REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A5052/2018

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

29/5/2018 .....

DATE SIGNATURE

In the matter between:

KELLY ANTOINETTE SLABBERT Appellant

and

SUSANNA LUCIA MARIA DU PLESSIS Respondent

JUDGMENT

WANLESS, AJ

Introduction

[1] This is an appeal against the whole of the judgment of Senyatsi AJ[1] delivered, in this court, on 6 September 2017, leave having been granted by the court *a quo* to appeal on 31 August 2018.[2]

[2] The Applicant in the court *a quo* (Susanna Lucia Maria Du Plessis) instituted an application for a declarator and certain ancillary relief pertaining to an immovable property.[3] The First Respondent was Kelly Antoinette Slabbert, together with six (6) other respondents. The First Respondent opposed the application. None of the other respondents opposed that application and are not parties to this appeal. The court *a quo* granted the Applicant the relief sought, together with a punitive order as to costs, giving rise to the institution of this appeal by the First Respondent. For ease of reference the Applicant in the court *a quo* shall be referred to as "the Respondent" and the First Respondent in the court *a quo* shall be referred to as "the Appellant". Despite the fact that Senyatsi AJ did not specify, as required by section 17(6)(*a*) of the Superior Courts Act 10 of 2013, that leave was granted to the full court of this division rather than to the Supreme Court of Appeal,[4] both the Appellant and the Respondent expressly requested this court to hear the appeal.

The facts

[3] Little purpose would be served, other than to burden this judgment unnecessarily, by setting out the facts of this matter in great detail. Indeed, this has already been done by the learned Acting Judge in his thorough judgment.[5] In essence, it is clear that the parties in this matter, either wittingly or unwittingly (it not being necessary to decide) were part of a massive fraud perpetuated by Brusson Finance (Pty) Limited (hereafter referred to as "Brusson").The *modus operandi* of Brusson, in doing so, is clearly set out not only in the judgment of the court *a quo* but also in various

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[1] Judgment of Senyatsi AJ at pages 304-320 of the record.
[2] Order of Senyatsi AJ at page 321 of the record; judgment of Senyatsi AJ in respect of application for leave to appeal at pages 322-325 of the record.
[3] Notice of Motion at pages 1-8 of the record.
[4] Judgment of Senyatsi AJ at pages 304 to 320 of the record; Order of Senyatsi AJ at pages 302 & 303 of the record.
[5] Judgment of Senyatsi AJ at pages 304-320 of the record.

other judgments of our courts[6] in the ensuing litigation which arose at the demise of both the scheme and of Brusson (now in liquidation).

[4] In short, a homeowner who needed to borrow money against the security of her home but who did not qualify for bond finance or further bond finance "sold" his or her home to an "investor". In the present case the Respondent, who needed to borrow money to start a business but who did not qualify for bond finance from a reputable lender, signed three documents at the offices of Brusson. The documents were in standard form and the numerous handwritten additions thereto were not initialled. Pursuant to these documents the Respondent sold her home to the investor, the present Appellant. In due course she would be allowed to buy it back once she had parted with sufficient money in favour of both Brusson and the Respondent. The clear and convincing version of the Respondent in this regard is that she, as a layperson, signed what she thought were no more than documents necessary to give effect to what she had been informed, by representatives of Brusson, was simply a transaction in which she would put up her home as security for a loan. The Respondent says, convincingly, that she never intended to sell her home or to transfer ownership in it.

[5] The common thread to all of the individual transactions which formed part of the fraudulent Brusson scheme is that the owner of the immovable property was advised by Brusson that not only would the owner retain ownership of the immovable property but, further, that there would be a "resale" of the immovable property to the owner.[7] That is, the investor would sell the same immovable property back to the owner. This would take place either instantaneously, once the proceeds for, *inter alia,* the loan to the owner had been accessed by the investor by way of a mortgage bond against the immovable property but, certainly, no later than when the owner had repaid his or her indebtedness, in respect of the loan, to that investor.

[6] In both *Ditshego v Brusson Finance (Pty) Limited (supra)* and *Absa Bank Limited v Moore and Another (supra)* our courts found that the transactions forming part of the Brusson fraudulent scheme were indeed unlawful; invalid and, consequently, of no force and effect. Despite the fact that the Heads of Argument filed

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[6] *Ditshego v Brusson Finance (Pty) Limited* 2013 JDR 2440 (FB); *Absa Bank v Moore* 2016 (3) SA 97 (SCA); *Absa Bank Limited v Moore and Another* [2016] JOL 36771 (CC); *Radebe v Sheriff for the District of Vereeniging* [2014] ZAGPJHC 228 (25 September 2014).

[7] *Absa Bank Limited v Moore and Another (supra)* at paragraph 5 of the judgment.

on behalf of the Appellant did briefly make reference to a submission that the present matter was distinguishable thereto, it was not argued on behalf of the Appellant, before this court sitting as a court of appeal, with any great "vigour" that the transaction in the present matter was a lawful one. Further, it is important to note that the Appellant accepts that the Respondent was always under the impression that the ownership by the Appellant of the immovable property was only "temporary" (in order to give effect to the scheme, as dealt with above) and that ownership would revert to the Respondent. Indeed, it would be difficult for the Appellant to have raised any argument contrary thereto, in light of, *inter alia*, the convincing explanation in relation thereto as provided by the Respondent and as dealt with earlier in this judgment. There is nothing on the application papers in this matter that could lead to a finding that the transaction in this matter was, in any material manner whatsoever, distinguishable to those adjudicated upon in the matters of *Ditshego v Brusson Finance (Pty) Limited (supra)* and *Absa Bank Limited v Moore and Another (supra)*. Like those other transactions the transaction in the present matter must therefore be accepted to be invalid.

[7] The thrust of the Appellant's argument, on appeal, was that pursuant to the demise of the scheme and when Brusson failed to continue to act in terms thereof the parties entered into an oral agreement during June 2010. In this regard the Appellant avers that whilst some terms of the original agreement were "borrowed" or "incorporated" into this oral agreement, it was a new and separate agreement which replaced the agreement entered into and which was part of the fraudulent scheme. This is denied by the Respondent.

[8] On the Appellant's version the material terms of the alleged oral agreement were the following:-[8]

1. The Respondent agreed to pay the Appellant directly the amounts that she previously paid directly to Brusson every month so that the Appellant, in turn, was in a position to pay the monthly mortgage bond instalments due and payable to the Bondholder (Nedbank Limited) thereby taking Brusson 'out of the picture';

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[8] Sub-paragraph 18.9 of the Answering Affidavit at pages 121-122 of the record.

2. Arising from the aforegoing the Respondent would be entitled to continue to occupy the immovable property until she was in a position to buy the immovable property from the Appellant;

3. The Respondent agreed to pay all of the local authority charges in respect of rates, taxes, water and electricity in relation to the property directly to the Appellant every month so that the Appellant, in turn, as the owner of the immovable property, was in a position to pay the local authority charges incurred by the Respondent each month;

4. The Respondent agreed to purchase and take transfer of the immovable property directly from the Appellant for the sum of R 424 700.00; and

5. Once the Respondent was in a position to raise the necessary finance to purchase the immovable property from the Appellant the immovable property would be transferred to the Respondent by the Appellant.

[9] When dealing with these submissions in the court *a quo* the learned Acting Judge held[9] that since the transfer of ownership from the Respondent to the Appellant was occasioned by fraud, it remained of no force and effect irrespective of the alleged oral agreement. In other words, put simply, if the original agreement was invalid and ownership of the immovable property had not truly, in law, been passed from the Respondent to the Appellant then it was not possible to give effect to any subsequent oral agreement whereby the Appellant would, upon certain conditions being fulfilled, transfer ownership of the immovable property to the Respondent. The Appellant was never, at any stage, the lawful owner of the immovable property. Any agreement whereby the Appellant sought to transfer her alleged ownership of the immovable property to the Respondent or to any other party, would therefore be a nullity.

The law

[10] As held in the matter of *Nedbank Ltd v Mendelow NO and Another,*[10] if the underlying agreement (to pass ownership) is tainted by fraud then ownership does not

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[9] Judgment of Senyatsi AJ at para 27 at page 315 of the record.
[10] *Nedbank Ltd v Mendelow NO and Another* 2013 (6) SA 130 (SCA) paras 13-14.

pass. Further, for there to be a real agreement to transfer ownership there must be an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property.[11]

Conclusion

[11] There is nothing before this court to show that the court *a quo* misdirected itself in coming to the finding that it did and granting the Respondent the relief sought. In essence, this relief set aside the Deed of Sale whereby the immovable property was sold by the Respondent to the Appellant as part of the fraudulent scheme; the Respondent was declared to be the rightful owner entitled to restitution thereof and various other orders made to give effect thereto. This being the case, it must follow that it is unnecessary for this court to consider whether or not the dispute of fact raised on the application papers as to whether that oral agreement was entered into and the terms thereof, could be properly resolved without the aid of oral evidence and, more particularly, in favour of the Respondent (which the court *a quo* appeared to do).This is so, since even if the Appellant's version in this regard is accepted to be correct, this does not (for the reasons set out above) assist the Appellant in this appeal.

[12] There appears to me to be yet another reason (in law) as to why the oral agreement as alleged by the Appellant cannot be relied upon to support the submissions made on behalf of the Appellant that the Respondent, because she had breached the oral agreement by failing to continue to make payments to the Appellant in respect of an agreed purchase price for the immovable property, had instituted the application in the court *a quo* for the relief sought in an attempt to, unlawfully, obtain ownership of the immovable property.

[13] In this regard, subsection 2(1) of the Alienation of Land Act 68 of 1981 (as amended) states:-

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

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[11] *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) para 22.

[14] Since the Appellant relies on an oral agreement in respect of which the Appellant would ultimately sell the immovable property to the Respondent and no written agreement exists, this purported sale is of no force or effect. It being invalid, any such agreement, even if it was, as the Appellant avers, entered into, cannot be held to have novated the original invalid agreement (as specifically relied upon by the Appellant before this court).

[15] In any event, as a matter of fact, it is highly improbable that the Respondent would have agreed to the alleged terms of the oral agreement. Her home, at the relevant time in 2006, was valued at approximately R 500 000.00. She had applied to Brusson for a loan of only R 200 000.00 but had, to her surprise, been granted a loan of approximately R274 000.00 being both the amount in terms of the mortgage bond and the so-called purchase price of the immovable property. Despite this, Brusson had only advanced the sum of R148 539.46 to the Respondent. She had continued, each month, to pay Brusson the agreed monthly repayment amount as well as local authority charges. By the time of the alleged oral agreement in June 2010 she had paid far more than what would have been regarded as a fair rate of interest on the loan amount of R148 539.46. By approximately 2015 the Respondent had already paid total repayments in the region of R485 000.00 in respect of a loan of only R148 539.46. In these circumstances it is highly improbable, not only that she would agree to continue to pay monthly instalments as alleged but also, that she would have agreed to buy back her own home for a further sum of R274 000.00. In addition thereto the terms of the alleged oral agreement are all clearly meant to be part of one deal and are not severable.

[16] A further point worthy of mention is that from 2006, when the Respondent signed the Brusson documents, to June 2010 (when the Brusson scheme collapsed) the Respondent had paid to Brusson, every month by debit order, the agreed amount. On 1 June 2010 the monthly debit order in favour of Brusson was not honoured. This was apparently not due to any default on the part of the respondent but rather as a result of certain difficulties being experienced by Brusson (no doubt attributable to the collapse of the fraudulent scheme). By the next day the Appellant was alive to the fact that the debit order had not been met. Further, she knew the name and contact details of the Respondent despite the fact that, when the Brusson documents had been

signed by the Respondent in 2006, the Respondent did not know the identity of the Appellant. This knowledge, acquired so efficiently and quickly by the Appellant, can lead to no inference other than the inference that the Appellant and Brusson had always worked closely together. This gave rise to the common cause facts where, in June 2010, shortly after the demise of Brusson, the Appellant contacted the Respondent seeking some arrangement whereby the Appellant would take the place of Brusson, at least insofar as continuing to receive money from the Respondent was concerned.

[17] Since, when all is said and done, it is not necessary for this court to consider whether the oral agreement, as alleged by the Appellant, was ever entered into between the parties, it is also unnecessary for this court to consider whether or not the Appellant had, on the application papers before the court *a quo*, successfully raised a defence based on the doctrine of estoppel. This is so, since it is settled law that "a state of affairs prohibited by law in the public interest cannot be perpetrated by reliance upon the doctrine of estoppel".[12] Since the transaction pertaining to the present matter was part of the Brusson scheme the illegality of which, as stated by Nicholls J in the matter of *Radebe v Sheriff for the District of Vereeniging (supra)* "brooks no doubt"[13] and further, as noted by Cameron J in the matter of *Absa Bank Limited v Moore and Another (supra)*[14] caused hundreds of homeowners and various banks to suffer loss, any defence of the Appellant based on an estoppel, does not assist the Appellant. The transaction is invalid and the doctrine of estoppel cannot apply.

[18] The Appellant's Notice of Appeal[15] raises a plethora of issues and consists of no less than 18 pages (excluding the annexures thereto). Each and every issue as set out therein has not (for obvious reasons) been specifically dealt with in this judgment. The principal reason therefor is that, once again in light of the fact that the transaction which took place is invalid, being tainted by fraud, it is unnecessary to do so, alternatively, these issues were either abandoned by the Appellant on appeal or were not argued with any real "conviction".

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[12] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) 1 (SCA) para 18.
[13] *Radebe (supra)*para 8.
[14] *Absa Bank Limited v Moore (supra)* para 6-11.
[15] Notice of Appeal at pages 326-343 of the record.

[19] Having regard to the aforegoing, it is clear that the appeal must be dismissed, with costs.

The scale of costs

[20] The Appellant avers that the court *a quo* misdirected itself when ordering the Appellant to pay the costs of the application on the scale of attorney and client.[16] It is trite that costs is a matter within the discretion of the court *a quo* and in the absence of a misdirection the appeal court will not lightly interfere therewith.[17] At the time when the Respondent instituted her application, it was clear that the Appellant was aware of the fact that all transactions linked to the Brusson scheme were tainted by fraud and, as such, were invalid. Despite the aforegoing the Appellant opposed the relief sought by the Respondent in the court *a quo* giving rise to the Respondent being mulcted in costs. The sole basis upon which the Appellant persisted with this opposition was, as is apparent from this judgment, a clearly misguided reliance on a subsequent oral agreement. Any opposition to the application was accordingly entirely without merit and may even be described as frivolous. This fact alone, apart from the other reasons as set out by the learned Acting Judge in his judgment,[18] supports a case that there was no misdirection by the court *a quo* in respect of the exercise of its discretion pertaining to the scale of costs which would entitle this court to interfere therewith.

[21] In determining the scale of costs which should be awarded to the Respondent in the dismissal of this appeal the persistence of the Appellant to recklessly pursue this matter "to the bitter end", is once again a factor which should be taken into consideration. Undeterred by the finding of the court *a quo* as to both the lack of a real basis in law upon which the Appellant could have opposed the Respondent's application (together with the finding that the Appellant's conduct in the litigation was deserving of an award of punitive costs) the Appellant nevertheless persisted with this appeal. As a result thereof the Respondent has, once again, incurred unnecessary legal costs. In this regard the fact that the court *a quo* adopted what could well be described as a conservative approach in granting the Appellant leave to appeal[19] on

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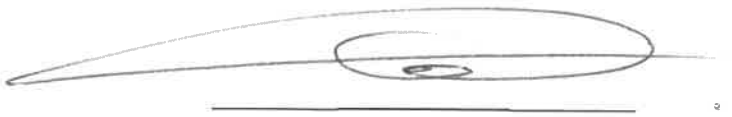
[16] Notice of Appeal, paras 21-23 at pages 341-342 of the record.
[17] *Rich NO v Rich Properties (Pty) Ltd and others* [2017] JOL 38592 (GP).
[18] Judgment of Senyatsi AJ; paras 28-31 at pages 316-317 of the record.
[19] Judgment of Senyatsi AJ; application for leave to appeal at pages 322-325 of the record.

the basis that the Appellant had shown that a court of appeal may have come to a different decision (without stating any reasons therefor), does not diminish the culpability of the Appellant in proceeding with this appeal. Nor does it provide any sustenance for an argument that this court should, in dismissing this appeal with costs, deviate from the scale of costs as awarded by the court *a quo*.

[22] The court makes the following order:-

1. The appeal is dismissed;

2. The Appellant is to pay the Respondent's costs of the appeal on the scale of attorney and client.

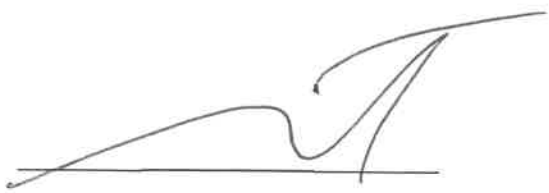


B WANLESS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



G WRIGHT
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	27 May 2019
Date of judgment:	3 June 2019

Appearances:

Counsel for the Appellant:	Mr Matthew Kerr-Phillips
Instructing Attorneys:	Matthew Kerr-Phillips
Counsel for the Respondent:	Adv. Jacques Lourens
Instructing Attorneys:	Ted Groenewald Attorneys