SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 03835/2010

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

REVISED
25/6/2012

In the matter between:

MKHWANAZI, PINKY Appellant

and

QUARTERMARK INVESTMENT (PTY) LTD First Respondent

REGISTRAR OF DEEDS Second Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. This was one of several *ex tempore* judgments delivered. At the time I indicated that the reasons would be amplified if necessary. It is appropriate to do so.

NATURE OF APPLICATION

2. The Applicant wishes to set aside the transfer effected on 20 November 2008 of her residential property in favour of the First Respondent and to declare the underlying agreement of sale null and void. She also seeks an order directing the Registrar of Deeds to transfer the property back into her name. Finally an order is also sought to interdict the First and Second Respondents from selling or transferring the property to anyone other than the Applicant. Costs are sought on the attorney and own client scale.

3. Numerous points were raised *in limine* by both parties. The bulk of them have no merit. The First Respondent's point regarding the non-joinder of Nedbank must however be addressed. The First Respondent contends that the bank is a necessary party to the proceedings if the *status quo ante* is to be restored, arguing that the bank's erstwhile bond over the property would have to be re-instated. The reason why the contention lacks merit will be dealt with separately. The other point *in limine* which

requires consideration is that raised by the Applicant regarding the hearsay nature of the First Respondent's answering affidavit. This will be considered when dealing with the evidential material that is properly before the court.

BACKGROUND

4. The First Respondent describes itself as a long term property investment company. As will become evident, the relationship between the parties pursuant to which the First Respondent claimed an entitlement to transfer the property arose from a money lending transaction.

5. It is not disputed that by early 2007 the Applicant was struggling to meet her bond and car instalment repayments. She required at least R30 000 to cover the arrears on both. Lawyers were contacting her to pay up the outstanding amounts, and in particular her bond repayments which were at that stage three months in arrears.

6. The Applicant contends that she came to hear of a company which could assist with loans and was given the contact details of a Mr George Mthebe. On making contact, Mthebe advised that it was unnecessary for her to come to his offices, asked for her physical address and indicated that he would pay her a visit. The Applicant claims that Mthebe subsequently arrived at her home unannounced. This was in March 2007. The Applicant

told him that she was looking for a loan of R30 000 to pay the arrears on both the bond and the car. Mthebe advised that he worked as an agent for the First Respondent, explained to her how the loan arrangement would work, said that he would return with documents for her to sign and that the First Respondent would help her obtain a R30 000 loan. He also stated that the First Respondent itself would either pay the arrears directly on her behalf or otherwise pay the amount into her account. The Applicant also avers that neither Mthebe nor anyone else on behalf of the First Respondent informed her that she would have to sell the house to the First Respondent and, equally significantly, claims that at no stage was a purchase price negotiated let alone mentioned.

7. According to the Applicant, a few days later Mthebe returned with a number of documents, "*indicated that he won't explain the process and documents again as he had done so on his first visit rather he will later come back to give me a copy. He hurriedly made me sign without affording me an opportunity to read. I trusted him probably because I was desperate and vulnerable. I just couldn't afford to lose the opportunity to pay off my arrears as I knew that this was probably my last chance to save my house and car from being repossessed.*"

This averment was made in paragraph 8.14 of the founding affidavit. The response is found at paras 31 to 34 of the Answering Affidavit and warrants repeating;

"31. The contents hereof are noted. I wish to draw the court's attention to the caveat subscriptor. Of particular importance is the sale agreement and the spaces provided for the signature of the applicant under the heading of seller. I find it highly improbable that the applicant did not read the contract, nor did she pay attention to the spaces provided for signature.

32. The applicant was never forced to sign any of the documentation provided, nor was she taken advantage of, because of her being vulnerable. The applicant was given the option to sell the property to the first respondent.

33. It is evident that the applicant signed a contract of sale of land on installments and agreement of lease. There is no mention of loan agreements in any of the documentation provided.

34. It is my further submission that the applicant is adequately educated to understand all documents concerned."

8. It is immediately apparent that aside from relying on the applicant's signature to the documents, which she had already admitted, the contents of the First Respondent's answering affidavit amount to submissions but do not gainsay the applicant's allegations of what occurred between her and Mthebe regarding the loan agreement and his representations. Mthebe did not depose to an affidavit. Accordingly there is no evidence, other than that of the Applicant, as to the circumstances surrounding her signature to the documents. The

relevance of the First Respondent's failure to challenge the Applicant's evidence with direct testimony ought to be apparent.

9. A few days after signing the documents an amount of R12 000 was paid into the Applicant's account. This covered the arrears in respect of the car. She was told that the arrears on the bond would be arranged directly with the bank. At Mthebe's request the Applicant deposed to an affidavit confirming her and her parent's details as well as her physical address.

10. The Applicant then proceeded to pay R3 000 per month or more into the First Respondent's account, although on occasion it would be only R2 500. In the meantime the First Respondent, according to what the Applicant alleges Mthebe told her, was continuing to pay the bond instalments of some R1800 per month on her behalf.

11. Some two years after signing the agreement the Applicant received a municipal utility bill which, for the first time, reflected the First Respondent as the account holder. She immediately contacted Mthebe for an explanation. He told her not to be concerned and said that "…. *his company's name was put for convenience as if they were paying for the water bill."* This was stated in para 8.19 of the founding affidavit. The contents of the subsequent paragraphs are equally telling if left unanswered:

> *"8.20. I wish to advise that around August 2009 I was visited at home by two gentlemen, one a police officer*

who introduced himself as Inspector Ngobeni and the other gentleman who called himself Calisto.

8.21. Calisto advised that he used to work with George and he has now discovered that there is fraud involved in the transactions we had.

8.22. He advised that the properties had been sold behind our backs and there are lots of people who are victims of this scam by the first respondent.

8.23. I went to Nedbank, the bond financer for the property who I always thought they were receiving monthly bond repayments through the first respondent as per the agreement I had with the first respondent.

8.24. I wish to state that I was traumatised when I discovered that my property was now owned by the first respondent. I was told that the first respondent "bought" the property from me for about R157 000.

8.25. I requested Nedbank to investigate how my property was sold without my involvement in the whole process."

12. These paragraphs contain serious allegations of fraud. They also reveal the Applicant's state of mind which, if accepted, is consistent with her being unaware of the actual contents of the documents she signed. The First Respondent did not dispute the contents of paras 8.19, 8.20 or 8.23 of the founding affidavit and admitted the contents of para 8.24. The contents of the

other cited paragraphs were denied. However certain significant facts were revealed in the First Respondent's answer to these paragraphs. They are;

a. Calisto did not work for Mthebe but for the First Respondent. His function was to offer a borrower, such as the Applicant (now a tenant because the property had by then been transferred into the name of the First Respondent), a first opportunity to buy back the property;

b. The documents signed by the Applicant do not contain a right to buy back the property (whether by way of a right of first refusal or otherwise) nor is such a provision found in any lease contract. The First Respondent however contends that it "has *the right to sell its property to whomever it chooses. It has always offered properties for sale to the tenants without a right of first refusal being agreed upon in the contract of lease.*"

c. The First Respondent continued to pay the bond instalments for *"some time"* and " ... *paid towards the cancellation of the then existing bond over the property"*. However the bond was settled in full once the First Respondent "... *became able to take transfer"*. These phrases are ambiguous. The undisputed facts reveal that the First Respondent had continued to pay the bond instalments to Nedbank for a period of 18 months with

transfer being effected during September or early October 2008;

d. The *"purchase price"* payable by the First Respondent to the Applicant for the property was R157 000 while the total amount of the transaction together with the bond instalments paid by the First Respondent to the bondholder over the 18 month period was said to be R198 000. The correct figure from the First Respondent's own documentation appears to be some R189 340 which, aside from the monthly bond repayments, includes transfer duty penalties and an interdict fee of R3 000 that is not explained;

e. The First Respondent avers that some R99 000 was paid over during the period of two years and nine months since the Applicant first commenced making payments to it; an average payment of R3 000 per month;

f. In September 2009 the First Respondent offered to transfer the property back to the Applicant at a purchase price of R440 000.

DOCUMENTS SIGNED BY THE APPLICANT

13. The documents presented by Mthebe to the Applicant at her residence and which she signed, without any witnesses, were a

fifteen page agreement of lease and a contract of sale of land on instalments of fourteen pages. Subsequently Mthebe presented her with another document which turned out to be a power of attorney authorising the transfer of property. It is in favour of several individuals at a firm of conveyancing attorneys and is dated 12 June 2007.

14. The sale of land on instalments agreement is clearly marked as such. Its effect is that on 3 April 2007 the Applicant sold her residential property to the First Respondent. A copy was not provided to the Applicant at the time of signing. It was subsequently supplied to her through Nedbank, *sans* the second page, after she came to learn that the property was now owned by the First Respondent. The second page however appears in the First Respondent's papers. The sale agreement discloses a purchase price of R157 000 with a deposit of R12 398. Monthly instalments of R1570 are payable as from 1 May 2007 and the First Respondent would take occupation and possession of the property on 3 April 2007. Interest is payable at the prescribed rate. Under clause 11 transfer would take place once the First Respondent had paid, aside from transfer costs and the like, the full balance of the purchase price together with interest, or once the First Respondent had provided the conveyancers with suitable guarantees for the outstanding balance.

15. The lease agreement was also clearly described as such. It provided that the Applicant would pay the First Respondent the

amount of R2 500 per month escalating by 10% annually. Despite the document's length, the lease was expressed to be a monthly tenancy " *until validly terminated by either party"*

16. It is evident that the power of attorney was signed well before the conveyancers were in a position to effect transfer under the agreement. It is also evident that the Applicant as purported seller did not present herself to them, as is the norm. Despite the seriousness of the allegation made that the power of attorney was not completed before them, there is no contradicting affidavit from the conveyancing attorneys. Moreover the written agreements do not require the Applicant to pay anything more than some R930 per month net (ie; the R2 500 less the R1570 which the First Respondent was obliged to pay her), yet she assumed the responsibility of paying on average R3 000 per month (which it is common cause she did for a period of over two years); an otherwise inexplicable fact bearing in mind the accepted financial straits in which the Applicant found herself.

THE ISSUE

17. The issue is straight forward. Was the agreement induced by fraud or is the Applicant otherwise entitled to resile from the contract despite signing it?

18. In *Blue Chip Consultants Pty Ltd v Shamrock* 2002 (3) SA 231(W) I had occasion to deal with the characterisation of this type of issue. The following was said at p239F-J:

> *" .... I do not understand our case law to hold that a person can escape the consequences of his signature if it can be shown that he had not read the document in question. That would be a starting proposition. One is expected to read what one signs. The law goes no further than to recognise that the other party by words, by conduct or by the form the document takes, may mislead or lull the signatory into believing that he need not go through every clause or he may ensure that the signatory does not go through the document carefully, but only skims through it before signing, whether by induced time constraints or other devises. The furthest courts will go on a principled approach is to identify the issue as one of iustus error. See Sonap Petroleum SA Pty Ltd (formerly known as Sonarep (SA) Pty Ltd) v Pappadogianis 1992 (3) SA 234 (A) at 239 A- 240 B and the cases cited. For the rest the approach is casuistic. It involves a consideration of the document itself and the nature the transaction between the parties. By nature the transaction I do not mean its legal classification. I mean what transpired between the parties which led to the signing of the document and other relevant admissible evidence which assists in explaining the basis upon which the signature was placed. It would embrace instances where the party who presented the form was aware that the other party was illiterate. It would include misrepresentations made by the creditor or other conduct which a Court considers sufficiently blameworthy so as to relieve a party from some, or all, of the ordinary consequences of his signature."*

19. If fraud is demonstrated as the reason for the signature being placed on the document, then that would on its own vitiate the agreement (see below). A fraudulent misrepresentation would also constitute a sufficient basis to support a case of *iustus error*; the requirement of reasonableness being satisfied by reason of an actionable fraudulent misrepresentation (or non-disclosure). See *George v Fairmead* 1958(2) SA 465 (A) at 471D.

NON-JOINDER

20. The *point in limine* raised by the Third Respondent regarding the non-joinder of Nedbank as erstwhile bondholder is unsound. Nedbank was paid out and its bond was cancelled. It was not privy to the alleged fraud and its transaction to cancel the bond on receipt of payment was not itself tainted. The bank is an innocent collateral party which cannot be expected to re-instate the bond over the property in order to mitigate the position of the alleged offending party.

21. Moreover if the aggrieved party seeks restitutio *in integrum* then the right to restoration of property or benefits arises as between the immediate parties to the tainted transaction. See *Marks Ltd v Laughton* 1920 AD 12 at 21.

22. Finally on this point: The bond was accessory to the loan from Nedbank, for which it was provided as security. The loan

was repaid at some stage by the First Respondent, thereby extinguishing the debt and releasing the security. The First Respondent has no right in law to recover from Nedbank the amount it paid up on the loan on the Applicant's behalf. Absent such a right and absent any right to re-instate the Applicant's loan with Nedbank there is no principal obligation which can be resurrected to support a bond as between the Applicant as debtor and Nedbank as creditor.

FRAUD AND *IUSTUS ERROR*

23. The next issue is whether the Applicant is entitled to escape the consequences of her signature on the basis of material fraudulent misrepresentation, or fraudulent non-disclosure, either *simpliciter* or by reason of the fraud resulting in *iustus error.* In the latter case *iustus error* vitiates consensus, thereby enabling the innocent party to set the agreement aside and claim *restitutio in integrum.* Compare Preller *and Others v Jordaan* 1956(1) at 496 (AD) esp. at 496E to F, and Miller J (at the time) in *Service v Pondart-Diana* 1964 (3) SA 277 (A) at 279E. See generally *Cornelissen, NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) at 170F.

24. The approach to disputes of fact in motion proceedings is clear from *Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E to 635 C. In *Whiteman t/a JW Construction v HeadFour (Pty) Ltd and another* 2008

(3) SA 371 (SCA) at para 12 the SCA said the following when applying *Plascon Evans*:

> *"An applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers."*

25. The one proviso set out in the SCA's summary of *Plascon Evans* applies where the denial by a respondent of a fact which has been alleged by the applicant is insufficient to raise a real, genuine or *bona fide* dispute. The other is where the answering affidavit contains a denial of allegations which are so farfetched and untenable that a court is justified in rejecting them on paper.

26. As mentioned earlier, the only affidavit filed by the First Respondent was that of Mr Brett Proven. There was no affidavit from Mthebe or from the firm of conveyancers. In the result the Applicant's version has not been contradicted by any admissible evidential material. Moreover no explanation was tendered as to why Mthebe did not depose to a supporting affidavit on behalf of the First Respondent with regard to the serious allegations made by the Applicant concerning what he had said to her.

27. Aside from there being no denial founded on admissible evidence to the essential averments made by the Applicant, the inherent probabilities also favour the Applicant: The contents of the documents placed before the court, the sequence of events and the manner in which the power of attorney was obtained constitute a strong body of mutually complimentary evidence supporting the Applicant.

28. Finally, the arithmetic itself supports the Applicant's averments and in my view is destructive of any attempt made by the First Respondent to suggest that the transaction was indeed a genuine one or was understood by the Applicant to have the same effect as provided for in terms of the documentation which she signed.

By way of illustration: Under the two written agreements the First Respondent could take possession of the property within a month of the agreement, on 3 April 2007, yet was only obliged to pay the Applicant a deposit of R12 398 and after that, R1 570 per month in liquidation of the total purchase price of R157 000 without any interest (since the space provided for inserting a rate of interest was left blank). In the meantime the Applicant was obliged to pay the First Respondent an amount of R2 500 per month, escalating at 10% per annum as from the date when the First Respondent was entitled to take possession of the Applicant's home, such occupation to be indefinite but on a month to month basis. Furthermore, transfer need only occur

on the final date of payment, which date is also omitted from the agreement.

29. Accordingly the allegations of fraudulent misrepresentation which induced the Applicant to conclude the agreements remain. The First Respondent cannot rely on the Applicant's signature to the documents since her undisputed evidence is that Mthebe fraudulently mislead her about their contents, rushed her into signing without reading them and also lulled her into believing that it was unnecessary to go through them as they conformed with his previous representations.

30. The Applicant negotiated for a loan only and at all material times the First Respondent, through Mthebe as its duly authorised representative, held out and fraudulently misrepresented to her that she was only concluding a loan agreement and that the documents she was given to sign hurriedly were so limited, knowing that she would rely on and be induced by these misrepresentations to sign, as it turns out she was.

31. Moreover the First Respondent, through Mthebe, fraudulently failed to disclose, as he was obliged to having regard to their earlier negotiations, that the documents she was to sign were not in respect of a loan but were in fact an out an out sale of her property to the First Respondent at a unilaterally determined price. The papers before court reveal that there had been no discussion about the Applicant's property, let alone its

value. The Applicant's case is that she would not have signed the documents had she been told the truth. See generally *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (AD) at 1145D-E and Gollach *& Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (AD) at 924A-C on fraudulent misrepresentation and actionable non-disclosure respectively.

32. The Applicant produced an affidavit deposed to by Mr Mutayi. This was in reply to the First Respondent's denial that it held itself out as a moneylender or had misrepresented the true nature of the documents. Mutayi's evidence is damning. He had been in the employ of the First Respondent for well over a year since June 2008 and his duties included collecting monthly payments from people who believed they were repaying their loans and also their current month's bond installment *via* the First Respondent. Despite such belief, according to Mutayi the properties were being, or had already been, transferred out of the owners' names. Mutayi stated that he had been briefed to lie to people about the nature of the documents they had signed so that they would not realise that they were contracting to sell their properties.

33. The Applicant raised the applicability of the National Credit Act 34 of 2005 (the "*NCA*" or the "*Act*") in the context that credit was provided to her recklessly as contemplated by section 80. The First Respondent contended that the transaction was not a credit agreement under the Act. I beg to differ. The oral

transaction contended for by the Applicant and which is not gainsaid on the facts falls within the provisions of section 8(3) of the NCA and accordingly is a credit agreement which is subject to the Act.

34. There was non-compliance with material aspects of that Act. Having regard to the view I take it is unnecessary to deal with the consequences of such a failure, save for issues regarding the competency of the relief sought. These will now be considered.

THE REMEDY

35. The Applicant seeks to set aside the transfer of the property to the First Respondent, to re-transfer the property into her name, to declare that the sale of property and the lease agreements are null and void and to interdict the sale or transfer of the property to anyone other than herself. The remedy self evidently is for *restitutio in integrum.*

36. It is common cause that;

a. Before the written agreements were concluded Nedbank held a bond over the Applicant's property for R151 087.90;

b. Pursuant to their transaction the Applicant paid to the First Respondent an amount of R99 000 over the period. This amount excluded further payments the Applicant made to the Municipality even after risk had passed in terms of the impugned sale agreement *and* after transfer of the property to the First Respondent;

c. The First Respondent continued to pay installments on the bond and settled the outstanding bond amount only some two years and nine months later in an amount which was not less than the R151 000 mentioned earlier. As a result the bond was cancelled and there is no bond presently over the property;

d. If the written agreements are set aside and the Applicant obtains restitution in the form of retransfer of her house as requested then she will receive unencumbered title to her property.

37. The Applicant does not tender restitution of any net benefits received, nor does the First Respondent counter-claim for restoration of the benefits it contends the Applicant obtained under the agreements. The First Respondent only sets out, and then by reference to an unsubstantiated conveyancer's skeletal reconciliation account, the total amount paid out to the bondholder but does not disclose when each was made. It appears that the First Respondent is content to rely on the failure to tender restoration of benefits received as a defence to

the Applicant's claim and the lack of precise accounting on its part as a basis for contending that this would render relief on motion incompetent. Moreover the First Respondent does not seek a referral of the matter to oral evidence or to trial.

38. The First Respondent argues that the Applicant failed to tender repayment of the monies that the First Respondent had paid out both to the Applicant directly and to the bondholder. The Applicant seeks to meet this by denying that she received any net financial gain if regard is had to the effects of the fraud and her payment of municipal charges even after the First Respondent had taken transfer. She also contends that the amount paid by the First Respondent to cancel the bond formed part of the whole scheme to defraud her of her property in order to sell it at a massive profit.

39. The First Respondent elected not to place acceptable evidence before court of the precise financial benefit which the Applicant received or when she received it. It also did not dispute that the Applicant had continued to pay municipal charges after the property was transferred. Irrespective of the amount, the First Respondent would still have to deduct the benefit it received of the Applicant's payments- an average of R3 000 per month. Interest would also have to be properly brought into reckoning to determine the net benefit the Applicant might have gained from the cancellation of the agreements. Accordingly, the amount of the benefit received by the Applicant is likely to be not more than some R51 000

(excluding the municipal charges paid), assuming that the Applicant does not have a further claim for supplementary damages because of her reliance on the First Respondent's representations. See Prof. AJ Kerr *"Some Problems Concerning the Beginning and Ending of Contracts"* (1989) 106 SALJ 97at p 108 ftns 77 to 81.

40. The main elements of the *restitution in integrum* remedy are the entitlement of the aggrieved party to set aside the legal consequences of an event (or a previously valid transaction) and the obligation to restore to the person from whom they were received *"... any property or benefits given and received in consequence of the original legal relations"* .See Kerr (SALJ article *supra*) at p99 ftn 12.

41. In the present case there is a dispute in motion proceedings as to whether the Applicant has gained any net financial benefit. Only if that issue is resolved in the First Respondent's favour will the necessity or otherwise of tendering restoration arise.

42. So far the case has been considered from the perspective of one overall fraudulent transaction which incorporates the tainted documents. However taken from a different perspective it might be contended that the Applicant entered into a loan agreement and the First Respondent fraudulently led her to believe that this was so. If the facts are considered in this manner then the application is confined to setting aside, under *iustus error* based on fraud, documents that do not accord with the oral agreement

concluded. If the signed documents are treated as *pro non scripto* then what would remain is the oral agreement concluded for a simple unsecured loan.

43. On this basis, the First Respondent would have lent an amount yet to be finally quantified on dates presently unknown, save for the R12 390 paid directly to the Applicant, which amount was reduced by the monthly repayments she made in reduction of the loan. Some of these payments may also have been made before the full loan was advanced. In this regard the Applicant may be entitled to rely on an application of *Extel Industrial (Pty) Ltd v Crown Mines (Pty) Ltd* 1999 (2) SA 719 (SCA) at 730B.

44. Accordingly it might have been open for the Applicant to hold the First Respondent to the loan. It might then seek to have any net outstanding balance on the loan forfeited by the First Respondent under section 89(5)(c) of the NCA if the First Respondent was obliged to, but did not, register as a credit provider in terms of section 40(4). The issue of a surviving loan agreement was not addressed in the papers, although it might be inferred from the Applicant's reliance on an alleged entitlement to terminate its obligations to repay any net benefit it received under the loan. Nonetheless the First Respondent certainly did not understand that the Applicant was seeking to hold it to the orally concluded loan agreement as represented to her.

45. I am mindful not to be overly formalistic regarding whether there was one overall tainted transaction or two transactions, one of which the innocent party might be entitled to have set aside and whether an election to do so had to be specifically pleaded. More so because the law remains in a formative stage regarding how best to address what are termed *" equitable considerations "* and how they are to be dealt with, bearing in mind the possibility of court intervention which was expressly left open in *Extel* (at 732F). There have been a number of cases since *Extel* and the courts' approach, while underpinned by consideration of *"equity and justice"* which lie at the essence of the *restitutio in integrum* remedy, necessarily remains casuistic. See *Extel* at 732F-H. See also *Klein NO. v Kolosus Holdings Ltd and Another* 2003 (6) SA 198 (T) at paras 111-114 and *Sithole v Ingwe Collieries Ltd and Another* (2005) 26 ILJ 2136 (T).

46. I accordingly proceed on the basis that the Applicant seeks *restitutio in integrum* pursuant to her election to set aside all transactions with the First Respondent by reason of fraud.

47. The starting point is the finding already made that the Applicant is entitled to have the agreements set aside as null and void *ab initio* by reason of the material fraudulent misrepresentations and non-disclosures by the First Respondent's acknowledged representative.

The effect is that the performance rendered by the parties no longer finds legitimacy and the parties are entitled to be restored, *vis a vis* each other, to their respective positions immediately prior to the impugned agreements.

48. Once a party is entitled to an order setting aside an agreement based on fraud the second part of the *restitutio in integrum* remedy is generally a simple matter of restoring property or benefits received pursuant to the affected transaction. However in the present case the entitlement to reciprocal restitution is not straight forward because of the following relevant considerations;

a. The underlying transaction as understood by the Applicant, and as fraudulently represented by the First Respondent, was one of money lending. If the transaction is a credit agreement falling under the NCA and the First Respondent was obliged to register as a credit provider , then the agreement would be unlawful and the provisions relating to forfeiture of rights by a credit provider under section 89(5)(c) would have to be addressed in the context of restoration of benefits under the *restitutio in integrum*;

b. Despite a finding that the Applicant is entitled to have the agreements set aside by reason of fraud, the purpose of the remedy (and its second key component) would be

seriously impeded, if not effectively frustrated, were the First Respondent entitled to insist on a prior determination of whether the Applicant derived a net benefit. Moreover if such a finding was made then Applicant would have to find the money to be refunded before she can obtain re-transfer of the property. It is to be borne in mind that the only realistic means she may have of raising finance to repay the First Respondent is by accessing the capital value of the property. Compare *Extel* at 732D-G

It is advisable to deal separately with the factual and legal issues underscoring these considerations.

WHETHER FIRST RESPONDENT IS A CREDIT PROVIDER SUBJECT TO REGISTRATION UNDER THE NCA

49. The First Respondent disputes that it engages in providing credit. I have found that the transaction between the Applicant and the First Respondent was a credit agreement under section 8(3). However in order to find that the agreement was unlawful and void under section 40(4) of the NCA the First Respondent must have been obliged to register as a credit provider. Registration is only necessary if a credit provider's activities satisfy the threshold requirements of section 40(1) read with section 42(1) of the Act. The relevant portions of these provisions read;

"40. ***Registration of credit provider.-***

(1) A person must apply to be registered as a credit provider if-

(a) that person .... Is the credit provider under at least 1oo credit agreements, other than incidental agreements; or

(b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1)

.....

(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89

.....

42. ***Thresholds applicable to credit providers. –***

(1) On the effective date, and at intervals of not more than five years, the Minister, by notice in the Gazette, must determine a threshold of not less than R500 000, for the purpose of determining whether the credit provider is required to be registered in terms of section 40(1)" (emphasis added)

50. If the First Respondent was obliged to register as a credit provider under section 40(1) but did not, then the agreements it concluded are rendered, by reason of sections 40(4) and 89(2)(d), unlawful and void to the extent provided for in section 89(5)(c).

51. If a credit agreement is unlawful under section 89(5)(c) then the credit provider forfeits the right to recover any monies lent

unless a court concludes that the consumer was unjustly enriched. However the amount of enrichment will still not accrue to the benefit of the credit provider. At best, under present legislation, it may be forfeited to the State. Section 89(5) reads:

"(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that—

(a) the credit agreement is void as from the date the agreement was entered into;

(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated—

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either—

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer."

52. In *Cherangi Trade and Invest 107(Pty) Ltd v Mason and others* [2011] ZACC 12 (now also 2011(11) BCLR 1123 (CC)) at paras [14] - [15] and [18] – [21] the Constitutional Court explained the difficulties of providing a comprehensible meaning to these provisions.

53. Accordingly if section 89(5)(c) of the NCA is directly applicable then, subject to any constitutional challenge, it is impermissible for a court to order the return to an unregistered credit provider , who is subject to section 40, any benefit received by a consumer arising from a credit agreement. Furthermore, the peremptory wording of section 89(5)(c) and its remedial nature suggests that a court may be obliged *mero motu* to act in accordance with its provisions if the facts before it fall within the scope of the provision. It should however be born in mind that the possibility of significant constitutional challenges were not excluded in *Cherangi*. See also the other issues raised by JM Otto in *The National Credit Act Explained* at pp 43 and 46.

54. I turn to the facts. The First Respondent describes itself as a property investment company and admits that it has concluded many similar written agreements and has *" always offer (sic) properties* (back) *for sale to the tenants without a right of first*

refusal being agreed upon in the contract of lease". It is therefore evident from the papers that the First Respondent engages in similar transactions and that less than five similar transactions would place it well within the threshold requirements for registration as a credit provider under section 40. Mutayi's affidavit and documents presented in the founding affidavit place the value of similar transactions concluded by the First Respondent in excess of the R500 000 threshold.

55. The papers do not raise the provisions of section 89(5) of the NCA. I am alive to the requirement that a party relying on statutory invalidity is expected to raise it pertinently. Accordingly at this stage the enquiry must be limited to whether the NCA ought to impact on the way in which the remedy of *restitutio in integrum* is to be implemented so as to give proper effect to the right the Applicant has to set aside the agreements in circumstances where she claims not to have received any net benefit from the annulled transaction. It must also be noted that the Applicant claims that the First Respondent should forfeit any right to repayment by reason of its conduct.

THE ISSUE OF RESTITUTION

56. It is axiomatic that fraud will vitiate the agreements in question. It will allow a court to set the transactions aside and grant interdictory relief to prevent the disposal or encumbering of the property. The question remains whether the Applicant

can obtain *restitutio in* the form of a re-transfer of the property into her name without a court first determining whether she received any benefits under the impugned transactions and requiring her to restore any such benefits against re-transfer.

57. The right to set aside the agreements based on fraud was not genuinely in dispute and therefore was properly a matter of speedy determination on motion so as to protect the Applicant against the property being on-sold. However resolving the issue of whether the Applicant had derived a net benefit which must be restored to the First Respondent could indefinitely delay her from obtaining retransfer of the property; this despite the fact that the First Respondent never overtly sought to obtain security for repayment and, on any reckoning, some two thirds of the money allegedly expended by the First Respondent to cancel the bond over the Applicant's property had been repaid.

58. Restoration of benefits is not considered in isolation as part of a counter-claim but rather as an element of the restitutionary process. See *Extel* at 731I to 732D. *Extel* however left open how a court is to deal with the *"many instances where the nature and extent of any restitution and its possible quantification would be matters of considerable factual and legal complexity, which may well require the intervention of a court to resolve..."* (At 732F).

59. Accordingly it becomes necessary to consider more closely the general common law rule regarding the tendering of benefits received when restitution is claimed.

60. The issues regarding *restitutio in integrum* and the innocent party's liability to restore any benefits received appear to arise not only under substantive law but also possibly under procedural law. This is considered later.

61. It is however accepted that the quantification of benefits received may not always be a simple arithmetic calculation: It might not be possible to return what was received or restoration may not adequately achieve justice between the parties. In the latter situation the innocent party may be entitled to what has been loosely termed "*restitutionary damages*". See Prof. AJ Kerr *"Some Problems Concerning the Beginning and Ending of Contracts"* (1989) 106 SALJ 97 at p 98 ftns 7-9 and 108 ftns 77 to 81. See also Kerr *The Principles of the Law of Contract* (6th)at 332-333 and the cited extract from *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* (1906) 23 SC 250 at 261. In the present case restitutionary damages may include the costs of obtaining, if possible, a fresh bond to fund whatever net amount the Applicant may be obliged to repay the Third Respondent as a result of the agreements being set aside. In *Extel* the SCA at p734E emphasised that because the rules regarding restoration are founded on equitable considerations a party *"…. may be hard pressed to show that as a matter of 'equity and justice' (ibid at 700 last line) that they*

were entitled to any compensation". (The reference is to *Feinstein v Niggli and Another* 1981 (2) SA 684 (AD) at 700)

62. In *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* 1936 TPD 209 at 213 the Full Bench held that the plaintiff was not entitled to rescind an agreement fraudulently concluded without tendering restitution. The effect of this case was ameliorated in *Van Schalkwyk v Griesel* 1948(1) SA 460 (AD) at 472 which held that restoration of benefits did not have to be tendered prior to institution of proceedings. These cases relied on the principles set out in Marks *Ltd v Laughton* 1920 AD 12. See also Van *Heerden and others v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) and more recently *Sackstein NO v Proudfoot SA (Pty) Ltd* 2006 (6) SA 358 (SCA).

63. An analysis of case law reveals another thread. Where impediments to restoration exist then the right to *restitutio in integrum* in favour of the innocent party who wishes to set aside an agreement on the grounds of fraud will be countenanced despite no full, or even partial, reciprocal tender to restore the *status quo ante*. These cases range from instances where the property perishes while in the possession of the innocent purchaser to where the property became valueless when put to its intended use. See *Marks Ltd v Laughton* 1920 AD 12 and *African Organic Fertilisers and Associated Industries Ltd v Sieling* 1949(2) SA 131 (W).

64. While the object of the rule is to restore the parties to their respective positions immediately prior to contracting *(Feinstein* at p700F) the dominant juridical consideration, at least in cases of fraud or other transactions considered in law to be odious, appears to be the need to afford fair relief to the innocent victim of a fraud. This is achieved by giving effect to the principal remedy, namely undoing a tainted transaction. The means of achieving the objective of fairness in claims for restoration is founded on the underlying principle of *"equity and justice"* (*Feinstein* at 700H). In my respectful view this is brought out in the following passage from *Mackay v Fey NO & another* 2006(3) SA 182 (SCA) at para 10:

> " *Whether the need to make restitution is excused, either in whole or partially, will now depend upon considerations of equity and justice and the circumstances of each case, the occasions on which it will do so are not limited to a specified and limited number of exceptions"*

65. In *Harper v Webster* 1956(2) SA 495(FC) at p500A-B Claydon FJ after referring to cases such as *Marks* and *Sieling* in support of the proposition that " *the inability to restore the thing sold would not be fatal to a claim for rescission in various circumstances"* continued:

> " *It does not seem that these cases should be regarded as laying down a general rule and limited exceptions to it; rather they indicate acceptance of the general rule but departure from it <u>when justice demands such departure</u>"* (emphasis added)

Kerr (*supra)* at p331 relates this extract to that contained at p502F of the same judgment which reads:

> *The general rule that the person seeking restitution must himself make restitution always governs, but the relief should not be denied when substantially that restitution can be made, and, in so far as it falls short of complete restitution, compensation in money can make good the deficiency"* (emphasis added)

The *ratio* in *Harper* was approved in *Van Heerden* at 31H-32D

66. In cases of fraud our law does not hesitate to protect the innocent party as "*fraud unravels all*" (Lord Diplock in *United City Merchants (Investments) Ltd and Others v Royal Bank of Canada and Others* [1982] 2 All ER 720 (HL) at 725j) and general principles are tempered accordingly.

Holmes JA in *Cornelissen, NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) 170D-F said the following:

> *"In any branch of the law, and whether common or statutory, fraud is regarded as an odorous concept. The Romans described it as*
>
> > *"any craft, deceit or contrivance employed with a view to circumvent, deceive, or ensnare another";*
>
> *see Digest, 4.3.1.2., referred to by DE VILLIERS, C.J., in Tait v Wicht and Others, 7 S.C. 158 at p. 165. The law has consistently set its face*

against it. Thus a fraudulently induced sale is voidable at common law, with the remedy of rescission and damages and a personal action against the buyer for recovery of the property. In certain cases fraud vitiates consensus and renders the sale void, leaving the seller with the remedy of vindicating the property as owner. Criminal law exposes an alleged defrauder to prosecution and even renders him liable to arrest without warrant; see sec. 23 (b) of Act 56 of 1955."

67. Where the need arises courts will also fashion a remedy where a right has been infringed. See *Minister of the Interior and another v Harris* 1952(4) SA 769 (AD) at p781A-B. It is also implicit from the authorities there cited that a party is entitled to a remedy that is effective in order to redress the right infringed.

68. In the present case the attainment of the right to which the Applicant is entitled would be frustrated if all the issues concerning restoration of benefits had to be determined before she could take re-transfer of her house. In particular:

a. It will be necessary to hear evidence in order to determine if any net benefit was received by the Applicant and to which the First Respondent is legitimately entitled;

b. If it is found that an amount is owing then the Applicant may be unable to pay it back directly and will be obliged once again to seek finance. In the present case if the Applicant's right to restitution is dependent on the outcome of a trial to determine whether she has benefitted as a result of the agreements being set aside then she will

not be able to access the value of the property to finance the amount that she might be held liable to repay the First Respondent (as it would still be the registered owner). On the basis that the amount could not be more than R59 000 the Applicant should be able to raise the amount against the security of a bond over the house. However the Applicant will be unable to regain title for as long as *restitutio* in the form of a re-transfer of her property cannot be effected.

c. It is likely that a court will find that the Applicant received a net benefit. However the provisions of section 89(5) (c) will preclude the court from ordering restoration to the First Respondent. That issue may then be the subject matter of appeal by the First Respondent, in which case the Applicant runs the risk of being out-litigated and unable to take title for a number of years even if she was ultimately successful.

d. The First Respondent adopted the position that the claim could be frustrated by simply alleging a failure by the Applicant to tender restoration, without fully quantifying the amount paid by her including interest and municipal charges. The First Respondent did not ask for a referral to evidence or to trial and while this court may exercise a residual discretion to do so *mero motu* the interests of justice militate against it and are better served by allowing the First Respondent if it is so advised to institute action

separately for the return of any benefits it may prove to be entitled in law.

RELEVANCE OF THE NATIONAL CREDIT ACT

69. Section 89(5)(c) of the NCA may have either direct or indirect application as a consequence of setting aside the written agreements on grounds of *iustus error* based on fraud. The law will give effect to the real substance and purpose of a transaction over the form it takes (eg *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 (2) SA 710 (A); the commentary in *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) at 877C-E and *Commissioner for South African Revenue Service v NWK Ltd* [2010] ZASCA 168 (now 2011 (2) SA 67 (SCA)) at para 55) .

Moreover section 8 of the NCA defines a credit agreement by reference to substance over form.

70. The substance of the agreement which the Applicant understood she was concluding and that which the First Respondent represented to her was being concluded was that of money lending and constituted a credit agreement as defined under section 8(3) of that Act.

71. It may be contended that the characterisation of the issues or the consequences of setting aside the agreements as a nullity

take the case beyond the scope of the NCA. I disagree. But even if that were so, a court cannot lightly ignore the impact of remedial legislation where under the common law a discretion based on equity and justice is accorded, much less where the application of the principle itself is governed by these considerations. See *Extel at* 732 F-H and *MacKay* at para 10.

72. Legislation that is remedial impacts on what are accepted and unacceptable societal norms. In the context of common law rights that are impacted by the Bill of Rights reference may be had to O'Regan J in Rail *Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 73,78 and 88 as well as to section 39(2) of the Constitution. The NCA in its terms is remedial socio-economic legislation intended to protect the proprietary rights of consumers while respecting the legitimate interests of credit providers.

73. If the NCA does not have direct application then a failure to respect its consequences where the credit provider was obliged to be registered under its provisions would amount to achieving indirectly under common law what a statute expressly forbids.

74. The case is on motion and the main concern is to provide an effective remedy to undo the fraud.

75. Accordingly it is sufficient to find that having regard to the considerations set out in relevant legislation, namely sections 40(4), 89(1)(d) and 89(5)(c) of the NCA, equity and justice

dictate that the Applicant is excused from being obliged to restore any benefits before the property can be re-transferred into her name.

76. The First Respondent however asserts that the Applicant is precluded from setting aside the contract as *void ab initio* until there has been proper restitution of benefits received. I have found that the submission is wrong having regard to the facts placed before me. This however does not mean that the First Respondent is not entitled to sue separately for repayment of any net benefits received; only that re-transfer of the property will not be denied to the Applicant because she has not tendered return of any benefits she may have received.

77. I am of the view that "*substantial restitution*" as that term was used in *Harper* can be achieved by securing immediate re-transfer of the property into the Applicant's name and allowing the First Respondent to institute an action if it is so minded to determine whether there is a net amount still payable by her. If there is an amount lawfully payable the Applicant can utilise the unencumbered property, which will by then be registered in her name, to procure a bond. The fact that the First Respondent holds no security for his claim should not be a concern because the Applicant, on the facts found, was not asked by the First Respondent to provide security and there is no reason to now improve its position.

78. In my view the question raised by the First Respondent regarding what is to happen considering that the bond was cancelled because of payments effected by the First Respondent on the Applicant's behalf is the subject matter of a separate action if it is so minded.

79. Such a course does not offend the "*once and for all rule*" of finality in litigation under procedural law for a number of reasons. Ordinarily the issue of *restitutio* and restoration of benefits is one dimensional; the culpable party to an agreement is to restore the asset and the aggrieved party is to return the price received less restitutionary damages or vice versa. In the present case property was transferred which, by reason of fraud, never formed the subject matter of consensus between the parties. Moreover the courts have separated claims that require the leading of evidence from issues that can be decided on paper. There is a further aspect: The Applicant is the victim of a fraud. The overriding consideration is to undo the fraud in a way that as between the innocent victim and the perpetrator ensures as far as possible that the victim does not *de facto* end up remediless.

80. In my view the enquiry in the present case of whether there has been a net benefit and if so whether it is claimable are discreet from the question of whether the Applicant is entitled to regain title to property that was transferred in the absence of consensus and by reason of fraud. Furthermore the manner in which the First Respondent engaged the matter suggests that it

may not pursue restitution at all. The reason might be the impact of section 89(5) (c) of the NCA. That being so, and since it was not sought, it would be an unnecessary waste of time to provide for a contingency that may not arise.

81. In the result it is more effective and, in my respectful view, in accordance with *Extel* and the import of section 89(5) (c) to confirm that this decision does not preclude the First Respondent from seeking by way of trial action restitution of any net benefits to which it is entitled having regard to any restitutionary damages or other amounts for which the Applicant may claim a reduction.

COSTS AND RELATED MATTERS

82. The failure to answer serious allegations of fraud is a matter of grave concern. For this reason the judgment and the papers are to be referred to the Director of Public Prosecutions in relation to the First Respondent.

83. I also consider it appropriate that the conduct of the conveyancers be referred to their appropriate Law Society. The concern is that, on the papers before me, they appear to have permitted a representative of the client, who had a clear interest, to procure the signing of powers of attorneys. As far as I am aware this does not accord with the ordinary practice of procuring powers of attorney in order to effect the transfer of

property on behalf of a seller; particularly not before the suspensive conditions have been complied with.

84. The punitive order sought for costs on the attorney and own client scale is justified for reasons apparent from the body of the judgment.

ORDER

85. I grant an order in the following terms:

1. *The transfer of the Property with description: ERF 1795 Klipfontein Extension 2, under title deed T103844/2008, which was effected by the Second Respondent on 20 November 2008 is set aside:*
2. *All the sale agreements which led to the above mentioned transfer are declared null and void:*
3. *The Second Respondent is directed to transfer the property into the name of the Applicant:*
4. *The First Respondent is interdicted from selling or transferring the above mentioned property to any party other than the Applicant:*

5. *The Second Respondent is interdicted from selling or transferring the above mentioned property to any party other than the Applicant:*
6. *The First Respondent is to pay costs of this application on the Attorney and own Client scale.*

DATES

DATES OF HEARING:	10 August 2010
DATE OF ORDER:	12 August 2011

LEGAL REPRESENTATIVES:

FOR APPLICANT:	Mr. Mkhize
FOR 1st RESPONDENT:	Adv. Bezuidenhout
	Mr. Vermaak