64481/2017

- (1) Reportable: NO
(2) Of interest to other judges: NO
(3) REVISED: YES

SIGNATURE:

DATE: 01 July 2024

In the matter between:

MMAMABIRI LEAH KGOELE
(ID Number: 4[...])

Applicant

And

KEY RESULTS PROPERTIES (PTY) LTD
(REG NO: 2007/025924/07)

First Respondent

ERNST PHILLIPUS BLIGNAUT

Second Respondent

THE REGISTRAR OF DEEDS PRETORIA

Third Respondent

SOUTH AFRICAN HOME LOANS

Fourth Respondent

JUDGMENT

LESO AJ

INTRODUCTION

1. This is an application for cancellation of the registration and transfer of the property described as Erf 1[...], Theresapark Extension 1, Pretoria, Registration Division J.R., Province of Gauteng in favour of the first respondents in terms of provisions of Section 6(1) and (2) of the Deeds Registries Act, Act 47 of 1937 (“the Act”), and to cancel all rights accorded to the first respondent by virtue of title deed with title deed Number: T2[...] and to register the above property in the name of the applicant.

BACKGROUND

2. This case involves a dispute over the transfer of property located at Erf 1[...], Theresapark Extension 1, Pretoria, Registration Division J.R., Province of Gauteng which was transferred from the applicant to the first respondent in 2008. The applicant (Leah) alleges that the transfer of the property to the first respondent, Money Box Inv 136 (now known as Key Results Properties) was induced by misrepresentation. The Leah seeks an order to declare the transfer of the property void and the property restored to her ownership.

3. The applicant (Leah) instituted two applications before this court. The first application is under case number: 94127/2016 for the rescission of the Eviction Order granted by the Court in favour of Key Results Properties (the first respondent) on 21 February 2019. The second application is in terms of the provisions of Section 6(1) and (2) of the Deeds Registries Act 47 of 1937 (“the Act”) under case number 64481/2017.

4. The first respondent opposed both applications and the parties agreed that the court would hear the applications simultaneously. The Court will first determine the Section 6 application because the application also impacts the rescission application.

If the applicant succeeds the rescission application also succeeds. A complete eviction application, inclusive of the annexures is attached to the rescission application however the founding papers to the eviction application are not relevant for purposes of deciding the Section 6 application.

5. South African Home Loans (Pty) Ltd ("SAHL") is joined in the proceedings as a party who has a direct and substantial interest in this application because it is a mortgagee in respect of the property in dispute.

COMMON CAUSE FACTS

6. Leah and her late husband purchased a property known as Erf 1[...] Theresa Extension 1, Pretoria, also known as 5[...] W[...] Street, Theresapark, Akasia which was mortgaged by ABSA Bank in the amount of R217 000.00(Two Hundred and Seventeen Thousand Rand) with the mortgage property repayment of R2 170(Two Thousand One Hundred and Seventy Rand) per month. A Foreclosure Order was granted in favour of ABSA after their account fell in arrears during August 2007 with the default amount of R26 020(Twenty-Six Thousand and Twenty Rand) for 12 months.

7. Leah and her late husband went to the first respondent's offices to sign some legal documents including some contracts after the first respondent's agents approached them regarding the property, two weeks before the property was sold on auction approached them. After signing the contracts, from 1 September 2007 they made payment to the first respondent in the amount of R3500 every month. From March 2008 the applicant made payment to the first respondent in the amount of R4 200 per month until January 2011 then a payment of R4600 per month. The last payments were from October 2011 to August 2013 when the applicant made monthly payments of R5000. The total amount paid by the applicant to the first respondent was R331 600.

8. On or about August 2010 Leah and Her husband became aware that the first respondent was the owner of the property and instructed Frank Senoko Attorneys to enquire from the first respondent about the transfer of the property to the first

respondent's name, the letter from part of the evidence bundle before this court.

Allegations of misrepresentation

9. The merit of the applicant's case lies in the allegations of misrepresentation by the respondents which led to the signing of the documents as follows:

9.1 Memorandum of Lease Contract Agreement (Lease Agreement for 12 months from 1 October 2007 to 30 September 2008 in the amount of R3500 dated and signed on 30 August 2007.

9.2 The Offer to Purchase the property for R278 300 was signed on 30 August 2007.

9.3 Power of attorney nominating Jacques Du Preez to act as their agent prepared by the conveyancer, C Botha on 30 August 2007.

9.4 Commissioned Special Power of Attorneys prepared by Janse Van Rensburg nominating Jacques Du Preez to act as their agent on behalf of Leah and her husband on 30 August 2007.

9.5 Memorandum of Lease Contract dated 13 March 2008.

9.6 Power of Attorney to Transfer prepared by Janse van Rensburg signed by Jacques du Preez on behalf of Leah and her husband on 07 December 2007 appointing Liezel Botha as their agent three months later. After the two had nominated Zelda Magrieta Janse Van Rensburg and Zelda Lerina Botha and Jacques du Preez authorized in terms of the special power to pass transfer on behalf of the applicant and her husband.

9.7 On October 2009 Leah and her husband signed an Offer to Purchase to Key Results(PTY) Ltd or Nominee, (the seller) in relation to the same property in the amount of R490 541.00.

10. It is an opportune moment to indicate that all the above-listed documents have challenges that affect their validity. I will discuss those challenges later.

11. The applicant complained that the property was illegally obtained by the respondents because the contracts and other legal documents to transfer the property to the first respondent were signed under the pretence that she was receiving a loan from the first respondent to settle her bond. She contends that she is the true owner of the property because the agreement between her and the respondents is void, therefore the property must be returned to her because the transfer of ownership was invalid. She relied on *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) and *Legator Mckenna Inc & v another Shea and others* 2010(1) SA 35(SCA) in her claim for vindication.

12. The applicant avers that when she and her husband were stressed and panicking that their property was going to be auctioned they were approached by the agents of the first respondent who promised to assist them in rescuing their property from auction. After the meeting with the agents, they went to the respondent's office to sign the documents without reading them because they believed they were signing a loan agreement for the first respondent to settle the bond with ABSA on their behalf on condition that they would pay back the loan in instalment with interest and that their property will serve as a security for the loan and the agreement for a loan had an amount which was repaid in monthly instalment. The applicant relied on *Dole South Africa(Pty)Ltd v Pieter Beukes (Pty) Ltd* 2007(4) SA 577 (C) at 587.

13. In opposition the first respondent refutes the applicant's claim of lack of intention and lack of knowledge on the basis that the very nature and meaning of the various documents signed by the applicant appear clearly from the content of the documents signed by the applicant and her husband, meaning the applicant knew exactly what he was signing.

14. The first respondent relies on the *caveat subscriptor* rule and disputes the applicant's allegations of misrepresentation and lack of intention to sell and pass transfer of the property while admitting all other facts or circumstances that led to the signing of the documents except the allegation on what the agents communicated to

the applicant.

15. The first respondent's arguments were to the effect that the Section 6 application is not *bona fide* because the applicant has no defence in light of the documents signed. The facts in the founding affidavit deposed by the applicant do not demonstrate that the applicant and her husband signed the contracts presented to them in *iustus error* and the authority of *Dole* referred to by the applicant is distinguishable from the facts of the applicant's case because in paragraph 587 of *Dole*, it is stated that *a party to a contract who has concluded same whilst labouring under a bona fide and reasonable mistake as to its contents will not be bound by the provisions thereof*. In the same breath, the counsel representing the respondents admitted that the contracts are not to the best of the standard of a legally binding contract.

16. At the end of his arguments, counsel for the first respondent raised the *point in limine* that the property is encumbered by a mortgage bond bearing mortgage bond number: 2[...] for an amount of R320,000.00 in favour of South African Home Loans (Pty) Ltd ("SAHL") registered on 11 March 2008 and argued with reliance on *Plascon Evans Rule*(see *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*) that the applicant cannot succeed in obtaining the relief applied for in the notice of motion because there she should have foreseen that a dispute of fact would arise however she elected to proceed by way of application proceedings.

17. I was surprised when the counsel for the respondent only raised this issue at the end of his submission because this was not one of the issues to be dealt with by the court in the joint minutes. It is clear from the respondent's replying affidavit and the subsequent submissions that all the averments in the founding are not in dispute. The affidavit contains sufficient evidence and factual averments necessary to support the applicant's cause of action. It is not necessary to seek oral evidence because the respondent raised is not a dispute of fact but a dispute of law which the court swiftly deals with hereunder.

ISSUES TO BE DETERMINED

18. Whether the applicant made a case for cancellation of the title deed in the name of the first respondent and the restoration of the property in her name.

DISCUSSION AND APPLICABLE LAW

19. The dispute relates to the contracts signed by the applicant which caused the transfer of the property to the first respondent's name. The applicable law is a law of contract where the capacity to contract, the purpose of an agreement or contract, the capacity, the offer, the acceptance, awareness and consideration form the essential elements to make a contract legally binding as expressed in literature and case law. The first respondent did not deny that his agents went to the applicant's home two weeks before the applicant's property was to be sold on auction. The circumstances of the case suggest that objectively, the parties had the capacity and the intention to enter or create legally binding contracts on 30 August 2007. The remaining issue in terms of the above elements is whether the applicant was aware of the purpose of the contracts which she was signing.

20. The applicant's case is that the first respondent and its agents coerced her to sign the contract by misrepresenting the purpose of the agreements between them. She denied that she intended to sell her property to the first respondent and denied the monthly payments to the first respondent were for rental but for loan repayment.

21. The onus is on the applicant to prove misrepresentation. She must prove that she did not consent to sell her property and she relied upon the untrue statement which induced her to enter into the contract to succeed with her claim for misrepresentation. Consequently, the transfer of the property to the first respondent will be void because the agreements or contracts signed by the applicant will be declared unlawful and nullified as if they never existed.

22. When dealing with the issue of misrepresentation the court in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) defines a misrepresentation 'as a false statement of fact, not law or opinion, made by one party to another before or at the time of the contract, concerning some matter or

circumstance relating to it'. The fact that the first respondent sent agents to the applicant a few days before the auction, invited her to their office to sign several legal documents and contracts then took payment from the applicant a month after the contracts were signed supports when it was not even the owner of the property which it and later took possession of supports the applicant's case that that the applicant not only misrepresented the true purpose of the contracts but had intention to defraud her and deprive her of her ownership of the property. I will later explain why the first respondent's actions were fraudulent when I discuss the issues I observed on the signed contracts.

23. The applicant denies that she consented to sell her property to the first respondent and that the contracts she signed were induced by misrepresentation. In *Quartermark* the court said the following about misrepresentation:

'A party seeking to avoid a contract on the ground of misrepresentation must prove that:

(a) the representation relied upon was made; (b) it was a representation as to a fact; (c) the representation was false; (d) it was material, in the sense that it would have influenced a reasonable person to enter into the contract; and (e) it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.' The applicant was already losing her property in two weeks when she was approached by the respondent's agents. It was after meeting the agents that led to the signing of the contract thereafter the applicant made monthly payments to the first respondent until she paid the outstanding mortgage of R331 600 while she enjoyed undisturbed occupation of the property until 2019. The chain of events clearly indicates that the respondents indeed lied to the applicant before or during the signing of the agreements. It is reasonable to accept that the representation or misrepresentation by the respondent that she consented to a loan agreement to save her property from execution was material in the sense that it influenced her to enter into a contract to which she would not have.

24. In *Absa Bank Ltd v Fouche* 2003(1) SA 176 SCA 180 and *Karoo & Eastern Board of Executors & Trust Co v Farr* 1921 AD 413 the following was said with

reference to policy consideration: *A representation is not regarded as wrongful merely because it is false and actually misled the other contracting party, the facts or facts to which the representation relates must fall within the compass of the norm protecting the interest of the negotiating parties against misrepresentation. The misrepresentation must be material or relate to material facts and the facts are material if they are likely to induce someone to enter into the contract.* The fact that the applicant's property was going to be sold in two weeks because she was in default of payment of the Bond, the fact that the first respondent sent agents to the applicant before the auction, then settled the full outstanding Bond with Absa in full while the applicant remained in occupation of the property is material facts which are likely to induce someone to conclude a contract.

25. In *Brink v Humphries & Jewell (Pty) Ltd* [2005] 2 All SA 343 (SCA) the court found that *'the appellant had acted under a misapprehension in signing the credit application form. The next step was the objective enquiry as to whether the reasonable man would have been misled...'* The applicant's version that she believed that she was consenting to the loan agreement is more probable and the argument by first respondent's argument that the applicant was aware that she was signing a sale agreement because of headings or nature and meaning of the various documents signed by the applicant is not plausible because one of the elements awareness in creating a legally binding contract is awareness or meeting of minds. The applicant's case is that she did not read the documents and contracts presented because she was aware that she was signing a loan agreement as presented to her by the first respondent justifies the applicant's claim of *iustus error* and the first respondent's defence of *maxim caveat subscriptor* cannot stand because the circumstance and the fact of the case prove that the applicant made a reasonable mistake in signing a contract without reading them.

26. The following was held in relation to *caveat subscriptor* rule in *Brink* *'The caveat subscriptor rule is based on the doctrine of quasi mutual assent. A party to a contract can rely on iustus error to repudiate his apparent assent to a contractual term if he has not, by his conduct, led the other party, as a reasonable man, to believe that he was binding himself. If the other party caused the iustus error through misrepresentation, then the party relying on the defence is not bound by the contract.*

Such misrepresentation need not be fraudulent. Innocent misrepresentation suffices where it is material, and the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. The fact that the first respondent claim that the applicant is bound by the agreements because he has signed while the counsel representing both could not explain the irregularities in the contract is incomprehensible.

27. The fact that the first respondent expected the applicant to have known and or appreciated what she was agreeing to is not plausible neither does the knowledge by the applicant form a basis for the creation of a legally binding contract. The first respondent's defence that the applicant is bound by the contracts because of what is contained in their headings supports the applicant's case that the documents were not explained to her. The first respondent's reliance on the headings or nature and meaning of the various documents signed by the applicant is frivolous.

28. There are two versions before me as to what the parties agreed to in August 2007. From the events and the circumstances. The first respondent did not dispute the version of events that led to the conclusion of the contracts as averred by the applicant. The only objection related to the circumstance that led to the conclusion of the contracts and the fact that the applicant was not specific about the names of the agents. The rest of the respondent's argument is technical and repetition of the applicant's case. The applicant's version is that the first respondent approached her and her late husband with the promise to assist them in rescuing the house from being auctioned by settling the bond at ABSA Bank on their behalf on condition that the applicant and the respondent would pay back the loan in instalments. The inescapable conclusion is that the applicant's version is the more probable one.

29. It is now convenient to deal with the issues of the problems which are clear from the contracts and other legal documents as listed in paragraph 9 and my finding on fraudulent misrepresentation.

29.1 Offer to Purchase the property signed on 30 August 2007 is incomplete and Ellen J De Wet is a purchaser, not the first respondent. The transfer of

the applicant's property to the first respondent on the strength of this document is fraudulent.

29.2 The Power of Attorney nominating Jacques Du Preez to act as their agent prepared by the conveyancer, C Botha on 30 August 2007 is not un-commissioned. This constitutes fraud.

29.3 There was no purpose in concluding the first lease agreement with the respondent because he was not even the owner of the property and it was absolutely unnecessary to conclude the second lease agreement while there was, according to the respondent, a binding lease agreement which was still in force. The lease agreements signed by the applicant were induced by fraud and are invalid.

30. The court could not overlook the fact that most of the documents do not fit the required standard of a simple contract or a legally binding document. The circumstances surrounding the signing of such contracts are questionable. During the hearing, the court raised concern about the chronology of events that led to the transfer of the property into the hands of the first respondent to which the counsel could not respond. The counsel representing the respondent distanced himself from making any submissions regarding this issue.

31. The respondent relies on the offer to purchase of 9 October 2009 where the respondent sold the immovable property to the applicant in the amount of R490 641.00 after the applicant had paid the full bond amount to the first respondent, this is not idealistic. The fact that the applicant continued to pay for the property he no longer owned and had to buy it again with twice the amount of the original bond she had secured is a travesty.

32. It is clear from the sequence of events that the respondent continued their scheme to defraud the applicant by attempting to sell her a property that she has fully paid for. It is apparent from the sequence of events that the applicant was put in the lion's den to coerce her in her desperate and weakest moment to sign off their property to them. The respondent defence that the state of the legal documents

signed by the applicant is left to be desired. in *African Realty Trust Ltd v Holmes* 1922 AD 389 at 403 it was said: '*But, as a Court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except insofar as they were expressly made part and parcel of the contract or are part of the contract by clear implication.*' In this case, the lease agreements were used to masquerade as a loan agreement in that way the applicant would not notice the true intention or motive of the respondents to transfer her property. It was not unreasonable for the applicant to believe that she had signed a loan agreement which he paid back.

33. There is no logic in the first respondent's submission that the applicant entered into a sale agreement with the plaintiff on condition that she pay the first respondent rental on the property it did not own. The applicant started paying rents in September 2007 while property was only registered in the first applicants in 2008. In *Brink* the court found that a hidden deed of suretyship incorporated in a credit application constituted a trap for the unwary. *Ex facie* the two lease agreement which the applicant was made to sign created a perfect disguise for the respondent and a trap for the applicant to believe that he was actually paying back the loan. The contracts will then be cancelled on the basis fraudulent misrepresentation by the first respondent.

34. It is common cause that the respondents obtained a default court order for the eviction of the applicant on 21 February 2019 and that court order is still in force and is binding on the applicant. The eviction order was erroneously obtained by the first respondent because the first respondent was not the lawful owner of the property. The requirement for eviction is ownership which is lacking in the case of the first respondent. The above order must be rescinded in order to restore the property to the applicant.

35. The circumstance of this case requires the law of natural justice which aim to secure justice and to prevent miscarriage of justice should apply under these circumstances. The applicant did not only lose ownership of her property but she is being evicted from the home she has fully paid with interest. The contracts were solely for the benefit of the first respondent and the transactions with the first respondent left the applicant and her family in a worse-off position. It is time that

justice is seen to be done not only by *vindication* but ensuring that there is nothing that connects the applicant to the respondents and that the applicant's right of ownership is restored without any obligations. This is the only way to ensure reasonableness, equity and fairness under natural justice.

36. In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 and *ST v CT* [2018] ZASCA 73, 2018 (5) SA 479 (SCA) the court held that 'the determination whether an agreement offends public policy entails the weighing-up of competing values. The court had to determine the extent to which a court may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh is a burning issue in the law of contract in our new constitutional era. The applicant has fully paid the bond on the property, she has been paying the Municipal account which included property rates and the account was in her name. She stayed in an undisturbed occupation until the first respondent obtained an eviction against in her absence. On the other hand, the first respondent used the property to make money out of the applicant by recovering the full outstanding bond that it paid to Absa

37. The applicant has fully paid the bond on the property and she is entitled to transfer ownership of the property into her name. The respondent must return the property to the applicant by signing all transfer and necessary documents.

38. The applicant has fully paid the bond on the property and she is entitled to transfer ownership of the property into her name. The respondent must return the property to the applicant by signing all transfer and necessary documents. The respondent paid in full the outstanding mortgage of R331 600 to Absa.

39. I am aware that South African Home Loans (Pty) Ltd ("SAHL") has an interest in the matter because the property in dispute serves as a security. Unfortunately, this is not the time and place to deal with the third party's interest because the property was unlawfully tendered by the first respondent as security. The applicant sought an order that the first respondent be liable to settle in full the existing bond held by the fourth respondent, pay all transfer and related costs and take necessary steps and sign all documents necessary to effect the transfer of the

property known as Erf 1[...], 5[...] W[...] street, Theresapark, Pretoria, Gauteng to the applicant within two months from the date of the order. The court will not grant this order because the bond is contaminated by fraud that led to the unlawful transfer of the property to the first respondent.

40. The order that the first respondent should continue to pay the bond will be scandalous because the first respondent cannot use the applicant's property as security without her consent nor can it obtain a mortgage bond over the property in dispute because it is not the owner of the property despite the registration of the property in its name. The bond with the third party is compromised. In any event, I have no intention to force the applicant into a relationship that never existed or a relationship that was formed by lies. The applicant should be allowed to enjoy his property free from bond or any obligations.

CONCLUSION

41. The evidence before me and the circumstances of this case does not suggest that the applicant consented to sell her property to the first respondent neither does the evidence suggest that the applicant consented to rent her property from the first respondent. A sale agreement that led to the transfer of the applicant's property to the first respondent and the lease agreements signed by the applicant is declared void and invalid because the contracts are tainted by fraudulent misrepresentation.

42. The court will set aside the court order if it is satisfied that the judgment or order obtained by the respondent was erroneously sought or granted as it is not in dispute that the order was obtained in the absence of the applicant

43. The applicant has fully paid the bond on the property and she is entitled to transfer of ownership of the property into her name. The respondent must return the property to the applicant by signing all transfer and necessary documents.

44. The above finding finally settles the eviction order which was granted by the because the remedy for misrepresentation is rescission, similarly, the eviction order

is rescinded.

45. The applicant sought an order for the Registrar of the Court to be authorised to sign all documents and take such steps as necessary to effect the transfer of the aforesaid property if the first respondent fails or refuses to effect the transfer of the property. The court is not inclined to grant this relief because the applicant has a recourse at her disposal should the first respondent not comply with the Order.

COSTS

46. It is clear from the defence or the explanation tendered by the first respondent to this court that the first respondent does not appreciate the harm and the financial strain he has subjected the applicant to. Not only in this matter but the eviction application and the rescission application. I could gather from the first respondent's counsel that the first respondent's business thrives with a similar *modus operandi* when he gave a history of the first respondent's business of buying and selling houses. The applicants should not have been before the courts if it was not for the unlawful conduct of the first respondent and the court should send a strong message to the litigants of the first respondent calibre that frivolous litigation should be discouraged with punitive costs.

47. In *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at para 23 the CC questioned if the punitive scale prayed for was warranted. The CC referred to a matter between the *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8 where Mogoeng CJ noted that 'costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.'

THEREFORE, I MAKE THE ORDER AS FOLLOWS:

ORDER

1. The court order granted on 21 February 2019 for the eviction of the

applicant is rescinded and set aside.

2. The transfer of the property described as of Erf 1[...], Theresapark Extension 1, Pretoria, Registration Division J.R., Province of Gauteng from the applicant to the first respondent ((known as Money Box Inv 135 (Pty) Ltd) is hereby declared void *ab initio* and cancelled.

3. The third respondent is ordered to cancel the Deeds Register of Transfer in respect of the first respondent (known as Money Box Inv 135 (Pty) Ltd) and the Title Deed Number: T2[...]in respect of Erf 1[...], Theresapark Extension 1, Pretoria, Registration Division J.R., Province of Gauteng in favour of the first respondent; and to cancel all rights according to the first respondent by virtue of said title deed

4. The third respondent is ordered to register the property described as Erf 1[...], Theresapark Extension 1, Pretoria, Registration Division J.R., Province of Gauteng in the name of Leah Khoele free from mortgage and any obligations.

5. The first respondent is ordered to pay the cost of this application on an attorney and client scale.

The judgment was handed down electronically and by circulation to the parties/legal representatives by e-mail and by uploading to Caseline. The date of hand- down is the date when the judgment was signed.

**J.T LESO
ACTING JUDGE OF THE HIGH COURT,
SOUTH AFRICA, GAUTENG DIVISION,PRETORIA**

Date of Hearing: 26 February 2024

Date of Judgment: 01 July 2024

APPEARANCES:

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