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**HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

**Case No: 11318/23
REPORTABLE**

In the matter between:

SHAMEEGAH ISMAIL

Applicant

and

JULIA CLAIRE JANTJIES NEE VERTUIN

First Respondent

WILLIAM JOSEPH VERTUIN

Second Respondent

PATRICK BENNET SWARTZ

Third Respondent

THE REGISTRAR OF DEEDS

Fourth Respondent

Judgment delivered: 6 March 2025

Date of Argument: 5 December 2024

JUDGMENT

Introduction

[1] This is an opposed application for a declarator in terms of which the applicant is seeking an order in the following terms:

- “1. The purported Sale and Deed of Sale concluded between the First and Second Respondents, as well as the Third Respondent be declared null and void ;*
- 2. The Deed of Sale be set aside, and the following property be transferred to the Third Respondent in accordance with the aforementioned Sale:*

***REMAINDER OF ERF 6[...], DELFT
ALSO KNOWN AS 1[...] D[...] DRIVE, DELFT
IN THE CITY OF CAPE TOWN
WESTERN CAPE PROVINCE
IN EXTENT: 350 (THREE HUNDRED AND FIFTY) square meters***

- 3. That the Applicant be declared the lawful owner of the abovementioned property at paragraph 2 hereinabove;*
- 4. The Fourth Respondent be directed to rectify its records and the Title Deed to the abovementioned property by:*
 - 4.1 Cancelling the transfer and registration of the said property in the name of the Third Respondent under Title Deed T00046585/2021;*
and

- 4.2 *Transferring and registering the abovementioned property at paragraph 2 hereinabove in the name of the said Applicant, Shameegah Ismail (Id No : 9[...]).*
5. *In the alternative to paragraph 4 above, the First to Third Respondents are to sign all the necessary documents presented to them in order for a conveyancer to give effect to paragraph 4 hereinabove and to have the property transferred to the Applicant.*
6. *Should the First to Third Respondent refuse or fail to sign, any Sheriff of the Honourable Court is authorised to sign any such documents on their behalf.*
7. *The First to Third Respondents is to pay the costs of the application, if opposed.*
8. *Further and / or alternative relief that the Honourable Court may deem fit.”*

[2] This matter concerns 2020 and 2021 contractual agreements in terms of which the abovementioned property (‘the property’) was sold.

[3] In order to grant the relief sought by the applicant, this court will first have to determine whether the applicant has satisfied this court that she has a legitimate legal interest in the matter before the court. The court will have to determine whether the 2020 sale agreement upon which the applicant, Ms Shameegah Ismail (‘Ms Ismail’), relies for her claim, is a valid and enforceable contractual agreement between her and the first respondent, Julia Jantjies (‘Ms Jantjies’).

[4] For the sake of consistency I will refer to the applicant as Ms Ismail and the first respondent as Ms Jantjies.

Background

- [5] On 30 August 2004, Ms Jantjies and second respondent, Mr William Joseph Fortuin ("Mr Fortuin") divorced. In terms of the divorce order, the property was awarded to Ms Jantjies as her sole and exclusive property.
- [6] On or about 2013, Ms Ismail's father, Mr Soleiman leased the property in terms of an oral agreement on a month-to-month basis ("lease agreement") from Ms Jantjies. The monthly rental was about R1 000.00.
- [7] On 21 October 2014, Mr Fortuin passed away. Consequently Ms Jantjies was appointed as the Master's representative of Mr Fortuin's deceased's estate.
- [8] On 8 March 2017, Ms Jantjies married Mr Frederick Cornelius Jantjies in community of property and the marriage still subsists.
- [9] In November 2020, Ms Ismail and Ms Jantjies signed an agreement of sale citing both Ms Jantjies and the late Mr Fortuin as the sellers. However no transfer of the property to Ms Ismail had taken place.
- [10] In January 2021 Mr Soleiman passed away, resulting in the termination of the lease agreement between him and Ms Jantjies.
- [11] On 16 March 2021, Ms Jantjies erstwhile attorney of record, Mr Bester informed Ms Ismail that the 2020 agreement was invalid due to Mr Jantjies not signing for the alienation of the joint property. Accordingly in March 2021 Ms Jantjies attorney issued a notice to vacate, informing Ms Ismail that she had to vacate the property by 2 April 2021 as Ms Jantjies believed that Ms Ismail was occupying the property without a lease agreement. Ms Ismail failed to vacate the property.
- [12] On 19 May 2021, Ms Jantjies and Mr Jantjies, as co-owners of the property, concluded the 2021 sale agreement with the third respondent. Consequently the property was transferred into the third respondent's name on 17 September 2021.

- [13] On 29 November 2022, the third respondent instituted eviction proceedings against the applicant in the Bellville Magistrate's Court under case number 8224/2022. The eviction proceedings have been stayed pending the determination of the present application.
- [14] The first respondent raised 2 points in *limine*. Firstly, that Ms Ismail failed to join the parties that had a direct and substantial interest in this matter. Secondly, that Ms Ismail's application lacks a cause of action.
- [15] After the parties had addressed the court regarding the points in *limine* on 4 November 2024, it transpired that a joinder and substitution application had already been granted. This application involved the addition of the fifth respondent, Mr Jantjies, to the proceedings and substituting Mr Fortuin with the Masters representative, Ms Jantjies. Consequently, the only point in *limine* that remains to be considered is whether the applicant's application lacks a cause of action.
- [16] The respondent avers that the applicant's application lacks a cause of action, in that prayer 1 sought by the applicant's notice of motion is not competent as no sale had taken place between the second respondent, the applicant, and third respondent.

“the purported sale and deed of sale concluded between the first and second respondents (as the Sellers), and the third respondent (the purchaser) be declared null and void.”

- [17] Ms Jantjies avers that the third respondent acquired ownership of the property in terms of a written deed of sale concluded between the third respondent as purchaser and herself and her current husband Mr Plaaitjies as sellers and co-owners of the property. Furthermore, she did not sign the 2020 agreement in her capacity as the Master's representative on behalf of the late second respondent's estate. Accordingly, the 2020 agreement fails to satisfy the

requirements in terms of section 2(1) of the Alienation of Land Act 68 of 1981 and is thus void.

[18] The respondent further avers that her erstwhile attorney, Andre Bester, subsequent to her signing the 2020 agreement, informed the applicant on 12 May 2021, that the agreement had been cancelled. In addition, Mr Bester on 29 March 2021, dispatched a notice to the applicant and other occupiers directing them to vacate the premises. Furthermore, the applicant has to date not filed any legal action to dispute the cancellation in order to reinstate the 2020 Agreement. Consequently, the applicant fails to disclose a cause of action due to the lack of a binding agreement between her and the respondent.

[19] In order to determine whether the applicant's application does not disclose a cause of action, and whether the 2020 or 2021 agreement was valid the court consequently referred the matter for oral evidence to be heard on 14 November 2024.

[20] In order to contextualise the issues in dispute, I will have to look at the surrounding circumstances and background of this matter. Accordingly, I first turn to deal with each party's case as set out in their papers.

The Applicant's Case

[21] In her founding affidavit the applicant, Ms Ismail, avers that the property is currently owned by Ms Jantjies. She has been residing at the property for 17 years. Ms Jantjies together with her late husband, Mr Fortuin offered to sell the property to Ms Ismail in 2020.

[22] On or about 25 November 2020 the late Mr Fortuin and Ms Jantjies entered into a sale agreement with her. In terms of the agreement the property was sold to her at a purchase price of R130 000.00. In terms of the purchase agreement she was to pay an amount of R90 000.00 with the balance of R40

000.00 to be paid into the transferring attorneys trust account upon the registration of transfer.

[23] Subsequently, while waiting for further communication from Ms Jantjies and the late Mr Fortuin regarding the registration of the property, she was informed by the third respondent that he was now the owner of the property as he acquired it on 19 May 2021 from Mr and Ms Jantjies . As a result the property was now registered in his name on 17 September 2021.

[24] Ms Ismail further averred that she has a clear right in that she entered into a valid sale agreement with Ms Jantjies and the late Mr Fortuin. Furthermore, that the Deed of Sale was never cancelled, neither was she given any indication by Ms Jantjies and the late Mr Fortuin that the balance of R40 000,00 had to be paid in order to effect transfer of the property. In addition, she never received her R90 000.00 which she had paid to the Ms Jantjies when she entered into the agreement on 25 November 2020.

[25] Ms Ismail averred that if this Court should not grant the relief sought in her notice of motion she will suffer irreparable harm, as she and her family will lose the property without being compensated, due to the fraudulent conduct of Ms Jantjies and the late Mr Fortuin. She is concerned that the third respondent will sell the property and this poses an imminent danger to her and her family being evicted from the property.

[26] Ms Ismail further avers that she was advised that there is no alternative remedy available to safeguard the rights of her and her family, other than for this court to grant the relief sought.

The First Respondent's Case

[27] In response to the applicant's averments, Ms Jantjies deposed to an affidavit on behalf of the third respondent and herself. Ms. Jantjies' allegations regarding him were corroborated by the third respondent in a confirmatory affidavit. The following is a concise summary of these affidavits:

[28] Ms Jantjies opposes the relief sought by the applicant on the grounds that:

- 28.1 The third respondent's Agreement of Sale ("2021 Agreement") is valid and enforceable.
- 28.2 Ms Ismail's purported Agreement of Sale ("2020 Agreement") fails to satisfy the requirements in terms of section 2 of the Alienation of Land Act 68 of 1981.
- 28.3 The 2020 Agreement fails to satisfy the requirements in terms of section 15(2)(b) of the Matrimonial property Act 88 of 1984.
- 28.4 The 2020 Agreement was cancelled by their erstwhile attorney.
- 28.5 At the time of the cancellation of the 2020 Agreement, the applicant failed to make any or all payment as alleged to the first respondent and/or to their erstwhile attorney.

Evidence during oral evidence

Applicant's oral evidence

[29] Ms Ismail called two witnesses, herself and Ms Soraya Ismail whose evidence was not relevant to the issue referred to oral evidence pertaining to the 2020 and 2021 sale agreement. The court subsequently excused her and therefore her evidence needs no further consideration.

[30] The evidence of Ms Ismail's can briefly be succinctly summarised as follows: She confirms that she resides at the property with her sister and children. She further provides an account as to how the property was acquired, which is corroborated by her founding affidavit. She further admitted that Mr Saban, her erstwhile attorney, represented her at the time the 2020 sale agreement.

- [31] She confirms that Mr Saban drafted the 2020 sale agreement and that it was subsequently signed by herself and Ms Jantjies in his office, in the presence of herself, her father, sister, the first respondent and the fourth respondent. She further confirms that Mr Saban who was also a conveyancer, was to effect the transfer of the property upon her settling the balance, and that this appeared on the face of the contract.
- [32] She further testified that she had no knowledge of any correspondence sent to Mr Saban by Mr Bester, Ms Jantjies' attorney, regarding the cancellation and invalidity of the 2020 agreement. She then further testified that she and her attorney Mr Saban were informed that Mr Fortuin, Ms Jantjies's previous husband, had passed away.
- [33] She further testified that she was aware that the fourth respondent, Mr Jantjies, was the current husband of Ms Jantjies and that he was present on the day that the 2020 agreement was signed. She further testified that payments had already been made in lieu of the sale of the property to Ms Jantjies, and that it was recorded in the 2020 agreement that she only had to pay the balance of R40 000,00 before the property could be transferred in her name.

Respondents oral evidence

- [34] In contrast, Ms Jantjies testified that the payments she had received were for arrear rental and not in lieu of purchase price of the property. She testified that at the time she signed the 2020 agreement, she was unsure what she signed. She referred to the 2020 agreement as a deed of sale, which she later rectifies during re-examination as being a title deed. She further testified that after the 2020 agreement was signed she took it to her erstwhile attorney Mr Bester who informed her that the agreement was invalid.
- [35] She then testified that Mr Bester sent letters to Ms Ismail's attorney, Mr Saban, informing Mr Saban of the invalidity of the agreement. She testified

that she understood that the property had not been sold in terms of the 2020 agreement due to its invalidity.

- [36] She further testified that she has difficulty reading and takes time to understand what is being explained to her. During her testimony she contradicted her affidavit, that she did not have the intention from the outset to sell the property to Ms Ismail, whereas in her founding affidavit it is apparent that she had the intention to enter into the agreement with Ms Ismail. She further testified that she does not deny the contents of her affidavit in its entirety, but only denies the aspect of her selling the property to Ms Ismail.

Third Respondent's oral evidence

- [37] The third respondent, Mr Swarts, evidence was briefly that he signed the 2021 sale agreement in respect of the property while being unaware that there was any other agreement in place between Ms Ismail and Ms Jantjies. Accordingly, he accepted the offer to purchase the property from Ms Jantjies. He further testified that he was informed to approach the offices of Mr Saban and to inform Mr Saban to seize any correspondence with Ms Jantjies as he has appointed an attorney to deal with the eviction of Ms Ismail. There was no dispute in relation to Mr Swarts evidence.

Applicable Legal Principles

- [38] For a valid contract under the common law the following requirements are applicable:
- (a) Consensus: the parties must agree to the terms of the contract
 - (b) Capacity: the parties must be of sound mind, not minors, and not disqualified by law.
 - (c) Certainty: the subject matter of the contract must be clear.

- (d) Possibility: the contract must be possible to perform.
- (e) Legality: the object of the agreement must be legal and not against public policy.
- (f) Formalities: the contract must meet certain formalities.

[39] Other essential elements include an offer and acceptance, consideration, authority and the intention to create a legal agreement.

[40] It is common cause when immovable property is being sold, the Alienation of Land Act 68 of 1981 (“the Act”) is applicable. Section 2(1) of the Act read as follows:

“(1) *No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.*

[41] Section 28 of the Act deals with the consequences of deeds of alienation which are void or are terminated. It reads as follows:

“(1) *Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and-*

(a) the alienee may in addition recover from the alienator...

(b) the alienator may in addition recover from the alienee...

(2) *Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.”*

[42] Where people are married in community of property, the Matrimonial Property Act 88 of 1984 finds application (“Matrimonial Act”). Section 15 of the Matrimonial Act deals with the alienation of property by spouses married in community of property. The relevant parts of section 15 read as follows:

“15. (1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such spouse shall not without the written consent of the other spouse-

(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate.

(b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in any immovable property forming part of the joint estate.”

Analysis

[43] Counsel for the respondents submitted during argument that Ms Ismail in her oral evidence failed to address the crux of the issue that this court referred to oral evidence. That she failed to deal with the point in limine, whether her application sets out a cause of action for the relief sought in prayer 1 of her notice of motion. In other words whether the 2020 agreement between herself and Ms Jantjies was valid, consequently resulting in the 2021 sale agreement between Mr Swarts and Ms Jantjies being null and void.

- [44] I am inclined to agree with counsel for the respondents, as Ms Ismail failed to lead any evidence on the correspondence between the erstwhile attorney of Ms Jantjies, Mr Bester, and her attorney, Mr Saban, regarding the validity and the cancellation of the 2020 contractual agreement. She admits that at the time Mr Saban was her attorney of record, However, wants this court to believe that she had no knowledge of the correspondence between Mr Saban and Mr Bester.
- [45] She did not deny that the 2020 sale agreement was cancelled and invalid, rather tried to raise a defence by stating that she had no knowledge of such cancellation or invalidity of the agreement. In addition, it is important to note that it was common cause that this agreement was drafted and signed by Ms Ismail while Mr Saban was still acting in his capacity as Ms Ismail's attorney. She further failed to explain to this court during her testimony why she never followed up with her attorney, Mr Saban when the transfer of the property was to take place as his firm was appointed to deal with the transfer. Clearly not taking the court into her confidence as to her knowledge with regard to the cancellation of the agreement.
- [46] Counsel for the respondents further pointed out during argument that according to Ms Ismail's testimony and the submissions made by her counsel during argument was that Ms Ismail was of the opinion that the agreement she signed was a sale agreement in respect of the property. It is trite that for any contractual agreement to be valid, both parties must have consented to the terms of the agreement. It appears that Ms. Ismail was the sole individual who intended to acquire ownership of the property, as indicated by her evidence.
- [47] Counsel for the respondents further argued that the contention by Ms Ismail that she signed the agreement with the owner of the property is incorrect as Ms Ismail does not dispute the registrar of deeds report that confirms that the owners of the property was Mr and Ms Jantjies jointly. Accordingly there could never have been consensus between the parties when the 2020 agreement was signed. I am inclined to agree with counsel for the respondent that the

oral evidence led by Ms Ismail cannot validate an agreement that does not satisfy the requirements for a valid contractual agreement.

Requirements of a valid agreement

Consensus

[48] In order for the parties to reach consensus to regarding any agreement, they must concur with rights and obligation that are created in terms of the contract. This must be conveyed in the form of an offer and acceptance. The offer must be made with the intention to be bound by the acceptance. The acceptance is then made with the intention to enter into a legal agreement. Ms Jantjies during her testimony contradicted herself on the material aspect of her intention to sell the property to Ms Ismail. In her founding affidavit she does not deny that her intention was to sell the property to Ms Ismail, however during cross-examination she denied that this was her intention from the outset.

[49] It is trite that an applicant will stand and fall by its pleadings in their founding papers. I therefore, find that when Ms Jantjies signed the 2020 agreement together with Ms Ismail, Ms Jantjies had the intention to sell the property to Ms Ismail. However, this is not the conclusion of the matter as this court must still determine whether the agreement complied with the other statutory requirements of a valid contract.

Capacity

[50] It is not in dispute that both Ms Ismail and Ms Jantjies had the necessary capacity to enter into this agreement.

Formalities of a contract

[51] It is not in dispute that the 2020 agreement was in writing and signed by both Ms Ismail and Ms Jantjies. It is also not in dispute that Ms Jantjies did not sign

the agreement in her capacity as the Master's representative on behalf of her late husband Mr Fortuin, or that Ms Jantjies current husband Mr Jantjies did not sign the agreement.

[52] In terms of section 15 of the Matrimonial Act it is a statutory requirement that a spouse that is married in community of property cannot alienate, sell immovable property or enter into a contact without the consent of the other spouse. Ms Jantjies testified that she and Mr Jantjies are married in community of property. Accordingly when Ms Ismail and Ms Jantjies entered into the 2020 agreement they did so without there being compliance with the Matrimonial Property Act. No evidence had been led or stated in the founding affidavit that Mr Jantjies consented to the alienation of the property.

[53] More importantly both Ms Ismail and Ms Jantjies testified that there had been no compliance with the Alienation of Land Act. Counsel for the respondents referred the court to the Supreme Court of Appeal matter of **Cooper NO and Another v Curro Heights Properties (Pty) Ltd (1300/2021) [2023] ZASCA 66 (16 May 2023)** at para 15, where it was held:

"The result of non-compliance with section 2(1), is 'that the agreement concerned is of no force or effect. This means that it is void ab initio and cannot confer a right of action'²²"

[54] Counsel for the respondents argued that for the 2020 agreement to have been valid it must have been signed by all parties. Furthermore, that it was common cause that it was not signed by Mr Jantjies nor by the Master's representative on behalf of the late Mr Fortuin's deceased estate. I am inclined to agree with counsel for the respondents that there has been no compliance with section 2(1) of the Alienation of Land Act or with section 15 of the Matrimonial Property Act, as neither the Master's representative on behalf of the deceased estate of Mr Fortuin, neither Mr Jantjies whose rights as to alienation of immovable property of spouses married in community of property is afforded protection gave their consent for such alienation of the property.

- [55] What is concerning in this matter is that not only was Ms Ismail legally represented during the signing of this agreement, after her attorney became aware of the non-compliance with the statutory requirements, Ms Ismail and or her attorney failed to take reasonable steps to rectify the agreement, by obtaining Mr Jantjies consent in order to validate the agreement.
- [56] The aspects of Possibility of Performance and Certainty which are the remaining requirement for a valid contract are not in dispute. For the reasons set out above it is apparent that Ms Ismail failed to comply with that statutory requirements for a valid contract and as such does not have a legitimate stake to bring this application.

Failure by Applicant to make payments

- [57] Counsel for the respondents argued that Ms Ismail failed to make out a case with regard to the R90 000,00 that she allege in her founding papers and during oral evidence to have paid to Ms Jantjies in lieu of the sale of the property. I am inclined to agree with counsel for the respondents that Ms Ismail did not seek repayment of the money that she had paid to Ms Jantjies, but deem it necessary to point out that even though Ms Jantjies tries to deny that she had been paid R90 000,00 by Ms Ismail in lieu of purchasing the property, this denial holds no water as the signed 2020 sale agreement attached to the applicant's papers confirms that Ms Jantjies had already been paid R70 000, 00 when contract was signed, a further R20 000, 00 had to be paid on registration of transfer of the property. To substantiate this contention I refer to clause 1 of the 2020 agreement which read as follows:

“1 PURCHASE PRICE

*The purchase price is the sum of **R130 000. 00 (One Hundred and Thirty Thousand Rand)** (hereinafter referred to as the **PURCHASE PRICE**) payable by the Purchaser to the Sellers as follows:*

1.1 **R70 000. 00 (Seventy Thousand Rand)** has already been paid in respect of the purchase price, and amount of **R20 000. 00 (Twenty Thousand Rand)** shall be payable to the transferring attorneys trust account upon registration of transfer.

1.2 The balance of the purchase price in the amount of R40 000 ,00 (Forty Thousand Rand) shall be paid to the transferring attorneys trust account upon registration upon registration of transfer.”

[57] I believe it is prudent to emphasise that, in accordance with section 28(2) of the Alienation of Land Act, Ms. Ismail would still be entitled to recover from Ms. Jantjies, who had not performed in full the terms of the 2020 agreement, that which Ms. Ismail had performed in accordance with the 2020 agreement, despite the fact that the 2020 agreement is deemed to be void. This is in reference to the same Alienation of Land Act on which the respondents based their defence. In other words, the R70,000.00 that Ms. Ismail had already paid in accordance with the 2020 agreement for the purchase price of the property can be recovered in accordance with section 28(2) of the Alienation of Land Act.

[58] With regard to Ms Ismail’s averment in her founding papers that she was advised that there is no alternative remedy available to safeguard the rights of her and her family, other than for this court to grant the relief sought, this court does not agree with. As demonstrated above Ms Ismail has various remedies available to her, for instance bringing an application to have the 2020 agreement rectified, or to bring an application for unjustified enrichment against the Ms Jantjies for the return of the money she had already paid in terms of the agreement.

[59] Lastly I now turn to the validity of the 2021 agreement.

[60] Counsel for Ms Ismail argued that the subsequent 2021 agreement is invalid as Ms Ismail has a clear right to the property in terms of the 2020 agreement. Counsel for the respondents argued that the 2021 agreement between Mr

Swarts and Mr and Mrs Jantjies was lawfully concluded and that Ms Ismail provided no legal basis in law to assert that the content of the 2021 agreement is null and void. Mr Swarts was a good and consistent witness who testified that at the time he signed the 2021 agreement he was unaware that there was another agreement in place. He testified that he informed Ms Ismail's attorney that he was the new owner of the property. The title deed of the property is also registered in his name. There is no evidence to the contrary that this agreement did not comply with the statutory requirements of a valid agreement, accordingly I am of the view that the 2021 agreement is valid and enforceable.

Conclusion

[61] For all the reasons advanced, I am of the view that the applicant has failed to satisfy the requirements for the relief sought. As the applicant is not the owner of the property and the 2020 agreement had been validly cancelled due to non-compliance with the Alienation of Land Act and the Matrimonial Property Act, I am not satisfied that the applicant has a legitimate legal stake in the matter before the court.

[62] In the circumstances I make the following order:

1. The application for the relief sought in terms of the applicant's notice of motion is dismissed with costs on a party and party scale A.

MTHIMUNYE AJ
JUDGE OF HIGH COURT

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