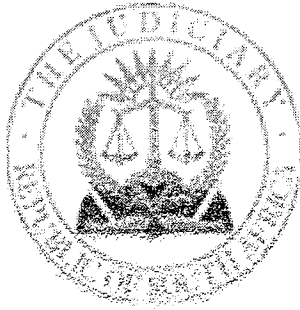
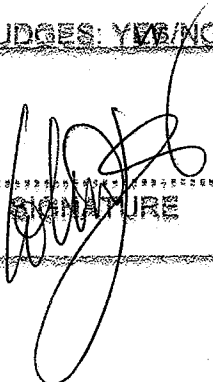


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2017/22588
2016/43175

| | |
|------------------------------------|--|
| DELETE WHICHEVER IS NOT APPLICABLE | |
| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED</u> |
| 17.2.2020 |  |
| DATE | SIGNATURE |

In the matter between:

MASHILO SHADRACK SEBOLA

1st Applicant

NOMBEKO DAPHNE SEBOLA

2nd Applicant

And

AUDUN STEEN-STENERSEN

1st Respondent

**THE BODY CORPORATE OF THE MONELMIE
SCHEME, NO SS. 221/2004. SS178/2003**

2nd Respondent

LARRY SMEYATSKY

3rd Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED

4th Respondent

THE SHERIFF OF ROODEPOORT-FWJ COETZEE

5th Respondent

THE REGISTRAR OF DEEDS

6th Respondent

J U D G M E N T

LAMONT, J:

[1] The applicants in the application seek a rescission of two judgments granted in this court on 22nd February 2018. One judgment was granted under case number 43175/2016. The order made was that an application for rescission which was before the court was dismissed with costs. The second judgment was granted under case number 22588/2017. The order made was that the application was dismissed the applicants to pay the costs of the application.

[2] The applicants sought leave to appeal against both judgments. Leave was refused. The applicants then petitioned the Supreme Court of Appeal for leave to appeal. Both petitions were dismissed. The basis of the dismissal was that there was no reasonable prospects of success in the appeals and there was no other compelling reasons why the appeal should be heard. The applicants then applied for leave to appeal to the constitutional court. Those applications were dismissed with costs on the basis that they did not engage the court's jurisdiction and in any event did not enjoy prospects of success.

[3] It is necessary to set out the background under which the litigation took place. The applicants purchased immovable property during 2007. They failed

to make the necessary payments to the fourth respondent of the loan granted to them by the fourth respondent. In consequence of the fourth respondent obtained judgment against them in 2014 and proceeded to sell the immovable property in execution of the debt. The property was sold to the first respondent by way of public auction during September 2016. The first and second applicants have resided continuously at the property throughout the period from the time of their purchase. None of the overheads relating to the property including the rates and taxes, levies to the body corporate etc. have been paid by the applicants for a significant period of time and there is a substantial debt due, approximately R 450,000. Pursuant to the sale in execution the property was transferred to the first respondent who has been the owner thereof since transfer was effected. Notwithstanding that the first respondent is the owner of the property he has been unable to gain possession of it. The respondents have actively engaged in litigation concerning the sale of the property and the right of access to the property all of which has resulted in a large number of applications against the first respondent being brought by the applicants. All those applications creations have been unsuccessful.

[4] The applicant brought an application under case number 22588/2017 seeking a declaration that the sale in execution of the immovable property be declared unlawful and unconstitutional and be set aside. The basis of the application was that a fraud had been perpetrated in that transfer had been affected without payments of the amount due to the second respondent having been paid. The other application brought by the applicant under case

number 43175/2016 was to rescind a costs order which had been made at the time of a striking of an urgent application off the roll. Both applications were dependent upon the applicants establishing fraud.

[5] The applicants relied in the applications and in the current applications to rescind, on allegations made that as the execution process which resulted in the transfer of the property to the first respondent was tainted by fraud the first respondent did not become the owner of the property and the sale in execution falls to be set aside.

[6] The second respondent alleged that a debt of R439 950 was due by the applicants to it. The applicants contest that that is the debt due to second respondent. The applicants raise a number of complaints with the calculation of the debt and whether or not any of the underlying amounts were in fact due. At the sale in execution prospective purchasers were advised of the existence of this debt and that in order to obtain transfer of the property the purchaser would need to produce a certificate from the second respondent sanctioning the transfer. This document is known as a compliance certificate. It is a document presented to the registrar of deeds to indicate that the second respondent does not contest the transfer.

[7] The first respondent attended the sale in execution on 2 September 2016 and purchased the property at the sale which was conducted by the fifth respondent. He signed the conditions of sale having bid R300 000 and made payment of the deposit and the Sheriff's commission. The first respondent

was unable to obtain a bond for the total amount of the outstanding purchase price and the contributions owed to the second respondent as the amount due to the second respondent was higher than the purchase price of the property and no lender was prepared to loan both amounts to him.

[8] Terms of the conditions of sale and execution of the immovable property signed by the first respondent reflect the identity of the property and the terms of the sale. The relevant terms are set out below: –

- 1 the first respondent was to pay a deposit of 10% immediately [clause 4.1],
- 2 the balance of the purchase price was to be paid to the sheriff against transfer [clause 4.4],
- 3 the first respondent was to be responsible for payment of all costs and charges necessary to effect transfer including but not limited to conveyancing costs, transfer duty or VAT attracted by the sale and any Deeds Registration Office levies [Clause 4.7],
- 4 the first respondent was informed of the following charges [clause 4.8]: –
 - 4.1 the arrear rates and taxes estimated at R 48,970.66,
 - 4.2 arrears charges payable in terms of the Sectional Titles Act, Act 95 of 1996 estimated at R 439,950. The sheriff and the first respondent noted that the amounts set forth in the clause were estimates only and that neither the sheriff nor the execution creditor warranted the accuracy of the estimate. The first respondent was advised that he would not be able to avoid his obligations nor would he have any claims against the sheriff for

the execution creditor if the ultimate amounts were greater than the estimated amounts. The actual amount owing in respect of arrear rates and taxes or arrears charges payable in terms of the Sectional Titles Act 95 of 1996 were to be paid by the first respondent within 7 days after being requested to do so by the attorney attending to the transfer. [Clause 4.8],

- 5 if the second respondent paid the whole purchase price and complied with the conditions concerning payment of costs and charges and levies [contained in clause 4.7 and 4.8] within 21 days of date of sale any claim for interest would lapse otherwise transfer would be passed only after the purchaser had complied with the provisions stipulated. [Clause 4.10].

[9] It is apparent that the contract requires in clause 4.7 and 4.8 that the first respondent was responsible for the payment of all costs and charges necessary to effect transfer including the cost due to the first respondent in terms of the Sectional Title Act and that whatever the actual charges were the first respondent would be unable to rely on the estimates contained in clause 4.8 to avoid the obligations to make sure that such payments as were required to effect transfer were made.

[10] The applicant submitted that the first respondent was obliged to make payment of the full amount due to the second respondent. It was submitted that the first respondent had not made made payment of the full amount as he had entered into an arrangement with the second respondent in terms whereof the first respondent's wife would sign an acknowledgment of debt

providing for payment to be made in instalments. On the 4th of December 2016 the second respondent provided an extended levy clearance certificate extending the earlier certificate from 30th November to 31st of December 2016. In that certificate the second respondent confirmed that in terms of Section 15 B (3) (a) (i) (aa) of the Sectional Titles Act 95 of 1986 suitable provision had been made to the satisfaction of the second respondent for the payment of all monies due to an in respect of the property up to and including 31st of December 2016.

[11] The conveyancer on 25 November 2016 provided a certificate in terms of Section 15 B (3) of the Sectional Titles Act that the second respondent had certified that provision had been made to the satisfaction of the second respondent for payment of the monies due to it. As at the date of transfer the provisions of the contract had been fulfilled in that as far as the second respondent was concerned the debt due had been provided for. The property as far as it was concerned could be transferred.

[12] The applicant submitted that as the certificate provided by the second respondent post-dated the conveyancer's certificate that a fraud had been perpetrated. The fraud consisted so it was alleged in that the conveyancer furnished a certificate at a time when there had been no certification by the second respondent. There are two reasons why the submission is fallacious. Firstly it is apparent from the second respondent's certificate that it is an extended levy clearance certificate i.e. a fresh certificate in respect of an extended period beyond the period of the previous clearance certificate. This

is apparent from the fact that the certificate is headed extended levy clearance certificate extended from 30 November to 31st of December 2016. There is no allegation or evidence that the inference drawn by the applicants that no certificate had been provided by second respondent could be drawn. It is apparent from the conveyancer certificate that she had been given a certificate by the second respondent providing for the payment in instalments this by reason of the reference to the section in the sectional titles act which sanctions payment in instalments. She would not know to include that reference unless she had been told to do so. The second reason why there is no fraud perpetrated is that the conveyancer was correctly stating the fact that the second respondent certified that provision had been made as required. There is no challenge to the certificate by the second respondent in fact the second respondent's conduct confirms that the conveyancer certificate was sanctioned and accurately reflects the position. The facts deposed as being true and correct by the second respondent's representative indicate that the conveyancer was authorized to make a statement that she did. There simply was no fraud. The property was duly transferred.

[13] The applicant submitted that it was not open to the second respondent to accept payment of the amounts due in instalments. That submission is fallacious as the Act provides that payment may be made in instalments in section 15 B (3) (a) (I) (aa). The applicant also submitted that inasmuch as payment was postponed over a period of time as contemplated by the acknowledgment of debt that there had not been payment hence the provisions of clause 4.10 of the contract prevented transfer. Clause 4.10

provides that transfer shall be passed only after the purchaser has complied with the provisions inter alia of clause 4.7. Clause 4.7 provides that the purchaser is responsible for payment of all costs and charges necessary to effect transfer including the costs relating to the levies of the second respondent. The first respondent by providing the acknowledgment of debt made provision for payment of all costs and charges necessary to effect transfer as the transfer could be affected based on the certificate of the conveyancer and the second respondent which had been provided.

[14] Assuming this analysis is incorrect there nevertheless was no breach of an obligation to pay. That obligation in terms of clause 4.8. only arose after a request for payment had been made. There is no evidence of such a request.

[15] There was accordingly no fraud perpetrated in the process of delivery of the immovable property to the first respondent in the Deeds Office on 15 December 2016. As at the date of transfer the relevant certification of the second respondent concerning costs and charges existed.

[16] The applicants' case is dependent upon establishing fraud in this process so as to found the argument that the transfer be set aside. As there was no fraud there was no flaw in the transfer and the first respondent became the owner of the property when it was transferred to him.

[17] The applicants alleged and submitted that the fourth respondent had intentionally misrepresented to the court that the property had been duly sold and transferred to the first respondent. This allegation and submission is erroneous based on the analysis undertaken above.

[18] The rescission sought of the order made under case number 40175/2016 fails also. The striking off and costs order should not be rescinded. The applicants accept that the rescission application must fail.

[19] There is before me a counter application. It is my view that this application should not be heard presently as it interferes with the rights of the applicants to prosecute the present application. The counter applicants accept that the applicants should not be prevented from prosecuting this application. It is my view that in the circumstances the counter application to declare the applicant a vexatious litigant thereby interfering with his right of prosecution of the application should not be heard presently.

[20] I did not deal with all the interlocutory applications as it appeared to me that the matter was best dealt with by dealing with the real issues before me.

[21] Accordingly both applications for rescission must fail.

[22] I accordingly make the following order.

1. The applicants' application is dismissed with costs, the applicants' to pay jointly and severally the costs of all the parties who incurred costs.
2. The counter application is postponed sine die. The costs are reserved.


 C G MONT
 JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG LOCAL DIVISION, JOHANNESBURG

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Adv. K.A. Magan

1st & 2nd RESPONDENTS ATTORNEYS:

Scalco Attorneys Inc

DATE OF HEARING:

12 February 2020

DATE OF JUDGMENT:

18 February 2020