



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

CASE NO: 18797/2021

(4) REPORTABLE: YES / NO
(5) OF INTEREST TO OTHER JUDGES: YES/NO
(6) REVISED: YES/NO

17 January 2025 [REDACTED]
DATE SIGNATURE

In the matter between: -

MATSHWENE MARIA MAGDALINE SEBONI N.O.
LETHABO EDMUND SEBONI

First Applicant
Second Applicant

And

ABSA BANK LIMITED
SOUTHERN SPIRIT PROPERTIES 87 (PTY) LTD
(in liquidation)
ASSET MANAGEMENT SPECIALIST (PTY) LTD
(deregistered)
REGISTRAR OF DEEDS, SOUTH AFRICA
NATIONAL CREDIT REGULATOR
TSHEPO HARRY NONYANE N.O.
ANDREW MAKGOANA KOTLOLO
FIRST RAND BANK LIMITED
PROC CORP 187CC
SB GURANTEE SO (RF) (PTY) (LTD)

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent

JUDGMENT

GWALA AJ

[1] This is a judgment in the application for leave to appeal brought by the seventh

respondent. In this judgment the parties shall be referred to as they appear in the heading and in the main judgment.

[2] The seventh respondent applies for leave to appeal against the whole judgment and order of this court delivered on 29 August 2024. The application is founded on the provisions of section 17(1)(i) and (ii) of the Superior Court Act, 10 of 2013¹. In essence, the seventh respondent contends that the appeal would have prospects of success and that there are some compelling reasons the appeal should be heard including conflicting judgment(s) on the matter under consideration.

[3] It is now trite that an applicant in an application for leave to appeal faces a higher and stringent threshold to demonstrate that there is a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.²

[4] I have considered the argument on behalf of both parties including such argument that I do not specifically highlight in this judgment. I am unable to form an opinion that another court will differ from the judgment sought to be appealed. In what follows I deal, in part, with some of the arguments advanced on behalf of the seventh respondent in support of his application for leave to appeal.

[5] In his first argument the seventh respondent contends that the applicants consented to the transfer of the property to Southern Spirit Properties 87 Pty Ltd (SSP) – the second respondent. It is argued that the applicants, acting on behalf of the Trust, gave a mandate and a power of attorney and appointed Asset Management Specialist Pty Ltd

¹ Which provides as follows: “**17 Leave to appeal**

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that
(a)(i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

² **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen (Unreported, LCC case no LCC14R/2014 dated 3 November 2014); See Also judgment by the full court in The Acting National Director of Public Prosecution v Democratic Alliance (unreported, GP case no 19577/09 dated 24 June 2016) at para 25; See Also SIZAZONKE ELECTRICAL CC AND OTHERS vs ESKOM HOLDINGS LIMITED (unreported, GP Case No. 75781/2013 on application for leave to appeal); See Also Notshokovu v S (157/15) [2016] ZASCA 112 (7 September 2016)**

(AMS) – the third respondent – as their agent the power of substitution and to represent the Trust to form and register a private company, to draft an agreement of sale, to administer the proceeds of the sale, to draw up all necessary documentation, take all steps necessary and sign all documentation to give effect to the mandate and power of attorney. Accordingly, so it was argued, there was a consent to transfer the property.

[6] This argument loses sight of the fact that the whole transaction, from the beginning to the end, was underlaid by fraud and that the applicants did not have any intention to sell or to transfer their property. Even worse for the seventh respondent, allegations that the applicants were hoodwinked into selling their property were not denied in the answering affidavit. Since such allegations stand unchallenged, they must be accepted as fact.

[7] The second argument by the seventh respondent was that he was a *bona fide* purchaser who innocently brought the property for value with no notice of any defect in the seller's (the SSP's) title. There are at least two problems with this argument. The first is that SSP never had any title to the property to begin with. Ownership of the property was never transferred from the applicants. The issue of defect in title does not even arise. The second is that during 2018, before the property was purportedly transferred to the seventh respondent, the second applicant attempted to prevent the sale by instituting legal proceedings which the seventh respondent actively opposed. Therefore, it cannot be that the seventh respondent was unaware of the fact that the SSP's title was in dispute.

[8] The third contention the seventh respondent raised was that if the property was sold at the judicial sale or by the liquidators of a company in liquidation and the transfer takes place before the owner of the property institutes rescission application, the property cannot be recovered from the *bona fide* purchaser. The right to property is constitutionally guaranteed. As such the owner of a property is protected against arbitral deprivation. A time has now come where if the owner of the property was deprived of their right to property, the cause or basis for the deprivation may be judicially considered and in appropriate circumstances the right be restored. If the court were to fail to intervene in a

matter such as this where there is evidence that the right to property was lost through fraudulent means, that would be to sanction fraud and perpetuate injustice. The other problem I have with the seventh respondent's argument in this regard is that since SSP never acquired any right to the property, it could not transfer any ownership. The inverse is that the seventh respondent could not acquire any right to the property from SSP who did not have a title.

[9] The fourth argument was based on the abstract theory of transfer of real right. The argument was that, if the agreement to transfer a real right was valid, generally, a real right will pass despite that the cause – the underlying agreement – was defective. In this matter the underlying agreement was not just defective. It was underlaid and or tainted by fraud. Fraud vitiated such agreement. See *Nedbank v Mendelow* 2013 (6) SA 130 (SCA); *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA). This becomes a distinguishing feature between the present matter and the Legator McKenna Inc and Another vs Shea and Others 2010 (1) SA 35 SCA (the Shea matter) upon which the seventh respondent placed reliance. In the Shea matter, there was no fraud involved. In that matter Ms Shea was declared incapable of managing her own affairs and was placed under curatorship by the order of the court. Mr McKenna was appointed as a *curator bonis*. Mr McKenna, in his capacity as a curator sold the property belonging to Ms Shea. She was later declared capable of managing her affairs. Upon this experience she instituted proceedings for the return of the property. She contended that the contract that gave rise to the transfer of the property was invalid because it was concluded by Mr McKenna before the Master of the High Court had issued him with letters of curatorship in terms of Section 72(1)(d) of the Administration of Estates Act, 66 of 1965.

[10] 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 '...'. 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 en 'n Ander 1980 (3) SA 917 (A) at 922E - F; Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra at 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 and Others v Jordaan 1956 (1) SA 483 (A) at 496; Klerck NO v Van Zyl and Maritz NNO supra at 274A - B; Silberberg J and Schoeman op cit at 79 - 80).

[11] In the present matter there was no intention on the part of the applicants to transfer ownership of the property to SSP. The transfer of the property was part of the scheme by AMS. In light of the scheme, even SSP did not have intention to become the owner of the property. It took transfer just to give effect to AMS's scheme to deceive the unsuspecting. In a nutshell, the agreement that gave rise to the transfer of the property was part of the fraud on the part of AMS. The consequence of the fraud is that the agreement was void.

[12] The fifth argument on behalf of the seventh respondent was that leave to appeal should be granted considering that the judgment conflicts with other judgments. I was not referred to any judgment to demonstrate this point. In the main judgment reference was made to several other judgments that dealt with the subject matter herein which had similar facts and had similar outcomes. I could not find such judgments with which the judgment sought to be appealed conflicts.

[13] The other contention that the seventh respondent raised is that the court erred in that it set aside irrelevant documents and agreements which relate to third parties with no relevance to the applicants. As a result, so it was argued, the order is vague and embarrassing. First, I do not see it the way seventh respondent sees it. However, for the possibility that someone else may view the judgment and order as vague, I give the following explanation.

[14] In prayer one (1) of the notice of motion the applicants sought an order as follows:

- "1. [t]he below mentioned documentation and agreements or similar referred to in the Founding Affidavit, and concluded between the First Applicant and Second and Third Respondents be declared invalid and of no force and effect and be set aside.

They listed a number of documents as annexures, from Annexure A further.

[15] Indeed, documents listed in the notice of motion include documents and or agreements which were apparently entered into between SSP or AMS and third parties. In the founding affidavit though the applicants explained as follows:

“74. [d]uring 2018, when I realised that we lost the property because of the AMS scheme and as stated in paragraph 54 above, my investigation led me to realise that the documents I signed included those mentioned below. I attach those that I signed and could secure and similar documentation, with reference to the judgments referred to above, I managed to obtain and which I signed for the property to be transferred to the second respondent...”

[16] To my understanding, the applicants are saying that where they could not find or secure the actual documents that the deponent to the founding affidavit signed as part of the scheme by AMS, they were attaching examples of such documents as similar documents that AMS would require their would-be victims to sign to complete the scheme. I understand the applicants to be saying that they signed similar documents as those referred to the notice of motion. The fact that the applicants could not secure some of the documents they actually signed is understandable given the time that has since lapsed since they were hoodwinked into signing those documents.

[17] The order I made did not necessarily set aside the documents relating to third parties. This much is clear from the fact that the order does not refer to documents as annexures as it is the case in the notice of motion. The order simply set aside such documents as would ordinarily be signed to give effect to the transfer of a property in the perpetuation of the scheme by AMS.

[18] In any event, even in the absence of that order setting aside the documents, the appeal does not enjoy any prospect of success particularly in view of paragraphs 2, 3 and 4 of the order.

[19] For all these reasons, I was not persuaded, nor could I form an opinion that the

appeal has prospects of success on any of the grounds raised and contended for.

[20] The next aspect to deal with is the question of costs. In the main judgment I did not award costs, though it was so deserving, because counsel for the applicant indicated that they were acting *pro bono*. The situation has since changed. The applicants' legal representatives are no longer acting *pro bono*. They informed the hearing accordingly. And they seek costs. I am of the view that costs are justified and cannot be left undecided. The applicants have succeeded in defending the application for leave to appeal and as such, in my view, they are entitled to costs. There is no reason to order otherwise. The costs shall include the costs of two counsel, both on Scale B.

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

1. The application for leave to appeal is dismissed with costs including costs of two counsel on Scale B.

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

Appearances:

Counsel for the seventh respondent:	Adv DB du Preez SC and Adv van Dyk
Attorneys for the respondent	Ross & Jacobsz Inc
Counsel for the applicant:	Adv N Ferreira with him Adv B Mtukushe
Attorneys for the applicant:	Eddie Du Toit Attorneys
Date of hearing:	21 October 2024
Date of delivery:	17 January 2025