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

CASE NO: 18797/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: **27 August 2024**

SIGNATURE:

In the matter between: -

MATSHWENE MARIA MAGDALENE SEBONI N.O.

First Applicant

LETHABO EDMUND SEBONI

Second Applicant

And

ABSA BANK LIMITED

First Respondent

SOUTHERN SPIRIT PROPERTIES 87 (PTY) LTD

(in liquidation)

Second Respondent

ASSET MANAGEMENT SPECIALIST (PTY) LTD

(deregistered)

Third Respondent

REGISTRAR OF DEEDS, SOUTH AFRICA

Fourth Respondent

NATIONAL CREDIT REGULATOR

Fifth Respondent

TSHEPO HARRY NONYANE N.O.

Sixth Respondent

ANDREW MAKGOANA KOTLOLO

Seventh Respondent

FIRST RAND BANK LIMITED

Eighth Respondent

PROC CORP 187CC

Ninth Respondent

SB GURANTEE SO (RF) (PTY) (LTD)

Tenth Respondent

JUDGMENT

GWALA AJ

[1] The Applicants seek an order declaring invalid, of no force and effect and setting aside certain documents, including agreements entered into between the applicants and the third respondent which gave effect to the transfer of a property known as Erf 5[...], Pretorius Park, Ext [...], No 1[...] G[...] Drive, Woodhill (the property). In addition, the applicants seek an order declaring that the first applicant in her capacity as a trustee of the Babirwa Trust (the Trust) remains the owner of the property and that the register of deed be authorised to re-register the property in the name of the Trust. In essence, the applicants seek a vindicatory relief.

[2] The applicants contend that the property belonged to the Family Trust (the Trust). The Trust lost ownership of the property through a fraudulent scheme known as *reverse mortgage scheme* perpetrated by the third respondent and associated companies, including the second respondent. At the time when the Trust lost ownership, both applicants were trustees thereof. The second applicant is no longer a trustee. They contend that for their part, they did not consent to the transfer nor did they have intention

to sell their property. They were tricked, by the fraudulent conduct of the third respondent, into signing certain documents that gave effect to the transfer of their property into the names of the third respondent in circumstances where they thought they were signing documents for their application for a loan.

[3] The documents sought to be declared invalid include the following: - (a) a mandate to the third respondent, Asset Management Speciality (Pty) Ltd (henceforth referred to as AMS) to restructure assets of the Trust and to obtain finance; (b) an agreement of purchase and sale of immovable property; (c) a negotiation agreement in respect of proceeds from transfer; (d) an irrevocable letter of authority; (e) an option agreement; (f) an agreement of lease; (g) an acceptance of all costs and understanding to pay all costs due in terms of the property restructure finance plan; (h) a power of attorney to pass bond; (i) a power of attorney to transfer; (j) a client's understanding and undertaking; (k) and release and waiver of liability, (l) assumption of risk and indemnity.

[4] Only the seventh respondent (Mr Kotlolo) opposes the relief sought. Mr Kotlolo is a third party who purportedly acquired ownership of the property from the Southern Spirit Properties 87 Pty Ltd, the second respondent herein, a company associated with AMS.

[5] The facts giving rise to the relief sought are largely common cause, the upshot of which is that the applicants were victims of a reverse mortgage scheme perpetrated by AMS together with several other companies associated with it including the second respondent.

[6] The applicants purchased the property during 2000 as a family home. They owned the property through the Trust. At the time they were joint trustees. At present only the first applicant is a trustee.

[7] The applicants found themselves in financial constraints and during April 2005, the second applicant, at the time still a trustee, was drawn into an advertisement publicly displayed by AMS in the Pretoria News Paper. AMS had advertised that it was offering

financial assistance in the form of loans to people who were in debt, including those whose credit records did not permit them to obtain credit facilities from credit providers.

[8] They approached AMS for financial assistance. They asked for a loan in the sum of R300 000. The aim was to utilise the aforesaid sum to effect some renovations on the property and consolidate their debts. They consulted with one Mr Bernard of AMS who advised that AMS would offer the needed financial assistance on condition that they register a second bond over the property as security for the loan. They were made to sign an application form together with the documents referred to above on the pretence that they would enable AMS to restructure the assets of the Trust, to obtain the loan and to secure and register the second bond over the property. The registration of the second bond would necessitate an increase in their current monthly bond repayment from R7 500 to approximately R10 000. They accepted these arrangements and proceeded to sign the documents on those bases.

[9] At all material times the applicants believed that they were concluding a loan agreement which would be secured by registration of second bond over the property. It was not disclosed to them that the true nature of the documents was that they were transferring their property. For their part, they never had intention to sell the property nor contemplated that by signing such documents they were in fact disposing off the property. Later on, they received a sum of R200 000.

[10] When they did not receive their municipal accounts, the second applicant attended to the offices of the municipality to enquire about the account. He was informed that the property belonged to Southern Spirit Properties, the second respondent in these proceedings. He went to Investec Bank with whom they had a home loan to make enquiries. He was informed that their bond account had been settled during May 2006 with the payment of a sum of R 910 000 which was outstanding then for their home loan.

[11] Notwithstanding the fact that the property had been transferred to Southern Spirit Properties, the applicants remained in occupation thereof.

[12] During 2007, Southern Spirit Properties underwent voluntary liquidation. As a result of its liquidation, during 2011 its liquidators sold the property in a public auction to Mr Kotlolo who registered a bond over the property with the eighth respondent, the First Rand Bank Limited. The applicants still refused to vacate the property contending that it was theirs. However, at a later stage they succumbed due to pressure and safety concerns. They vacated the property.

[13] During 2018, they became aware that there was an imminent sale of the by the auctioneers at the instance of Mr Kotlolo. The second applicant attempted but unsuccessfully to prevent the sale. He instituted an urgent application on 13 September 2018. However, the urgent application was struck from the roll for lack of urgency. The urgent application was opposed by Mr Kotlolo. Eventually, Mr Kotlolo sold the property to the ninth respondent by way of public auction.

[14] As alluded to above, this application is opposed by My Kotlolo only. He opposes the application on the basis that he is an innocent party who did not participate in the fraud perpetrated by AMS and its associated companies. When he acquired the property from the Southern Spirit Properties, so he contends, he had no knowledge of the fraud or the AMS's scheme and therefore he acquired a good title to the property. He invokes the abstract theory of passing of ownership applicable to immovable property. He does not dispute any of the allegations set out in the founding affidavit including the allegations of fraud perpetrated by AMS and that they are victims of the AMS's scheme.

[15] A truncated exposition of the AMS's reverse mortgage scheme is necessary. In terms of the scheme, AMS would lure people (clients) who were in need of financial assistance into believing that it could provide such assistance to them by for instance securing a second bond over their properties. A client would be made to sign some documents purporting to be a loan agreement in which the client's property would supposedly serve as security for the loan. Unbeknown to the client, the documents constituted a sale agreement in respect of the property. Upon signature of the documents,

AMS would surreptitiously sell and transfer the client's property to another entity controlled by the very AMS.

[16] Upon transfer of the property to an entity controlled by AMS, the former would obtain a mortgage over the property with the assistance of AMS, who also would arrange for bond payments. On the other hand, AMS would continue to take monthly payments from the client under the pretence that they were repayment of the loan. At least in this matter the applicants were made to believe that the monthly payments they made were, in fact, towards repayment of the loan.

[17] The property would later be sold back to the client from whom it was surreptitiously transferred. In this regard, a sale by instalment agreement would be concluded. In order to secure the sale back, the client would be granted an option for a consideration equal to 12,5% of the purchase price of the property. This option would be available and exercisable by the client after a period of 18 months against payment of the same purchase consideration. In this matter though, this second transfer did not occur.

[18] In this matter, the applicants' property was transferred to Southern Spirit Properties which was controlled by AMS. The applicants did not know that by signing the documents at the instance of AMS they were actually authorising the transfer of their property. All they were told and understood was that they were merely entering into a loan agreement. They contend that the transaction that resulted in them losing their property was a fraudulent scheme at the instance of AMS. For their part, they never intended to sell nor did they consent to the sale of their property but were tricked into the scheme perpetrated by AMS. They contend that they are entitled to vindictory relief.

[19] I am of the view that the applicants have indeed established that their property was transferred to the third respondent fraudulently. I am satisfied that they never had any intention to transfer their property nor any knowledge that their property was being transferred. The applicants have set out evident that led to the fraudulent transfer of their property to the second respondent and such evidence is not challenged.

[20] The AMS reverse mortgage scheme had been a subject of judicial scrutiny. First, it was the case of *Tshatshu v Standard Bank*,¹ second, it was the case of *Anderson and Another v Standard Bank of SA Limited and Others*.² In both matters the applicants had fallen victim of AMS's reverse mortgage scheme and in a similar manner they lost their properties as the applicants did in the present matter. They approached the court seeking vindicatory relief. The court declared that they were the owners of the property, it set aside the documents purporting to give effect to the transaction and ordered that the property be re-registered in their names because they had never intended to sell nor transfer their property, instead they had been hoodwinked as to the nature of transactions.

[21] It is trite that where a transaction for the transfer of property is underlaid by fraud, the ownership of the property will not pass notwithstanding transfer thereof. In *Nedbank v Mendelow*³ it was held:

“[12] It is trite that where 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 register. 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 title, and if it is effected as a result of a forged power of attorney or of fraud, then the right apparently created is no right at all.

[13] This court has recently reaffirmed the principle that where there is no real

¹ *Tshatshu and Another v Standard Bank of SA Limited and Others* (1787/2014) [2016] ZAECGHC 43 (6 May 2016).

² *Anderson and Another v Standard Bank of SA Limited and Others* (986/2019) [2024] ZAECQBHC 11 (13 February 2024).

³ 2013 (6) SA 130 (SCA) paras 12 to 14

intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect. In Legator McKenna Inc v Shea Brand JA confirmed, first, that the abstract theory of transfer of ownership applies to immovable property, and, second, that if there is any defect in what he termed the ‘real agreement’ – that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively – then ownership will not pass despite registration. Thus while a valid underlying agreement to pass ownership, such as a sale or donation, is not required, there must nonetheless be a genuine intention to transfer ownership. This principle was unanimously approved in Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd and has been followed consistently since then.

[14] *However, if the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass: Preller v Jordaan. That principle was applied recently by this court in Meintjies NO v Coetzer and Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd.” [Footnotes omitted].*

[22] There has been series of decisions of the SCA to the same effect that fraud vitiates consent. For instance, in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*,⁴ the first respondent, Ms Mkhwanazi, had instituted application proceedings against the appellant, Quartermark Investments (Pty) Ltd (Quartermark), claiming that the latter had fraudulently induced her into signing certain sale and lease agreements in respect of her immovable property. Ms Mkhwanazi sought and obtained an order setting aside the transfer of the property to Quartermark; declaring the sale agreements that led to the transfer null and void; directing that the property be transferred into her name.

⁴ 2014 (3) SA 96 (SCA) (1 November 2013).

The SCA with reference to its own jurisprudence⁵ said that where an underlying transaction is tainted by fraud, ownership will not pass despite registration of transfer.⁶ The principle has been confirmed by the Constitutional Court.⁷

[23] Turning to Mr Kotlolo's argument including abstract theory, it is correct that he did not participate in the fraud perpetrated solely by AMS and its associated companies. It is correct too that he is an innocent party. However, reliance on the abstract theory does not assist him since the transfer of the property was tainted by fraud, on the authorities referred to above the transfer of the property never passed from the applicants in the first place. Therefore, the purported transfer of the property by the second respondent to Mr Kotlolo was ineffectual because the second respondent could not transfer ownership of a property it did not own (*nemo plus iuris ad alium transferre potest, quam ipse haberet*) (a non-owner is not capable of transferring ownership).

[24] The abstract theory has been discussed in the authorities above. I may just mention that mere registration of transfer of property does not suffice to pass ownership and importantly, ownership does not pass without the requisite intention by both parties. In the *Legator McKenna*⁸ case, the SCA stated thus:

"[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property, is effected by registration of transfer in the Deeds Office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. 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 (see eg Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein 1980 (3) SA 917 (A) at 922E-F; Dreyer and Another

⁵ *Preller & others v Jordaan* 1956 (1) SA 483 (A) at 496; *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA); *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others* 2012 (3) SA 35 (SCA).

⁶ See Also *ABSA vs Moore and Another* 2016 (3) SA 97 SCA para 36.

⁷ *Absa Bank Limited v Moore and Another* 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC) para 14.

⁸ *Legator McKenna Inc and Another v Shea and Another* 2010 (1) SA 35 (SCA).

NNO v AXZS Industries (Pty) Ltd (supra) para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement (see eg Preller v Jordaan 1956 (1) SA 483 (A) 496; Klerck NO v Van Zyl and Maritz NNO (supra) 274A-B; Silberberg and Schoeman op cit, 79-80).”

[25] Although the transfer of the property from the applicants to Southern Spirit Properties was registered, such registration was ineffectual. The registration of transfer did not divest the applicants of their ownership of the property. The applicants never intended to transfer the property at all nor to sell it. Their signatures were procured by reasons of AMS’s fraud. Their consent to transfer the property was vitiated by AMS’s fraud. Therefore, the transfer of the property to Southern Spirit Properties was void. It follows that despite the registration of transfer ownership, the ownership of the property never passed from the applicants to Southern Spirit Properties and the latter could not transfer further rights it did not have. Accordingly, the applicants succeed.

[26] The next question to consider is costs. Counsel for the applicants indicated that they do not be seeking costs since they are acting *pro bono*.

[27] In the result I make an order in the following terms:

1. The following documents are declared null and void and of no force and effect and are accordingly set aside:
 - (a) a mandate to the third respondent, Asset Management Speciality (Pty) Ltd to restructure assets of the Trust and to obtain finance;
 - (b) an agreement of purchase and sale of immovable property;

- (c) a negotiation agreement in respect of proceeds from transfer;
- (d) an irrevocable letter of authority;
- (e) an option agreement;
- (f) an agreement of lease;
- (g) an acceptance of all costs and understanding to pay all costs due in terms of the property restructure finance plan;
- (h) a power of attorney to pass bond;
- (i) a power of attorney to transfer;
- (j) a client's understanding and undertaking;
- (k) release and waiver of liability; and
- (i) assumption of risk and indemnity.

2. It is declared that the first applicant in her capacity as the trustee of the Trustee of BABIRWA TRUST IT 6554/1998 is the owner of the property known as Erf 5[...], Pretorius Park, Ext [...], No 1[...] G[...] Drive, Woodhill (the property);
3. The first applicant in her capacity as the trustee of the Trustee of BABIRWA TRUST IT 6554/1998 is entitled to the restitution in respect of the property and it is restored;
4. The registrar of deeds is authorised to register the property in the names

of the first applicant in in her capacity as the trustee of the Trustee of
BABIRWA TRUST IT 6554/1998.

GWALA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant: Adv N Ferreira with him Adv B Mtukushe
Attorneys for the applicant: Eddie Du Toit Attorneys

Counsel for the respondent: Adv van Dyk
Attorneys for the respondent Ross & Jacobsz Inc

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