REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: 17417/2012

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

GIFPROPS (PROPRIETARY) LIMITED Applicant

And

DAVID GORDON N.O. First Respondent

THE REGISTRAR OF DEEDS PRETORIA Second Respondent

JUDGMENT

OPPERMAN AJ

NATURE OF APPLICATIONS

[1] In this application the applicant seeks the following relief:

1.1. declaring that it is the owner of the immovable property constituted by Erf […], W[…] Extension 124, situate at 13 E[…] Street, C[…], W[…], Johannesburg (*"the property"*);

1.2. and flowing from such declaratory relief, a further order directing the first respondent to forthwith take the steps necessary and sign the documents necessary to effect registration of transfer of the property into the name of the applicant.

[2] There are two further applications which are of moment to the present proceedings being:

2.1. an application for security for costs brought by the first respondent against the applicant in the present application ("*the security for costs application*"); and

2.2. an application for eviction brought by the first respondent against one Gillian Helen Silcock ("*Ms Silcock*") under case number 16995/2012 ("*the eviction application*").

[3] By agreement between the applicant, the first respondent and Ms Silcock: The outcome of this application will be determinative of the outcome of the eviction application in that, should the applicant succeed in this application, the eviction application is to be dismissed, and conversely, should the applicant fail in this application an order for eviction in terms of the eviction application is to ensue. The parties are in agreement that a period of 2 (two) months would be reasonable period for Ms Silcock to vacate the property. The security for costs application does not require determination,

and each of the parties thereto are to bear their respective costs as a result thereof.

INTRODUCTION

[4] Simon Wolf Feinstein ("*Mr Feinstein*") passed away in 2011. Prior to him passing away, Mr Feinstein and Ms Silcock were close friends. Ms Silcock contends that they were never involved in a physical relationship but that Mr Feinstein had expressed his desire to marry her on a number of occasions. Ms Silcock and her children have lived in the property owned by Zelpy 2098 (Proprietary) Limited ('Zelpy') since April 2007. Levy statements were submitted to the Applicant and paid for by Mr Feinstein. It is clear that Mr Feinstein contemplated making a donation to Ms Silcock of this property. He took some steps to achieve this. He acquired a shelf company during 2004 and changed it's name to incorporate the first two letters of Ms Silcock's name and the first letter of Mr Feinstein's surname to form the name of the applicant. On 25 November 2004 Ms Silcock became the sole director and sole shareholder of the applicant. During December 2004 the Applicant concluded a written sale agreement to purchase the property from Zelpy. That transfer never took place. No explanation has been provided as to why this did not occur. During 2006 Mr Feinstein expressed his disappointment in regard to the fact that Ms Silcock was not reciprocating his feelings. It was also in mid-2006 that Mr Feinstein commenced a relationship with one Tracy Rose who he subsequently married. Mr Feinstein purchased the property during October 2006 from Berkeley Developments (Proprietary) Limited ('*Berkeley*') and registered the property, not into the name of the applicant, but into his own name.

Zelpy had changed it's name to Berkeley. In his will, which is dated 29 June 2009, he bequeathed all his assets to Tracy Rose save for certain monetary sums which he wanted his children and his wife from a previous marriage, to receive. Neither the property, nor Ms Silcock, are mentioned in his will. Once Mr Feinstein passed away, the applicant, through Ms Silcock, asserted a claim to the property, but only after Ms Silcock had submitted a claim in respect of improvements she had made in respect of the property.

THE RELEVANT FACTS

[5] The first respondent is the duly appointed executor to the estate of the late Mr Feinstein, having been so appointed on the 14th day of November 2011, Mr Feinstein having passed away on the 25th of October 2011.

[6] Prior to the death of Mr Feinstein, and on the 25th of November 2004, a written agreement was concluded between Ms Silcock on the one hand, and Mr Feinstein, on the other ("*the Share Transfer Agreement*").

[7] The terms of the Share Transfer Agreement included the following:

7.1. From the effective date, which was identified as being the 25th of November 2004, Ms Silcock was to become the sole shareholder and director of the applicant;

7.2. In the future, Mr Feinstein was to take steps for the applicant to acquire the property and such was to be fully paid for;

7.3. Under certain specified conditions there was to be a revision in the shareholding and directorship in the applicant, one of which was specified in the following terms:

> "Simon finds a partner entering his life, and thereafter Gill may vacate the cluster."

7.4. By way of security in favour of Mr Feinstein, Ms Silcock was required to sign a blank share transfer form in respect of all of the issued share capital in the applicant.

[8] On the same day, namely the 24th of November 2004 Ms Silcock became the sole director and shareholder in the applicant.

[9] On the 9th of December 2004 Mr Feinstein purporting to represent the applicant made a written offer to purchase the property from Zelpy which offer was accepted on the 10th of December 2004 ("*the first sale agreement"*).

[10] The first sale agreement was expressly made subject to the following condition, namely:

> "Building contract
>
> 15.1 This offer to purchase is subject to the successful conclusion by the purchaser of a building contract in respect of the property and attached hereto marked "Annexure D" within 2 (two) months of the date of signature of this agreement by the purchaser …"

[11] In terms of clause 1 thereof the purchase price was to be the sum of R100 000, to be paid against registration of transfer of the property into the name of the applicant, but to be secured by an approved banker's guarantee in a form acceptable to Zelpy payable free of exchange and to be furnished within 45 days of the date of the acceptance of the offer by Zelpy.

[12] No allegation that a building contract as alleged or otherwise had been concluded within the required period, is made by the applicant in any of the papers filed nor has any evidence been presented that an approved

banker's guarantee had been furnished within 45 days of the date of the acceptance of the offer by Zelpy.

[13] On the 30th of October 2006 (i.e. just short of two years later) Mr Feinstein, acting personally entered into a written agreement ("*the second sale agreement*") for the acquisition by him, in his personal capacity, of precisely the same property, the seller thereunder being described as Berkeley.

[14] In terms of the second sale agreement:

14.1. the conveyancing attorneys were identified as Yammin Hammond & Partner, such being Berkeley's attorneys who was to attend to registration of transfer of the land into Mr Feinstein's name, Mr Feinstein being under obligation to sign all documents relating to transfer in order to procure such;

14.2. the purchase price of the property was stated to be the sum of R200 000.

[15] The property was transferred into Mr Feinstein's name on the 10th of September 2007.

[16] Consequent upon the first respondent's appointment as executor to the estate of Mr Feinstein, and on the 2nd of December 2011, acting in terms of section 27 of the Administration of Estates Act, Act No. 66 of 1965 ("*the Act*") the first respondent caused a notice to be published both in the Government Gazette and in The Star newspaper calling upon all persons enjoying a claim in the deceased's estate to lodge such claim within 30 days.

[17] Ms Silcock lodged a claim in her personal capacity in respect of the property relating to payments made by Ms Silcock in respect of the

property which she, at the time, categorised as being Mr Feinstein's property.

[18] The claim so submitted by Ms Silcock was rejected by the first respondent, and Ms Silcock did not pursue the matter any further.

[19] The applicant has lodged no further claim in the estate.

THE APPLICANT'S CASE, AND THE FIRST RESPONDENT'S ANSWER THERETO

[20] The applicant relies upon two principal grounds for the relief sought by it namely:

20.1. that the applicant is in fact the owner of the property which has been incorrectly registered in Mr Feinstein's name; and

20.2. the conclusion of the second sale agreement constitutes an intentional and mala fide circumvention of the first sale agreement permitting of the relief sought by the applicant.

[21] The latter contentions are premised upon allegations advanced by the applicant in the further affidavit filed by it in the security for costs application and form the subject-matter of a strike out application.

[22] Each of the principal contentions relied upon by the applicant are dealt with hereunder.

THE APPLICANT'S OWNERSHIP OF THE PROPERTY

[23] It is the applicant's contention that it is entitled to the declaratory order sought by it because the property is in fact owned by the applicant.

[24] Resultant from the applicant's alleged ownership of the property the applicant contends that it is accordingly entitled to the subsequent relief sought in the Notice of Motion, namely the relief compelling the first

respondent to sign all documentation necessary to effect registration of transfer of the property into the name of the applicant.

[25] The case which the applicant seeks to make out, so as to demonstrate its ownership of the property, is, premised upon the contentions that:

25.1. it was never Mr Feinstein's intention to acquire ownership of the property but rather that the property be acquired by, and belong to, the applicant;

25.2. the applicant's deponent was under the impression that registration of transfer into the name of the applicant had in fact taken place;

25.3. the registration of transfer of the immovable property into the name of Mr Feinstein on 10 September 2007 was a mistake.

[26] The first respondent disputes that the applicant is the owner of the property and contends that:

26.1. there is no dispute between the parties that Mr Feinstein was the registered owner of the property;

26.2. as such the property is an asset in the deceased estate;

26.3. because the property is an asset in the deceased estate, the Act requires the first respondent to take the property into his custody, possession and control and to sell the property to the best advantage of the estate.

[27] For ownership to pass in respect of immovable property it is necessary, *inter alia*, for there to be registration of transfer thereof in the relevant

Deeds Office, inasmuch as ownership only passes against such registration.[1]

[28] Although it is, *inter alia*, a requirement for the passing of ownership of immovable property under South African law, that the transferor must have both the capacity and the intention of transferring ownership and the transferee must have the intention of accepting ownership, provided that registration of transfer has in fact taken place, non-compliance with any of the requirements postulated for the passing of ownership will not prevent such ownership from passing, even if the person to whom ownership has passed has received such in error.[2] In *Legator McKenna Inc v Shea*, 2010 (1) SA 35 (SCA) Brand JA held as follows at p44:

> "[20] This brings me to the next enquiry. Should the transfer of the house to the Erskines be regarded as valid despite the invalidity of the underlying sale which was the causa for the transfer? The appellants' contention that it should, was rooted in the assumption that the abstract theory - as opposed to the causal theory - of transfer has been adopted as part of our law. According to the abstract theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction such as, in this case, the contract of sale. The causal theory, on the other hand, requires a valid underlying legal transaction or iusta causa as a prerequisite for the valid transfer of ownership (see eg *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 301H - 302H; *Van der Merwe Sakereg* 2 ed at 305 - 6). With regard to the transfer of movables our courts, including this court, have long ago opted for the abstract theory in preference to the causal theory (see eg

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[1] See section 16 of the Deeds Registry Act, Act 47 of 1937 which provides as follows: *"Save as otherwise provided in this Act or in any other law the ownership of land must be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar …"*See also The Law of South Africa, Vol 27, First Re-Issue Volume; Things, para 362(g); The Law of South Africa, Vol 14(1), Second Edition Volume; Land, para 22

[2] The Law of South Africa, Vol 27, First Re-Issue Volume; Things, para 362(g); Knysna Hotel CC v Coetzee NO 1998 (2) SA 743 (SCA) at 751D-F as read with 754C-D

Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd 1941 AD 369 at 398 - 399; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) ([2006] 3 All SA 219) in para 17)."

[21] Some uncertainty remained, however, with regard to the transfer of immovable property. In the High Courts that uncertainty has been eliminated in a number of recent decisions where it was accepted that the abstract system applies to movables and immovables alike (see eg *Brits and Another v Eaton NO and Others* 1984 (4) SA 728 (T) at 735E; *Klerck NO v Van Zyl and Maritz NNO and Related Cases* 1989 (4) SA 263 (SE) at 273D - 274C; and *Kriel v Terblanche NO en Andere* 2002 (6) SA 132 (NC) at paras 28 - 49). These decisions are supported by academic authors advancing well-reasoned arguments (see eg *DL Carey-Miller: The Acquisition and Protection of Ownership* at 128 - 30 and 168; *CG van der Merwe Sakereg op cit* at 305 - 10; CG van der Merwe & JM Pienaar 2002 Annual Survey 466 at 481; *Badenhorst, Pienaar & Mostert Silberberg & Schoeman's The Law of Property* 5 ed at 76). In view of this body of authority I believe that the time has come for this court to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well.

[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922E-F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra* at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 496; *Klerck NO v Van Zyl and Maritz NNO supra* at 274A - B; Silberberg J and *Schoeman op cit* at 79 - 80)."

[29] The applicant accepts that Mr Feinstein concluded the second sale agreement and that pursuant thereto the property was registered into Mr Feinstein's name. Both the act of concluding the second sale agreement and its terms, are incompatible with any intention, other than that Mr Feinstein intended to become owner of the property pursuant thereto. The very act of registration into the name of Mr Feinstein, which per force requires, *inter alia*, the intervention of a conveyancer and the granting of a power of attorney to such conveyancer[3], are incompatible with any intention other than the intention to transfer ownership of the property, not to the applicant, but to Mr Feinstein.

[30] The vast majority of factual matter relied upon by the applicant to demonstrate an intention at variance with an intention to accept ownership, predates Mr Feinstein having personally concluded the second sale agreement (which was concluded on 30 October 2006), such as, for example, the conclusion of the share transfer agreement (concluded on 25 November 2004), the transfer of shareholding in the applicant to Ms Silcock (25 November 2004), the conclusion of the first sale agreement (9 December 2004) and the correspondence with the conveyancing attorneys who were instructed to attend to registration of transfer of the property from Zelpy into the name of the Applicant (which did, in any event, not occur).

[31] Had Mr Feinstein intended to transfer ownership of the property, not to himself, but to the applicant it is inexplicable that he would either have entered into the second sale agreement, or given effect thereto pursuant to

[3] See section 20 of the Deeds Registry Act

the conclusion thereof, or caused transfer to be registered into his own name.

[32] Such conduct on behalf of Mr Feinstein is the antithesis of the purported intention that the applicant asserts Mr Feinstein held at all material times.

[33] Cardinal to the determination of this application is accordingly the explanation proffered by the applicant for this conduct on the part of Mr Feinstein.

[34] The founding affidavit deposed to on its behalf merely states that:

> "I do not know why Simon entered into the Berkeley Development agreement."

[35] The contention, advanced by the applicant, that registration of transfer of the property into Mr Feinstein's name was a mistake, is an inference which the applicant seeks to draw in the factual matrix as presented by it.

[36] In a civil context, for the applicant to rely upon the inference in question it must demonstrate:

36.1. that the inference which it contends for is consistent with all of the proven facts; and

36.2. the proven facts render the inference more probable than any other reasonable inference[4].

[37] In light of what is set out above, the applicant's reliance upon the inference contended for by it, fails on both scores.

[38] It is contended by the applicant that its case is, *inter alia*, to be adjudicated upon the fourth set of affidavits filed by it in the security for costs

[4] C W H Smit and H Rademeyer, Law of Evidence, Butterworths Loose Leaf Edition, para 3111, Issue 1, page 3-3; MacLeod v Rens 1997 (3) SA 1039 (E) at 1049A-C

application, and the matters communicated by Mr Feinstein to the persons therein referred to. These matters include:

38.1. In regard to the intention of Mr Feinstein in respect of the property, Mr Feinstein's intention is confirmed by :-The other close friend and personal assistant of Mr Feinstein, Ms Lynch, who knew Mr Feinstein for many years and who contends that it was always the intention of Mr Feinstein, as expressed by him to her on many occasions, that the property would belong to Ms Silcock. Mr Feinstein had reportedly referred to the property as "*Gill's home*" and had stated to Ms Lynch that Ms Silcock would own the property.

38.2. Other friends and business associates of Mr Feinstein who had also confirmed the intention of Mr Feinstein in regard to the property, were, Raymond Thomas Albert Charles Nethercott, Carla Maria Veloso Colaco and Tinette Michelle Underdown.They all express shock and surprise that the property is not registered in Ms Silcock's name.

[39] The first respondent has applied for the striking out of the allegations so relied upon, inter alia, upon the basis that such constitutes impermissible hearsay evidence and is argumentative and speculative in nature.

[40] The applicant acknowledges that the statements therein relied upon constitute hearsay evidence but requests that the communications be reveived for the truth of the content thereof. Section 3(1)(c) of the Law of Evidence Amendment Act, Act 45 of 1988 ('*the Law of Evidence Amendment Act*') provides:

"3. Hearsay evidence. -

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(*a*) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(*b*) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(*c*) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

[41] Hearsay evidence is not to be admitted in civil proceedings unless: the person against whom such evidence is to be adduced agrees thereto (which is manifestly not the case in the present proceedings); or the person upon whose credibility the probative value of such evidence depends himself testifies at such proceedings (once again that element is absent in that Mr Feinstein, the deceased, cannot speak to the issue); or the Court permits the receipt of such evidence having regard to the factors specified in section 3(1)(c) of the Law of Evidence Amendment Act.

[42] I am mindful of the caution issued by *Du Plessis J in Hewan v Kourie NO*, 1993 (3) SA 233 (TPD) at 239F being that the flexibilty introduced into the

rule by Section 3(1)(c) should not be negated by also introducing reliabilty as an overriding requirement.

[43] In considering the factors so postulated, the evidence relied upon in the present matter ought, in my view, not to be admitted (I am not making an order in respect of the striking out application but disregard such evidence for purposes of adjudicating this matter) :

43.1. The nature of the proceedings are application proceedings, and thus the hearsay evidence will not be exposed to trial-like scrutiny, unless this Court should both admit the evidence, and direct that the deponents be subjected to cross-examination;

43.2. The nature of the evidence in question is of an inherently dangerous type in that reliance thereon presupposes not only that the deponents have honestly and accurately conveyed what was communicated to them and when this occurred, but in addition, that Mr Feinstein, if he in fact communicated the matters relied upon, was himself being honest and accurately communicated his intentions;

43.3. The purpose for which the evidence is tendered (i.e. its purported probative value) is in order to establish what, on the applicant's version, lies at the very heart of its case, namely the true intention of Mr Feinstein, and the purported mistake made by him in transferring ownership of the property into his own name.

[44] The admission of such evidence will be prejudicial to the first respondent who, it must be remembered, acts in his representative capacity as the duly appointed executor.

[45] In the ultimate result, even if this Court admits the evidence it will still be required to speculate as to whether Mr Feinstein, if he in fact communicated the matters relied upon by the applicant to the said deponents, was seeking to truly communicate his thoughts, or was rather seeking to portray a state of affairs not reflective of the truth, for whatever reason, whether it be to perpetuate a relationship with Ms Silcock, despite the truth, whether to hold himself out as being of a philanthropic and altruistic persuasion, or for any other of a myriad number of reasons.

[46] Should this Court permit the receipt of the matter it then bears emphasis that:

46.1. in terms of the affidavit deposed to by Ms Lynch it was during mid-2006 that, on her version, Mr Feinstein expressed to her disappointment in regard to the fact that Ms Silcock was not reciprocating Mr Feinstein's feelings;

46.2. it was also in mid-2006 that Mr Feinstein commenced a relationship with one Tracy Rose, whom he subsequently married.

[47] It is hardly coincidental therefore that it was at or about the time that Mr Feinstein was not only feeling, but expressing his disappointment vis-à-vis Ms Silcock, and at a point in time where he had already commenced dating the person who subsequently became his wife, that he concluded the second sale agreement in terms of which he personally sought to acquire the property.

[48] There is good reason to doubt the veracity of the allegations advanced by Ms Silcock on behalf of the applicant, as to the intention of Mr Feinstein, in that certain of her conduct is incompatible therewith. At a very early stage

in the interaction between Ms Silcock and the first respondent, and as far back as December 2011, Ms Silcock did not seek to contend that the applicant was the owner of the property, or that it had mistakenly been registered into Mr Feinstein's name.

[49] On the 12th of December 2011 Ms Silcock (but not the applicant) lodged a claim against the estate of Mr Feinstein in respect of monies expended by her on the very property at issue in this matter.

[50] In terms thereof Ms Silcock gave notification of her claim:

> " for payments made by Gillian to Simon's property, 23 Village on Avon, 13 Elm Avenue, Craigavon."

[51] The First Respondent seeks to draw the inference that because Ms Silcock did not contend at that stage that the Applicant is the true owner of the property or make any of the other contentions that she has in the main application and the eviction application, that the main application is meritless. This argument is not without merit. Ms Silcock explains that at the time she did not think that it was necessary to make reference to the property belonging to the Applicant. She explains that she was lodging a claim in the estate of Mr Feinstein, and at the time she did not apply her mind to the issue of who in fact owned the property. She contextualises her situation explaining that at the time she was not legally represented and did not have the benefit of legal advice and when she started communicating with the First Respondent he had advised Ms Silcock that the property was registered in Mr Feinstein's name. She had not been made aware of the legal position that the registration of the property in Mr Feinstein's name was not definitive of the situation.

[52] This explanation is not entirely reconcilable with the position adopted in the founding affidavit of this application. Ms Silcock explains that subsequent to the first sale agreement, she was under the impression that registration of transfer of the property had taken place into the name of the Applicant and that the Applicant was in fact the registered owner of the property. It must have come as quite a shock that the property was not registered in the applicant's name. She didn't raise this with the first respondent during their initial exchanges. One would have thought that it would have been the first thing she would've raised, irrespective of assistance by legal representatives. First and foremost, most certainly from Ms Silcock's perspective, is the factual position (not legal construction), that she thought the Applicant was the registered owner. She didn't raise this issue at all. She didn't contend that a mistake had occurred. Instead, she submitted a claim for improvements or payments made to '*Simon's property'*.

[53] On 15 February 2012 Ms Silcock submitted a written offer to the first respondent to purchase the property at a reduced purchase consideration. She contended that she did this in order to resolve the matter and she did so without prejudice to her, as well as the Applicant's rights. To the best of Ms Silcock's knowledge, the estate of Mr Feinstein is insolvent or will not have much to distribute, and Ms Silcock believed that it was the right thing to do, towards the estate of Mr Feinstein and in particular, the beneficiaries thereof, being Mr Feinstein's three children, Leonard, Natalie and Steven.

[54] The applicant's reliance on the absence of any mention of the property in Mr Feinstein's will, for the purpose of demonstrating the intention of Mr Feinstein (as relied upon by the applicant), is untenable. The will

specifically provides that all property, other than that specifically mentioned, is bequeathed to Ms Tracy Rose, his wife. To suggest that, because there is no mention of the property in the will, Mr Feinstein did not regard the property as an asset in his estate, is incorrect. It would first be necessary for the applicant to demonstrate that Mr Feinstein, in referring to the other assets, had in mind assets other than the property. This it has not done.

DOCTRINE OF NOTICE AND THE ALLEGED DOUBLE SALE

[55] The second basis for contending that it is entitled to transfer of the property is contained in the doctrine of notice summarised by Brand JA in Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) at para [11]:

> "The legal basis advanced by Vrededorp for its claim to the blue portion is again derived from the doctrine of notice. This time it relies on the application of the doctrine in the sphere of successive sales. The usual operation of the doctrine in this instance, as explained in our case law, is essentially as follows: if a seller, A, sells a thing - be it movable or immovable - to B and subsequently sells the same thing to C, ownership is acquired, not by the earlier purchaser, but by the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his or her right is unassailable. If the second purchaser, C, is the first transferee, his or her right of ownership is equally unassailable if he or she had purchased without knowledge of the prior sale to B. But, if C had purchased with such prior knowledge, B is entitled to claim that the transfer to C be set aside so that ownership of the thing sold can be transferred to B. (See eg *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 at 46; *McGregor v Jordaan and Another* 1921 CPD 301 at 308; *Tiger-Eye Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C) I at 358F - G; *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) at 894B - D; *Cussons en Andere v Kroon* 2001 (4) SA 833 (SCA) ([2002] 1 All SA 361) at 839C - E (SA); *Badenhorst, Pienaar & Mostert* op cit 89; Gerhard Lubbe 'A doctrine in search of a theory: reflections on the so-

called doctrine of notice in South African Law' 1997 *Acta Juridica* 246 et seq. Again it is unnecessary to enter into the unresolved debate referred to earlier, ie whether knowledge acquired by between purchase and transfer would make any difference.)[5]"

[56] Zelpy and Berkeley Developments are one and the same entity.

[57] At the time that Ms Silcock had deposed to the founding affidavit in this application, the answering affidavit in the eviction application and the replying affidavit in the present application, she had not realised that Zelpy and Berkeley were in fact one and the same entity.

[58] Applicant argues that because both Berkeley (Zelpy having changed its name), and Mr Feinstein were aware of the first sale agreement and because the first sale agreement had not been cancelled, the Applicant is entitled to claim transfer of the property directly from Mr Feinstein (his estate as represented by the First Respondent).

[59] The applicant contends that if Mr Feinstein had decided to have the property registered into his name, then he acted contrary to the first sale agreement concluded with Zelpy as the seller, and in regard to the subsequent sale agreement concluded by Mr Feinstein with the same seller (the second sale agreement), both the seller and Mr Feinstein were aware of the previous sale agreement and the rights of the Applicant pursuant thereto and they acted intentionally and mala fide in concluding the second sale agreement and allowing the property to be registered in the name of Mr Feinstein. It is not necessary to show mala fides. It is sufficient to show actual knowledge or dolus eventualis in respect of the existence of a personal right. See *Meridian Bay Restaurant* (supra) at para [18].

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[5] See too Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO 2011 (4) SA 1 (SCA)

[60] The issue which thus falls for determination is whether there was a prior sale and whether Mr Feinstein was aware of it at the time of the conclusion of the second sale agreement? This in turn gives rise to the question whether the first sale agreement was enforcible at the time of the conclusion of the second sale agreement. For the first sale agreement to remain enforceable at the instance of the applicant, (or preclude either the execution of the second agreement, or performance thereunder), it is necessary for the applicant to demonstrate (both allege and prove) that the suspensive condition therein contained (at clause 15 thereof) was duly fulfilled. See *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co. Ltd* 1963(1) SA 632 (A.D) at 6446; *Rohroff v Nothling* 1971(1) SA 14 (E) at 16 E-F; *Kate's Hope Game Farm v Terblanchehoek Game Farm* 1998(1) SA 235 (SCA) at 241 C.

[61] Clause 15.1 reads:

> "Building contract
>
> 15.1 This offer to purchase is subject to the successful conclusion by the purchaser of a building contract in respect of the property and attached hereto marked "Annexure D" within 2 (two) months of the date of signature of this agreement by the purchaser …"

[62] There was some debate as to whether or not clause 15.1 created a condition (if a condition, it was accepted that it was a suspensive condition) or a material term. Reliance was placed on the decision of *Pangbourne Properties Ltd v Gill and Ramsden (Pty) Ltd*, 1996 (1) SA 1182 at 1187 I to 1188E in respect of the proper interpretation of the use of the words '*subject to'*. In assessing the use of the words '*subject to'* I have regard to the principles inunciated in *Pangbourne* (supra). I also have particular regard to the fact that Mr Feinstein, according to Ms Silcock, intended to

provide a home for her. That being so it would make little sense for him to purchase a piece of land without a dwelling on it and without the prospect of a house being built within a reasonable time from conclusion of the agreement, hence the cut-off period of 2 months for the conclusion of a building contract from date of signature of the first sale agreement. I find that in this instance, the words '*subject to*' were used to create a suspensive condition.

[63] I now turn to consider whether the suspensive condition had been fulfilled. No allegation that a building contract as alleged or otherwise had been concluded within the required period, is made by the applicant in any of the papers filed by it despite the pertinent challenge by the first respondent. There is also no allegation that a bankers guarantee had been provided for the payment of R100 000 within 45 days from the acceptance of the first sale agreement.

[64] The applicant's reliance for the relief predicated upon the alleged double sale, was advanced for the first time in the security for costs application. In para 24 of an affidavit deposed to on 11 October 2012, Ms Silcock advises that applicant's founding affidavit will be supplemented to place reliance on the doctrine of notice. This did not occur.

[65] The allegations advanced in the founding affidavit to this application place no reliance upon such causa at all.

[66] First respondent argues that reliance upon such a causa is wholly impermissible in that such cause of action is a complete departure from the case that the first respondent was required to meet and that it constitutes new matter in every sense of the word.

[67] In *Director Of Hospital Services v Mistry*, 1979 (1) SA 626 (A) at 635 H – 636:

> "It follows from this that a Judge cannot make good matters of fact if they are not stated by the parties, unless they are quite notorious from the documents which have been put in by way of proof in the proceeding. That is to prevent his appearing by making good doubtful matters of fact to fill the role not so much of Judge as of advocate, and to defend as counsel rather than to judge."
> (Voet 5.1.49 Gane's trans vo1 2 at 60.)
> When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:
>
> > "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

See too *Union Finance Holdings Ltd v IS Mirc Office Machines II (Pty) Ltd* 2001 (4) SA 842 (W) at 847D-H (and the cases there referred to); *Body Corporate, Shaftsberry Sectional Title Scheme v Rippert's Estate* 2003 (5) SA 1 (C)at 6D-F.

[68] The Applicant did not dispute that the cause of action sought to be relied upon constituted new matter. It contended that extraordinary circumstances existed in that new facts came to light after the filing of the initial founding affidavit. I find that this occurrence does indeed constitute extraordinary circumstances. However, a threat to supplement the founding papers was made in October of 2012. By March 2014 this had not happened. The

applicant had ample opportunity to apply to supplement its cause of action and to thereby afford the first respondent a proper opportunity to deal with all the features thereof.

[69] I accordingly find that the Applicant is precluded from relying on this cause of action.

[70] If I am wrong in this finding I would nonetheless find that the Applicant has failed to show that the first sale agreement was in existence alternatively enforcible, at the time of the conclusion of the second sale agreement two years later, for the reasons set out hereinbefore.

CONCLUSION

[71] I accordingly find that:

71.1. the applicant is not entitled to the relief sought by it in the Notice of Motion to the declarator application; and

71.2. in consequence thereof that the application stands to be dismissed with costs.

[72] As a further consequence, and resultant from the agreement concluded between the parties, an order in terms of prayers 1 to 4 of the eviction application ought to issue.

ORDER

[73] I accordingly make the following order:

1. The application is dismissed with costs.
2. Helen Gillian Silcock ('Ms Silcock') is ordered to vacate the property situate at 23 V[…], 13 E[…] Street, C[…], S[…] and known as Erf […] W[…] Extension 124 Township, Registration Division OQ, Province of Gaureng ('the property') by 31 October 2014.

3. If Ms Silcock has not vacated the property by 31 October 2014, the Sheriff is authorised and required to carry out the eviction order by removing from the property Ms Silcock and all persons who occupy the property by, through or under her.

4. Ms Silcock is ordered to pay the costs of the eviction application.

_____

I Opperman

Acting Judge of the High Court

Heard: 5 March 2014
Judgment delivered: 18 August 2014
Appearances:
For Plaintiff: Adv L Hollander
Attorneys: Gjersoe Inc - Ref: Mr Gjersöe
For Respondent: Adv A Sawma SC
Attorneys: Wertheim Becker Inc - Ref Mr S Gordon