IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable/Not reportable

Case no: 4279/2023

In the matter between

KEEWAVE TRADING 373 CC	**First Applicant**
MHLOPHEKI JOSIAH KHUMALO	**Second Applicant**
BONGIE NELLY PLAATJIE	**Third Applicant**
PULE HERBERT ISAK MAKGOE	**Fourth Applicant**

and

RAMAQELE THABANG DIEDRICH NTHONGOA	**First Respondent**
ELIZABETH FEHLIWE NTHONGOA	**Second Respondent**
ROBSON MAUNZE MLAMBO	**Third Respondent**
MATHOKO ALPHONCINA MLAMBO	**Fourth Respondent**
THE REGISTRAR OF THE DEEDS OFFICE BLOEMFONTEIN	**Fifth Respondent**
NGWATHE LOCAL MUNICIPALITY	**Sixth Respondent**
DU TOIT MANDELSTAM ATTORNEYS	**Seventh Respondent**

Heard: 31 October 2024

Delivered: 30 January 2025

Summary: Alleged fraudulent sale of immovable property – whether registration of property in the name of purchaser should be cancelled

ORDER

1. Prayers 1, 2, 3 and 4 of the Notice of Motion, as amended, are granted.

JUDGMENT

LOUBSER PJ

[1] In this opposed application the Applicants are moving for the following orders:

1. That the sale and transfer of the property described as Erf 8[…] situated in 4th Avenue in Parys, Free State Province, by the First and Second Respondents to the Third and Fourth Respondents be declared unlawful and set aside.

2. That the Fifth Respondent be ordered to cancel the registration of the property in the names of the Third and Fourth Respondents and to register the property under the name of the First Applicant.

3. That the First and Second Respondents are ordered to return the purchase price of the property to the Third and Fourth Respondents, including all the associated costs.

4. That the First and Second Respondents and the other Respondents who oppose the application be ordered to pay the costs of the application.

[2] The Second and Third Applicants are members of the First Applicant close corporation. The Second Applicant deposed to the founding affidavit filed in the application. The First Respondent is also a member of the First Applicant. The Second Respondent is his wife, and they are the previous registered owners of the property in question. The Third and Fourth Respondents are married to each other, and they are the current registered owners of the property that is now the subject of the dispute between the parties.

<u>The case for the Applicants</u>

[3] The Applicants do not seek any relief against the Sixth and Seventh

Respondents. The latter is the firm of attorneys who were responsible for the transfer of the property to the Third and Fourth respondents. It is stated in the founding affidavit that the sale of the property by the First and Second Respondents to the Third and Fourth Respondents was vitiated by fraud and that it must be declared unlawful and set aside for that reason.

[4] The reason why it is alleged that the sale of the property is fraudulent is then set out in the founding affidavit as follows: In 2006 the Second and Third Applicants, together with the First Respondent, founded and registered the First Applicant as an entity for purchasing and selling immovable properties. By 2013, however, the First Applicant had become deregistered as its annual returns were not submitted to the CIPC. While the First Applicant was still deregistered, the Second Applicant, representing the First Applicant, made an offer to auctioneers to purchase the property in question, which offer was accepted by the auctioneers.

[5] Following the acceptance of the First Applicant's offer, the purchase amount of R240 000.00 was paid from the bank account of the First Applicant to the transferring attorneys. This payment is evidenced by a resolution of the members of the First Applicant signed by them, including the Second Applicant and the First Respondent, authorizing the transfer of the purchase amount to the transferring attorneys.

[6] The transferring attorneys then indicated on 13 November 2013 that they were still waiting for the First Applicant, who featured as the purchaser, to be reinstated before they could proceed with the transfer of the property into its name. In order to avoid any further delays caused by the reinstatement process, the members of the First Applicant then resolved that the property must be registered in the name of the First Respondent in his capacity as member of the First Applicant to facilitate the sale and the transfer of the property. The transferring attorneys were informed accordingly. The application to register the property in the names of the First and Second Respondent on the basis of their marital regime, was lodged with the Fifth Respondent by the transferring attorneys on 18 June 2014. During the period that followed, the property was then registered in the names of the First and Second Respondents by the Fifth Respondent.

[7] The Applicants say in the founding affidavit that the registration of the property in the names of the First and Second Respondents was only a temporary measure whilst the reinstatement of the First Applicant was awaited. When it was resolved by the members that the property must be registered in the name of the First Responded, they also resolved that the property would be transferred to the First Applicant as soon as it becomes reinstated again.

[8] On or about 6 September 2021 the Applicants became aware that the First and Second Respondents were selling the property and that the Seventh Respondent had been instructed to facilitate the transfer process. When the Applicants made enquiries at the Seventh Respondent in this regard, they were informed that the First Responded did not inform them of the arrangements with the First Responded as alleged, and that the full purchased price of the property had already been paid to the First Responded by the purchasers. Despite objections raised by the Applicants, it later transpired that the property was registered in the names of the Third and Fourth Respondents on 16 September 2021. Meanwhile, the First Applicant became reinstated on 18 July 2022, and is currently registered and conducting business.

[9] In conclusion, it is stated in the founding affidavit that the First Respondent knew that the property was registered in his name in his capacity as a member of the First Applicant, and that it was never intended that he and his wife would own the property in their personal capacities. He knew that the registration in his name was temporary pending the First Applicants reinstatement, and he knew that the property was purchased by the First Applicant with its own funds. Consequently, the sale of the property to the Third and Fourth Respondent constituted a fraudulent sale, it is stated.

<u>The Case for the Respondents</u>

[10] The Third Respondent filed an answering affidavit to the application. This affidavit is accompanied by confirmatory affidavits by the First, Second and Fourth Respondents. The Third Respondent has never been a member of the First Applicant,

and he says in his affidavit that he has obtained the background of this matter from the First Respondent prior to him purchasing the property. The First Respondent had told him that, at the time that the property was purchased at the auction, he wanted to withdraw as a member of the First Applicant, and he informed the Second Applicant accordingly. However, the Second Applicant advised him to withhold his resignation for a while so that he could devise an exit plan for him to ensure that he would be sufficiently compensated for his contribution to the First Applicant over the years.

[11] When the property was purchased, the Second Applicant requested the First Respondent, who was a co-signatory on the First Applicant's bank account, to release the funds from the First Applicant's bank account to pay the purchase price of the property. When the deregistration of the First Applicant then became a problem, the Second Applicant saw it as the opportune time to implement the exit compensation for the First Respondent by donating the property to the First Respondent.

[12] After the property was then registered in the names of the First and Second Respondents, they put the property up for sale, and the Third and Fourth Respondents then purchased the property from them. The property was then registered in their names as owners thereof.

[13] The Third Respondent further referred to the resolution annexed to the founding affidavit to show that the Second Applicant has been authorized by the members of the First Applicant to launch the application. The resolution was signed by the Third Applicant only, on 6 May 2023. Out of the four members of the Applicant at the time, only one has signed. For this reason, the Second Applicant had no authority to launch the application on the First Applicant's behalf, he says. The Third Respondent further raised a suspicion regarding the commissioning of the founding affidavit by pointing out that the date of signing of the founding affidavit (1 May 2023) has been deleted and substituted by the date of 1 January 2023. Both dates show that the signed resolution dated 6 May 2023 was only concocted as an afterthought in an effort to show that there was prior authority given to launch the application. It is clear, however, that no prior authority was obtained, the Third Respondent says. Lastly, he points out that the Fourth Applicant was

already deceased when the application was filed.

[14] The Second Applicant deposed to a replying affidavit in the application. In the affidavit, he points out that the Third Respondent did not have any personal knowledge of the events in question, and that he only relied on what he was told by the First Respondent. The Second Respondent strongly denies the version of the exit plan for the First Respondent and the alleged donation of the property to him. He indicates that he could never donate the property to the First Respondent without a valid resolution to that effect by the other members of the First Applicant. The Third Respondent has not produced such a resolution, he says.

[15] The Second Applicant further annexed an affidavit deposed to by the First Respondent in earlier eviction proceedings. In that affidavit the First Respondent alleged that the property was purchased by a taxi association at the auction, and that it was later donated to him.

[16] As for the allegations regarding the resolution authorizing him to launch the application on behalf of the First Applicant, the Second Applicant points out that the resolution was signed on 6 May 2023, while the date of the signing of the commissioning of the founding affidavit has been deleted (1 May 2023) and substituted by the date of 1 August 2023, and not 1 January 2023.

[17] Now in the papers before the Court there are two important facts which are common cause between the Applicants and the Respondents. The first is that the property was purchased at the auction with funds provided by the First Applicant. The First Applicant was therefore the purchaser without any doubt. The second is that the property could not be registered in the name of the First Applicant after the purchase because the First Applicant had become deregistered as a CC by the CIPC.

[18] The only crucial and material dispute of fact on the papers is the dispute

concerning the reason why the property then became registered in the names of the First Respondent and his wife, the Second Respondent. According to the Applicants this was done as a temporary measure to register the property in the name of the First Respondent as a representative of the First Applicant until such time as the First Applicant becomes reinstated by the CIPC again. Once that happens, the property would then be registered in the First Applicant’s name. The Respondents, on the other hand, allege that the property was donated by the Second Applicant to the First Respondent to compensate him for his services to the First Applicant.

[19] It is trite that factual disagreements in motion proceedings are to be dealt with in accordance with the rule in Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd,[1] which stipulates that a court should rely only on the evidence given by the respondents.[2] This rule, however, does not apply where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[3]

[20] The question in the present case is then whether the Respondents’ version of a donation of the property is to be regarded as so far-fetched or clearly untenable that it can safely be rejected on the papers before the Court. I have no doubt that the answer to this question must be in the affirmative, for the following reasons: The Second Applicant is not only a member of the First Applicant. He is also an admitted and practicing attorney of the High Court of South Africa. He would have known that he could not unilaterally donate the property paid for by the First Applicant to the First Respondent. He would have known that in order to do so, he needed a resolution to such effect from the members of the First Applicant. Significantly, there is no mention or trace of such a resolution in the papers before the Court. The First Respondent is also a member of the First Applicant, and he also would have known that he could not acquire the property of the First Applicant as a donation without a valid resolution signed by all the members.

[1] 1984(3) SA 623 (AD)
[2] Thint (Pty) Ltd v NDPP and Others 2009(1) SA 1 (CC)
[3] Plascon-Evans case, supra, at 635C

[21] The First Respondent presented a totally different version in an affidavit under oath in another case, namely that it was a taxi association which had purchased the property at the auction, whereafter the property was transferred to him. The Court consequently has great difficulty in believing the version of the First Respondent in this Court. It is clear that the First Respondent has failed his fiduciary duty to the First Applicant as a member of the CC when he failed to give transfer of the property back to the First Applicant when it became reinstated. Instead he fraudulently misrepresented to the Third and Fourth Respondents that he was legally entitled to sell the property to them. In addition, the version presented by the Second Applicant is far more probable than the version presented by the First Respondent. It simply does not make any sense that the Second Applicant would donate the property of the First Applicant to another without any authorization or compensation.

[22] The application therefore stands to succeed. The version of the First Respondent is rejected as false. As for costs, the conduct of the First Respondent warrants a punitive order of costs. The technical defences raised by the Respondents also need to be dismissed. The resolution to launch the application could obviously not be signed by all the members, because some of them took sides with the First Respondent. The alleged date of the commissioning of the founding affidavit can also not pose any problem, since the application was only issued on 15 August 2023, which date came after the different dates of commissioning suggested by the respective parties.

[23] Lastly, it needs mentioning that the Fifth Respondent in his report expressed no objection to the granting of the prayers sought in the Notice of Motion. The Fifth Respondent did also indicate that if the transfer of the property to the Third and Fourth Respondents is ordered to be cancelled, then the Court may order that the property, upon such cancellation, be registered in the name of the First Applicant in terms of the provisions of Section 33(1) of the Deeds Registries Act.[4] In the circumstances of this matter, such an order is justified.

[24] The following order is made:

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[4] Act 47 of 1937

1. Prayers 1, 2, 3 and 4 of the Notice of Motion, as amended, are granted.

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P.J. LOUBSER, J

Appearances:

For the Applicants:	Adv. I. Macakati
Instructed by:	Cheadle Thompson & Haysom Inc, Johannesburg c/o Honey Attorneys, Bloemfontein
For the Respondents:	Adv. V.M. Lifhiga
Instructed by:	RM Makhalemele & Associates Inc. Parys c/o Rampai Attorneys, Bloemfontein