REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22082/2013

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

26 Sept 2014 .....
DATE

.....
SIGNATURE

In the matter between:

MOORE, CHRISTINE MARTHA	First Applicant
MOORE, JACQUES	Second Applicant

And

THE SHERIFF FOR THE DISTRICT OF VEREENIGING	First Respondent
KABINI, SUNNYBOY	Second Respondent
ABSA BANK LIMITED	Third Respondent
CLOETE, CORNELIA MARIA N.O.	Fourth Respondent
KAPLIN, HARRY N.O.	Fifth Respondent
DE OLIVIERA, ANNA PAULA N.O.	Sixth Respondent
POOPEDI, SOPHIE N.O.	Seventh Respondent
THE REGISTRAR OF DEEDS, JOHANNESBURG	Eighth Respondent

JUDGMENT

CHOHAN AJ:

INTRODUCTION

1. The first applicant was the registered owner of a residential property situated at Erf 1163 Rivers East Township Division IR Gauteng ("the immovable property"). During 2009, the first applicant together with the second applicant concluded a series of agreements, the net result of which was that the immovable property was transferred and registered in the name of the second respondent. The second respondent simultanously procured a loan from the third respondent to acquire the immovable property and upon the transfer of the immovable property into his name, a mortgage bond was registered over the immovable property in favour of the third respondent.

2. I shall for convenience, henceforth refer to the second respondent as Kabini and the third respondent as the bank.

3. Kabini renaged on his obligations to repay the loan to the bank and in 2011, the bank obtained an order against Kabini inter alia for the repayment of monies advanced to him and for an order declaring the immovable property executable.

4. The applicants, having been visited with the spectre of the immovable property that the first applicant once owned, being sold in execution to recover Kabini's debt to the bank, launched two applications, one being a

rescision application and the other being an applicatnion for declaratory and ancillary relief. These two applications have been consolidated and were heard simultanously.

5. Broadly speaking, the applicants sought the following orders:

5.1. a declarator that the agreements concluded by them, details of which I shall address more fully later, are invalid, unlawful and liable to be set aside;

5.2. a declarator that the first applicant is entitled to the restitution of the immovable property;

5.3. a declarator that the mortgage bond granted by the bank to Kabini and registered over the immovable property is invalid, unlawful and of no force or effect and the setting aside of that bond;

5.4. the rescision of the default judgment granted on 12 July 2013 under case number 11951/2011 in terms of which the bank obtained an order:

5.4.1. for the payment of the amount of R500 067.00 from Kabini;

5.4.2. interest on the aforesaid sum at the rate of 9% per annum, calculated and capitalised monthly in arrears, from 2 December 2010 to date of payment;

5.4.3. declaring executable the immovable property.

6. At the commencement of the proceedings, counsel for the applicant confined the relief sought in relation to the rescission of the judgment obtained by the bank to only that portion of the judgment relating to the executability of the immovable property.

7. Both the rescission and declarator applications and the relief sought thereunder were opposed by the bank.

BACKGROUND

8. In order to contexualize these proceedings, it is necessary to set out the salient facts that gave rise to the two applications launched by the applicants. Those facts as they have emerged from the papers filed in the two applications are set out hereunder.

9. Prior to 2009, the first applicant was the registered owner of the immovable property. The applicants currently reside on the immovable property together with their son. There were five mortgage bonds registered over the immovable property in favour of the bank. At the time, the first applicant appeared to have been making payment of the sum of R2 900.00 per month in respect of at least one of the mortgage bonds registered in favour of the bank over the immovable property.

10. During the course of 2009 the applicants began experiencing financial difficulty and applied to the bank for a further loan in the amount of R220 000.00. That application was refused by the bank as a result of the first applicant's poor credit rating.

11. As a result, presumably of the bank refusing to grant the first applicant a further loan, the applicants looked elsewhere and accordingly stumbled

across a newspaper advertisement in which a company by the name of Brusson Finance (Pty) Limited (who I shall hereinafter refer to as "Brusson"), was offering financial assistance to people who had been blacklisted or who could not obtain loans from financial institutions.

12. The applicants contacted Brusson for a loan. Certain documents were telefaxed to the applicants to complete and they thereafter attended the offices of Brusson to sign those documents. I shall return to a consideration of those documents in more detail later.

13. In May 2009 the applicants attended the offices of Brusson to sign the documents that had earlier been telefaxed to them. They were informed by someone whose identity they do not know that they would receive the loan amount applied for, that the immovable property would be used as security for the loan and that the loan would have to be paid over three years in monthly instalments.

14. The applicants thereafter signed the documentation and left Brusson's offices.

15. The documents which the applicants signed are the following:

15.1. the first was an agreement entitled *"Memorandum of Agreement"* which was concluded between Brusson, Kabini and the applicants;

15.2. the second was an agreement entitled *"Offer to Purchase"* and was ostensibly concluded between the applicants and Kabini for the sale of the immovable property at a purchase price of R686 000.00. It provides in its terms for:

15.2.1. the amount of R686 000.00 to be paid to the applicants upon the registration of transfer of the property into the name of Kabini;

15.2.2. the procurement of bond finance of an amount of no less than R480 000.00 from a registered financial institution;

15.3. the third was an agreement entitled *"Deed of Sale"* and was ostensibly concluded between Kabini, as the seller of the immovable property and the applicants, as the purchasers thereof. It provides in its terms for the purchase of the immovable property in the sum of R648 000.00, to be paid in minimum instalments of R7 578.50, the first instalment of which would be due on the transfer of the property into the seller's name.

16. The applicants contend that when they signed these agreements, the name and details of Kabini had not been inserted and that they had in fact signed blank documents.

17. These agreements must be read in conjunction with a brochure that was in circulation at the time and which explained the scheme followed by Brusson. That brochure represented the following:

> *"The client/homeowner temporarily transfers his/her property to a Brusson investor and in return receives the financial relief applied for.*
>
> *The Brusson investor applies for a mortgage loan from a financial institution to cover the cost of the initial transaction, and in so doing,*

makes funds available to the client. Brusson in turn debits its client. Brusson guarantees the monthly instalment to the financial institution.

The property is immediately sold back to the client by the Brusson investor using a sale by instalment agreement so that the client retains ownership of his/her home. On fulfilment of the sale by instalment agreement, the client transfers the property back into his/her name."

18. Brusson's interest was earmarked by a monthly collection fee, purportedly intended to cover collection fees, as well as any insurance policy that it took out on an investor's life.

19. This brochure was however not read by either of the applicants at the time.

20. Pursuant to the conclusion of these agreements:

20.1. Kabini, on 31 June 2009, applied to the bank for a mortgage loan in an amount of R480 000.00. Pursuant to that application, the bank granted the loan and entered into a written mortgage loan agreement with Kabini;

20.2. on 24 August 2009 the immovable property was transferred and registered into the name of Kabini and simultaneously with such registration, the Registrar of Deeds caused to be registered a mortgage bond over the immovable property in favour of the bank;

20.3. simultaneously therewith, the five mortgage bonds that had been registered over the immovable property previously were all cancelled;

20.4. the applicants received an amount of R157 651.00 from Brusson and were told by Brusson that they would have to pay a monthly instalment of R6 907.03 over a three year period.

21. Not long after this, on 2 November 2009, the first applicant applied for debt review and following an application by his debt councillor to the Magistrates' Court for the District of Vereeniging to re-arrange his debt obligations, a restructuring order was granted in terms of the National Credit Act 34 of 2005 ("the NCA"), in terms of which an amount of only R3 058.28 was to be paid to Brusson.

22. On 5 July 2010 the applicants received a letter from TC Hitge Attorneys, acting on behalf of Brusson, advising them that in terms of the offer to purchase and instalment sale agreement that had been concluded on 12 May 2009, they had undertaken to pay an amount of R6 907.03 per month to Kabini and that they were currently indebted to Brusson in the sum of R43 579.87.

23. On 23 March 2011 the bank issued summons against Kabini for the sum of R500 067.00, together with an order declaring the immovable property specifically executable.

24. Kabini did not file any notice to defend that action and judgment by default was accordingly granted on 12 July 2011.

25. On 26 August 2011 the applicants were served with a notice of attachment in which they were informed that by virtue of a writ of execution issued out of the office of the registrar of this court on 10 August 2011, the sheriff was to attach and take into execution the immovable property.

26. It was however only after the applicants received a letter dated 23 May 2013 from Resque Financial Solutions and which was addressed to Kabini, that they attended at the Legal Resources Centre and where attempts were thereafter made to stay the sale in execution of the immovable property.

THE APPLICANTS' APPROACH

27. The applicants contend in essence that when they concluded the spate of agreements referred to more fully above, they did not know that what they were doing was selling the first applicant's property. They believed that they were simply providing the immovable property as security for the loan that they were to receive from Brusson. They had no intention, so the argument went, to transfer ownership of the immovable property. Nor, for that matter, did Kabini, as the so-called Brusson investor have any intention to acquire ownership of the immovable property. The agreements were simulated and although they appear *ex facie* the documents, to represent agreements of sale, upon a proper consideration, the clear intention was that of a loan managed by Brusson.

28. In the result, it was argued on behalf of the applicants that in light of the fact that there had been no intention to transfer the immovable property, they were entitled to vindicate the immovable property and in the course to set aside not only those agreements which they had concluded with Brusson and Kabini, but also the mortgage bond that had been registered over the immovable property.

29. The notion that fraud unravels all featured prominently in the course of what I describe as the applicants' primary proposition. It is an aspect to which I shall turn to in more detail later.

30. In addition, the applicants also placed reliance on two further grounds in support of the proposition that the agreements that had been concluded with Brusson and Kabini were illegal. They are that:

30.1. the agreements amounted to an unlawful *pactum commisorium*;

30.2. Brusson was not registered in terms of section 40 of the NCA and the agreements were therefore unlawful and void in terms of section 89 thereof.

31. Although the applicants also contended that the loan agreement concluded between the bank and Kabini was void because of the fact that the bank had recklessly granted credit to Kabini, there was no prrof of this and this ground was, rightly in my view, not persisted with with any vigour. Nothing further needs be said about this ground.

THE BANK'S OPPOSITION

32. The bank opposes the relief sought by the applicants on a number of grounds. Those grounds, briefly summarised, are the following:

32.1. in the first instance, the bank contends that the applicants do not have *locus standi* to rescind and set aside the judgment that had been obtained by it against Kabini, principally because the applicants were not parties to that action;

32.2. in the second instance, the bank contends that the applicants in any event had failed to make out a case for rescission in terms of the provisions of rule 31(2)(b) and/or rule 42(1)(a) of the Uniform Rules of Court and/or in terms of the common law;

32.3. in the third instance, the bank contends that the agreements that had been concluded by the applicants were not void *ab initio* with regards to the rights and obligations conferred on the bank;

32.4. in the fourth instance, the bank contends that the relief that the applicants seek for the restitution of the immovable property and the declaration that the mortgage bond granted by the bank is invalid, unlawful and of no force and effect is incapable of being granted in view of the bank's rights and obligations in terms of that mortgage bond.

33. The bank crystallized its oppostion during the course of its argument, by suggesting that even if:

33.1. the memorandum of understanding that had been concluded between Brusson and the applicants constituted a *pactum commisorium* and thus illegal;

33.2. the offer to purchase and sale by instalment agreement was unlawful and in contravention of the NCA by virtue of the fact that Brusson had not been registered in terms of section 40 to provide credit to the applicants,

it did not necessarily follow that the mortgage bond that had been registered over the immovable property should be set aside. The bank was at pains to point out, and rightly so, that it was unaware of the Brusson scheme and had in good faith advanced the sum of R480 000.00 to Kabini and as security therefor, procured that a mortgage bond be registered over

the immovable property.

THE BRUSSON SCHEME

34. The applicants were not the only people to have been enticed to participate in what has now commonly been referred to as the Brusson scheme.

35. Neither would it seem, was the scheme confined to the bank. Other financial institutions also fell victim and loaned substantial monies to so-called Brusson investors on the strength of the security that was provided in the form of the various residential homes that were being transferred and registered into the names of the so-called Brusson investors.

36. Not surprisingly, there have been a number of judgments that have since been handed down in relation to the Brusson scheme:

36.1. in Ditshego & two others v Brusson Finance (Pty) Ltd[1], Jordaan J dealt with facts almost similar to the present instance and concluded that the Brusson scheme was a simulated transaction and thus the agreements concluded therein were unlawful and void. No mention was however made of the vailidity or otherwise of the mortgage bond in that context;

36.2. in Mabusa v Nedbank Ltd & another[2], Mavundla J was tasked with determining whether a judgment that had been granted by default in favour of Nedbank against one Walter Steyn ought to be rescinded in terms of the common law on facts similar to the

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1 An unreported judgment of Jordaan J, delivered on 22 July 2010 in the Free State High Court under case number 5144/2009

2 An unreported judgment of Mavundla J, delivered on 24 June 2014 in the Gauteng Division, Pretoria under case number 67456/2010

present instance. Not surprisingly, the applicant in that matter relied on the judgment of Jordaan J in Ditshego *supra*. Mavundla J concluded that the applicant in that matter never had any intention to sell her property to Brusson, nor to buy it back from Walter Steyn and that the applicant was accordingly caught in a similar scheme as referred to in the Ditshego matter.[3] He concluded that the applicant's property had been fraudulently transferred out of her name into the name of Walter Steyn and that her right and title to that property and even occupancy would be prejudicially affected if the judgment that had been obtained by Nedbank was not rescinded.[4] He added that the fraud of Walter Steyn indirectly contributed to Nedbank granting the loan to him and that but for the fraud, the loan itself would not have been granted.[5] He accordingly exercised his discretion and granted a rescission of that judgment;

36.3. in ABSA Bank v Boshoff[6] Goosen J dealt with a summary judgment application and a defence thereto to the effect that the mortgage bond sought to be relied upon by ABSA had been concluded pursuant to the Brusson scheme which had been found in Ditshego to be unlawful. The learned judge however concluded that the reliance on Ditshego was misplaced because Jordaan J did not declare the mortgage loan agreement in that matter to be unlawful. On the contrary, he

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3 Judgment of Mavundla J: para 14
4 Judgment of Mavundla J: para 16
5 Judgment of Mavundla J: para 19
6 An unreported judgment of Goosen J in the Eastern Cape High Court handed down on 28 August 2012

ordered restitution of the property subject to the bond holder's rights, thereby recognising that even though the Brusson scheme was unlawful, the obligations that arose from the mortgage loan remained enforceable.[7] Goosen J accordingly proceeded to grant summary judgment in ABSA's favour;

36.4. in Jacobs v Nedbank[8] Kubushi J was called upon to consider the validity of a loan agreement in the context of the Brusson scheme and whether to rescind a judgment that had been granted in default against Jacobs who was similarly inticed to participate in the Brusson scheme. He found, having considered Jordaan J's dicta in Ditshego *supra* however that Jordaan J had not considered this issue and therefore could not have found the loan agreement between the Brusson investor and the financial institution unlawful. He held moreover that the agreement between the financial institution and the Brusson investor could in no way be said to have formed an intergral part of the Brusson scheme[9] and accordingly concluded that Jacobs had no *bona fide* defence to the financial institution's claim. He accordingly dismissed the application for rescission;

36.5. in Realoboho Innocentia Leshoro v Nedbank & one other[10] the applicant in that matter similarly sought the rescission of a default judgment that had been obtained by Nedbank against one Balibali Takalani pursuant to her participation in the

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7 Para 7 of Goosen J's judgment
8 2012 JDR 1873 GNP
9 Para 13 of Kubushi J's judgment.
10 An unreported judgment of Monaledi AJ, delivered on 20 March 2014 in the Free State Division, Bloemfontein under case number 5131/2011

Brusson scheme. The learned judge however was disinclined to grant an order rescinding that judgment on the basis that the applicant did not have the necessary *locus standi.*[11]

36.6. Finally, in Radebe v Nedbank and others[12], Nicholls J had occasion to deal once again with the disastrous consequences of the Brusson scheme and more importantly with relief identically sought as in the present matter. The learned judge concluded that Radebe was entitled to an order setting aside all the agreements that had been concluded with Brusson and the so-called Brusson investor and to restitution of his property on the basis of a lack of any intention to transfer ownership of the property.[13] She held in relation to the bond that had been registered over the property that it was liable to be set aside as being of no force and effect.[14]

37. These are but a few of the judgments that have since been delivered in relation to the Brusson scheme. No doubt there will be others as financial institutions seek to recover the loans that they had made to the so-called Brusson investors.

38. All of these matters, it would seem, have the following in common:

38.1. the applicants were all financially strapped and were looking to secure a loan which they would otherwise not obtain through a registered financial institution;

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[11] Judfgment of Monaledi AJ: para 27
[12] An unreported judgment of Nicholls J in the South Gauteng High court handed down on 25 September 2014
[13] Para 21 of Nicholls J judgment
[14] Para 36 of Nicholls J judgment

38.2. all of the applicants concluded agreements with Brusson;

38.3. all of the applicants concluded agreements to transfer their immovable property to a Brusson investor, who in turn concluded agreements to re-sell that property back to the applicants in instalments;

38.4. the Brusson investor utilised the immovable property as security in order to obtain the necessary finance from a registered financial institution, who in turn registered a mortgage bond over the immovable property in question;

38.5. invariably the Brusson investor defaulted on his/her payments to the financial institution and proceedings were then instituted to reclaim the amounts advanced, together with orders declaring the properties that had been secured executable.

39. Quite clearly, the Brusson scheme was widespread and would seem to have targeted the most vulnerable of people, namely those who were already over indebted.

40. It is quite apparent from the various matters to which I have referred to above that different approaches have been taken in relation to a bank's rights under the mortageg bond. Some have held the underlying loan agreements to be enforceable whilst others have set aside the mortgage bonds in question. None appear to have drawn any distinction (to the extent that such a distinction has significance) between the loan agreements concluded with so called Brusson investors on the one hand and the mortgage bonds registered ober the properties on the other hand. In

adidition, I have reservations as to the correctness of the views expressed in Jacobs *supra* and to some extent in Boshoff *supra* to the effect that the loan agreement between the financial institution and the Brusson investor was not an intergral part of the Brusson scheme. In my view it was the pivotal element of the scheme. That is precisely how Brusson secured the monies which it then advanced toits clients. The scheme would not have worked otherwise. And that is why it required the transfer of immovable property into the name of the investor – so that it could be offered as security to a bank providing the necessary finance.

THE INTENT TO TRANSFER OWNERSHIP

41. As I alluded to earlier, at the heart of the applicants' claim is the fact that they had been defrauded by Brusson. They contend that they thought they were entering into a loan agreement and providing the immovable property as security, whereas, as it turned out, the immovable property was in fact transferred into the name of Kabini as part of an elaborate scheme that had as its victims both the applicants and the bank.

42. The applicants' claim that they did not intend to transfer ownership of the immovable property to Kabini or anyone else for that matter. The absence of such intent would suffice to restore the property back into the name of the first applicant. That is because in the absence of any intention to transfer ownership, a material requirement of the now established and well recognised abstract theroy of transfer of immovable property would be lacking.[15]

43. However, I found the applicants' claim that they had no intent to transfer

[15] See Legator Mckenna Inc v Shea and others 2010 (1) SCA 35 SCA at para 22

ownership of the immovable property difficult to reconcile with the following objective facts:

43.1. the offer to purchase that the applicants concluded quite clearly and in express terms provides for the transfer of the immovable property into the name of the purchaser, albeit that Kabini's details had not at that stage been reflected on the document;

43.2. the applicants would no doubt have also signed the relevant transfer documents in order to enable the Registrar of Deeds, the eighth respondent, to register and transfer the immovable property into Kabini's name. The papers are silent on this aspect, but I find it inconceivable that such documents would not have been signed;

43.3. the applicants on their own version only required a loan of R220 000.00 and yet concluded agreements with Brusson and Kabini where a purchase price of R686 000.00 was reflected. No explanation is tendered by the applicants for this, despite the clear invitation to do so in the bank's answering affidavit;[16]

43.4. there were five bonds that were registered on the immovable property which the applicants had initially failed to disclose and which, upon the registration and transfer of the immovable property into the name of Kabini, were cancelled. No further payments were made by the first applicant to the bank and the suggestion that Brusson was to settle the applicants' existing

[16] Bank's second answering affidavit: p 325, para 75.3, read with the applicants' replying affidavit: p 448, para 5

bond in the amount of R145 000.00 from the amount that was to be loaned is rather curious given that what was in fact received by the applicants from Brusson was the amount of R157 651.00;[17]

43.5. the papers likewise do not disclose what the market value of the immovable property was at the time of the conclusion of the agreements with Brusson and Kabini. That was an important feature in Jordaan J's view in Ditshego *supra* in determining whether or not the agreements were simulated or whether what was being applied for was simply a loan;

43.6. the papers likewise do not disclose whether or not the applicants continued to pay the rates and taxes for the immovable property consequent upon the conclusion of the agreements with Brusson and Kabini. This too, in my view, would have been an important consideration in determining whether or not the applicants knew that the immovable property had in fact been transferred to Kabini or not;

43.7. when the applicants, in November 2009, applied for a debt review, they identified one of their debt obligations as constituting a *"bond"* in favour of Brusson in the total amount of R660 000.00.[18] The annotation that the debt was a bond would not have of its own been significant, but for the fact that immediately below that annotation the applicants recorded a further debt to Blue Finance in the form of a *"loan"*. Quite

[17] Applicants' second founding affidavit: p 193, para 50
[18] Applicants' second founding affidavit: p 234

clearly, the applicants drew a distinction between a *"loan"* on the one hand and a *"bond"* on the other hand. It is of course true that the bond holder was not Brusson but the bank and that the amount of R660 000.00 was not the amount that had been advanced to the applicants or to Kabini, but what this clearly demonstrates is that the applicants' knew that a bond had been registered over the immovable property;

43.8. finally, when the applicants received a notice of attachment of the immovable property on 26 August 2011, they did not take any active steps to contact the bank and/or to ascertain on what basis the immovable property was being attached. This of course must be seen in the context of their knowledge by now that what they had in fact concluded was an offer to purchase an instalment sale agreement.[19]

44. My uneasiness with these aspects of the applicants case must of course also be contrasted with the peculiar and unusual features of the agreements that were concluded by the applicants with Brusson and Kabini. Those features suggest that the whole tenor and effect of those agreements comprised a loan against the immovable property being tendered as security.[20] Jordaan J in Ditshego found that these features were foreign to the usual and *bona fide* agreements relating to the sale of immovable property[21] and the only reasonable conclusion to be drawn therefrom was that the real intention was that the applicants had obtained a loan from Brusson against the security of their property. The agreements

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[19] Applicants' founding affidavit in the declarator application: annexure "CM9", p 240
[20] Judgment of Jordaan J: para [9] – [14]
[21] Judgment of Jordaan J: para [28]

were nothing but simulated transactions.[22] I align myself to the findings made by the learned judge in that regard.

45. I am also in agreement with Jordaan J that the agreements should not be looked at separately or in isolation. They are inextricably linked and comprise a single inter-related transaction or scheme. That in my view would also include the mortgage bond registered in favour of the bank, albeit that the bank was unaware of the Brusson scheme.

46. In the present instance, Kabini was undoubtedly an integral part of the Brusson scheme. He was needed to secure the mortgage loan from the bank. But if, as Jordaan J found, the agreements were all simulated, Kabini in the present instance would not have had any intention to acquire ownership of the immovable property from the first applicant. That much is in any event apparent from the sale in installment agreement that the applicants concluded with Kabini.

47. Thus, even though there are a number of features relating to the applicants' conduct that in my view *prima facie* demonstrate that they wittingly participated in the Brusson scheme, given the other peculiarities and the simulated nature of the transaction, I conclude that there was no consensus in relation to the transfer of ownership in respect of the immovable property.

48. In any event, and even if I am wrong on this aspect, the agreements would be unlawful, either because the memorandum of agreement constitutes an unlawful *pactum commisorium* or because the offer to purchase and sale in instalments contravene the NCA.[23]

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[22] Judgment of Jordaan J: para [28]
[23] See Ditshego at para 28

49. It would follow that at the very least, the applicants would be entitled to a declaration that the memorandum of agreement signed between them and Brusson and the offer to purchase and sale agreement signed between Kabini and the applicants are invalid, unlawful and of no force and effect and thus liable to be set aside.

THE MORTGAGE BOND

50. The pivotal enquiry though remains and that is whether or not the applicants would, by virtue of the aforegoing conclusion, also be entitled to an order declaring the mortgage bond to be invalid, unlawful and of no force and effect and to have that bond set aside.

51. The applicants rely in this regard on the decision of the Supreme Court of Appeal in Nedbank v Mendelow[24] where Lewis JA reaffirmed the principle that:

> *"Where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect."*[25]

52. Lewis JA further held that if the underlying agreement was tainted by fraud or had been obtained by some other means that vitiates consent, such as duress or undue influence, ownership does not pass.[26]

53. The Supreme Court of Appeal in that matter held that in light of the fact that the signature of the owner of the property had been forged on a deed of

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[24] 2013 (6) SA 130 (SCA)
[25] At 135, para [13]
[26] At 135, para [14]

sale, there had been no intention to transfer ownership of the property, with the result that ownership did not pass and the bond registered over the property was not valid.[27]

54. A similar approach was taken by the Supreme Court of Appeal in Quartermark Investments (Pty) Ltd v Mkhwanazi & another[28] where Theron JA found that because Ms Mkhwanazi had been fraudulently induced to sign a sale agreement and thus had no intention to transfer ownership of her property to Quartermark, she was thus entitled to rescind that agreement.[29]

55. The Supreme Court of Appeal confirmed that where the underlying transaction was tainted by fraud, ownership would not pass despite the registration of transfer and in those circumstances a party may proceed by way of the *rei vindicatio* for the return of the immovable property that had been transferred out of his or her name and in doing so need not tender restitution of what had been received pursuant to the agreement sought to be set aside. Restoration of the benefits received may be the subject of a separate claim for unjustified enrichment.[30]

56. It does not appear as though these *dicta* were considered in Jacobs and Boshoff *supra*. Those judgmenets proceeded on an analysis of Jordaan J's dicta in Ditshego and why reliance thereon by the applicants in those matters were misplaced. No further detailed consideration, it would seem to me, was given to the validity of the mortgage bond in circumstances where

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[27] At 136, para [15]
[28] 2014 (3) SA 96 (SCA)
[29] At 104, para [23], read with p 102, para [17]
[30] Quartermark *supra* at para [26], quoting with approval the decision of Rhoode v De Kok & another 2013 (3) SA 123 (SCA) at para [24]

the underlying agreements that had been concluded pursuant to the Brusson scheme were found to be unlawful and void due to the absence of any intent to transfer ownership.

57. In any event, I have already expressed my reservations as to the correctness of the view that the loan agreements and consequently the bonds that were registered over those properties in those matters were not an intergral part of the Brusson scheme. In my view, they were.

58. It is however unnecessary to decide whether the loan agreement that was concluded between the bank and Kabini is to be set aside or declared unlawful or void. That is because no such relief is sought by the applicants. The applicants seek merely to set aside the mortgage bond and I imagine that the reason therefore is to retain intact the bank's contractual claim against Kabini and the monetary judgment obtained by it against him.

59. A distinction must in this regard, in my view, be drawn between the personal rights created by the loan agreement and the real rights that arise pursuant to the registration of the bond over the immovable property. Having found that neither the applicants nor Kabini intended to transfer and acquire ownership of the immovable proerty, the real right that was registered over the property must, if regard is had to the Supreme Court of Appeal in Mendelow *supra*, be set aside. That however still leaves intact, the personal right that the bank has against Kabini arising from the loan agreement.

60. In returning the immovable property to the first applicant, the further question that arises is whether the property should be returned subject to the reinstatement of the five bonds that were previously registered over the

property prior to their cancellation and the transfer of the property into Kabini's name. At first blush, this approach appeared as artifical as the simulated transactions concluded pursuant to the Brusson scheme. That was primarily because the reinstatement of those bonds carried with it the revival of the applicants debt towards the bank which cleary had been discharged when the new mortgage bond was registered over the immovable property. A more compelling argument against such an approach is to consider the position where the previous bonds were registered in favour of other financial institutions who did not provide any loan to a Brusson investor. The reinstatement of those bonds would result in the revival of those debts which have long been discharged. This conundrum is however not one that presents itself in the present case and I am therefore not called upon to decipher it.

61. In the present case, and despite the envisaged conundrum referred to above, the proposition that the five bonds previously registered over the immovable property be reinstated became more attractive. But for the Brusson scheme, those bonds would not have been cancelled and the first applicant's debt to the bank would have remained in extant. A reinstatement of those bonds would in these circumstances be appropriate.

62. It would accordingly follow, that the first applicant would be entitled to an order setting aside the mortgage bond that had been registered over the immovable property, subject to the reinstatment of the five bonds that had previously been registered over the immovable property.

63. Finally, on this aspect, the applicants had in their founding affidavit in the declarator application indicated their willingness to pay "*any outstanding*

amount (if any) to get the property registered back in my [the first applicant] *name".*[31] That tender was ambigious and upon further inquiry, it transpired that what was meant thereby was a tender to repay the amount received by the applicants from Brusson, less whatever payments they made to Brusson. Although this may be cold comfort to the bank, whose security for the loan advanced to Kabini has just been set aside, it is a tender which I intend holding the applicants to as will appear from the order that is set out below.

THE RESCISSION APPLICATION

64. The applicants were quite clearly not parties to the action instituted by the bank against Kabini.

65. The question that arises is whether they have locus standi to set aside that portion of the judgment that had been obtained by the bank against Kabini in which the immovable property was declared executable?

66. A rescission of a judgment may be brought in terms of rule 31(2)(b), rule 42(1) or the common law.[32] Rule 31(2)(b) applies when a judgment was obtained in default of the party to the action.

67. Rule 42(1)(a) on the other hand applies if a judgment was obtained erroneously in the absence of any party affected thereby. A judgment will have been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware which would have precluded the granting of the judgment and which, had the judge known about it, would have led

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[31] Founding affidavit, Declarator application, paginated page 205
[32] See Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576 W at 578A

him or her not to grant it.[33] The rule, so it has been held, is intended to allow a party who was not present when the judgment was granted to be given an opportunity to place before a court facts which the court that had granted the judgment was unaware of and which now being aware off, would not have granted the judgment in the first place.[34]

68. Finally, there is the common law which empowers a court, on sufficient or good cause to rescind a judgment obtained in default of appearance by a party. Although the phrase "sufficient or good cause" defies precise definition, it has been held to mean that a party must disclose a bona fide defence which *prima facie* carries some prospect of success.[35] Under the common law, various grounds such as fraud, error, and the discovery of new documents have formed the foundation of rescission applications.

69. It would seem to me that the applicants probably fall within the ambit of rule 42(1)(a) or the common law. In this regard, the applicants need not have been a party to the action that the bank had instituted against Kabini. It suffices that they have a sufficiently direct and substantial interest in the subject matter of the judgment or order and one that would have entitled them to intervene in the action that ultimately gave rise to the order now sought to be rescinded.[36]

70. The applicants clearly have a direct and substantial interest in the order relating to the execution of the immovable property. They are self evidently parties affected by the order. Moreover, had the judge hearing the action been told of the Brusson scheme and the lack of any intent on the part of

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[33] See Topol v L S Group Management Services (Pty) Ltd 1988 (1) SA 639 W at 648E
[34] See Stander and another v ABSA Bank 1997 (4) SA 873 E at 882E
[35] See Chetty v Law Society of Tvl 1985 (2) SA 756 A at 764J
[36] See United Watch and Diamond Company v Disa Hotels 1972 (4) SA 409 C

the first applicant to transfer ownership of the immovable property to Kabini, he or she would, I would venture to say, not have granted the order declaring the immovable property executable. The order thus obtained by the bank was granted erroneously as contemplated by rule 42(1)(a).

71. But if I am wrong on the applicability of rule 42(1)(a), then it would seem to me that the common law should prevail. And although the applicants claim for a rescission of that part of the judgment relating to the execution of the property may not find a home within the traditional grounds historically relied upon, there is nothing preventing them from establishing a new ground, provided it establishes a bona fide defence which prima facie has some prospects of success. This they have established, given my findings in relation to the declarator application.

72. In this regard, it must be borne in mind that that portion of the order granted in favour of the bank is not being set aside on the grounds of a fraud[37] of which the bank was a party to, but rather on the grounds that the applicants are, by virtue of the *rei vindicatio*, entitled to the restitution of the immovable property.

73. In the result, I find in favour of the applicants insofar as they seek an order rescinding that portion of the judgment relating to the execution of the immovable property.

CONCLUSION

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[37] *Contra* Makins v Makins 1958 (1) SA 338 (A) in which it was held that a judgment will not be set aside on the grounds of fraud unless it can be shown that the successful litigant was a party to that fraud.

74. In the result, I make the following order:

74.1. the memorandum of agreement concluded between the applicants and Brusson Finance (Pty) Limited ("Brusson"), as well as the offer to purchase concluded between the applicants and Kabini on 4 June 2009, together with the sale agreement concluded by the applicants and Kabini on 18 June 2009 are declared invalid, unlawful and of no force and effect;

74.2. the above agreements are set aside;

74.3. the first applicant is entitled to the restitution of the property situated at Erf 1163 Rivers East Township Division IR Gauteng subject to:

74.3.1. the reinstatement of the five mortgage bonds that had previously been registered over the property;

74.3.2. the applicants paying the third respondent the amount received by them from Brusson less any payments made to Brusson;

74.4. the mortgage bond granted by the third respondent to Kabini in respect of the acquisition of Erf 1163 Rivers East Township Division IR Gauteng is set aside;

74.5. the default judgment and order granted under case number 2011/11951 in favour of the third respondent, insofar as it relates to the declaration that the aforegoing immovable property be specially executable, is set aside;

74.6. each party is to pay their own costs.

75. I have insofar as the costs are concerned exercised my discretion not to apply the general rule that costs follow the result primarily because of my misgivings as to the applicant's participation in the Brusson scheme and their conduct once they discovered, on their version, that the immovable property had been transferred to Kabini. Although my disquiet did not warrant the conclusion that the applicants had no intention of transferring ownership of the immovable property to Kabini, it does play a role in the allocation of costs and it is for that reason that I have ordered each party to bear their own costs.

M A CHOHAN
ACTING JUDGE OF THE
HIGH COURT

HEARD: 18 SEPTEMBER 2014
DELIVERED: 26 SEPTEMBER 2014

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