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

CASE NO: 2019/26963

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
Date:28 September 2021

In the matter between :

M[....], J[....]	Applicant
and	
MAGUDULELA, THULANI CYRIL	First Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Second Respondent
THE REGISTRAR OF DEEDS, JOHANNESBURG	Third Respondent

JUDGMENT

Delivered: This judgment is handed down electronically by circulation to the parties' representatives by email.

TURNER AJ:

[1] This application addresses competing interests over Erf [....], Vosloorus Extension 9 (“the property”).

[2] The first respondent is the current registered owner and the second respondent is the bond holder, having registered security over the property after granting a loan to the first respondent. The applicant was the registered owner prior to registration into the name of the first respondent in 2010 and she seeks the following relief: an order declaring the registration and transfer of the property in the name of the first respondent to be declared null and void; cancellation of Title Deed No. T44041/2010 (dated 15 December 2010) in terms of which the property was registered in the name of the first respondent; an order directing the Registrar to transfer the property into her name; and costs.

[3] The first respondent opposes the relief. The second and third respondents have not participated in the litigation. I deal with the question of service on the second respondent later in the judgment.

Relevant facts

[4] The property was first established by Ekurhuleni Metropolitan Municipality during 1987 and a leasehold was registered against the property in the name of A[....] S[....] R[....] (“R[....]”) in 1989, together with a bond in favour of the Johannesburg Municipal Second Pension Fund.

[5] The applicant and R[....] were married in February 1989 and lived in the house which was constructed by them on the property. On 24 May 1991, the applicant obtained a divorce order in this Court (Case No. 7110/1991) in terms of which the marriage between her and R[....] was dissolved and the court ordered that R[....] forfeit the benefits arising out of the marriage in community of property. It appears that, despite this order, the applicant was unable to evict R[....] from the house and he remained resident in the house until he passed away in July 2000. In the period between 1991 and 2000, R[....] married Ermaley T[....] (also referred to as Emily Tshidi Mmusi) (“T[....]”) and it appears that T[....] remained in occupation of the property after R[....]’s death.

[6] When the applicant attempted to register the property in her name, following the death of R[....], she discovered that a second divorce order had been obtained in favour of R[....] in the Central Divorce Court in August 1992, in terms of which the applicant was to have forfeited all benefits arising from the marriage in favour of R[....]. The applicant then launched proceedings in the High Court, under the original divorce case number (1991/7110), citing the executor in R[....]'s deceased estate, T[....] and the Sheriff for Boksburg. The matter came before Claassen J on 22 August 2006 and Claassen J granted an order in terms of which: (i) the 1992 order granted by the Central Divorce Court was declared null and void; (ii) the 1991 divorce order was declared valid; (iii) the executor of R[....]'s estate was to *"do all such things and sign all such documents as may be required to procure the transfer of* [the property] *into the name of the applicant …"* ("the Claassen J order").

[7] The property was transferred and registered in the name of the applicant in April 2009 under T11591/2009.

[8] In the current matter, the respondent alleges that the documentation prepared and relied upon by the applicant to obtain transfer in 2009 misrepresented her position as it referred to her as a "surviving spouse", which was false in 2009. The respondent alleges that, as a result, the transfer to the applicant was fraudulent and cannot be relied upon. I return to this allegation below.

[9] After obtaining registration of the property, the applicant attempted to evict T[....], who refused to vacate the property. In October 2010, T[....] pretended to be the applicant and entered into a deed of sale with the first respondent in terms of which she purported to sell the property to the first respondent for an amount of R480,000. It is not disputed that whilst the applicant's name and identity number appear on the deed of sale, the deed of sale was not completed by the applicant but by T[....], pretending to be the applicant.

[10] The property was registered in the name of the first respondent on 15 December 2010 under Title Deed T44041/2010. Although not dealt with directly in the papers, it seems clear that the sale price was paid to T[....], not to the applicant.

[11] In the founding affidavit, the applicant makes the following allegations:

> *"8.13 All of the above who were involved in the transfer and sale of my property were aware that the sale was fraudulent but continued with sale and registration. Even the first respondent was made aware before the sale and registration was complete but never-the-less continued with the sale. The first respondent ended up threatening me that I must not come to the house any more because it is his house.*

8.14 All the parties to the sale and registration were aware of the criminal case against their client Emily T[....] Mnusi because they were all subpoenaed by the criminal court as witnesses in the fraud case."

[12] In the answering affidavit, the first respondent records:

"I do not know whether or not E[....] T[....] Mmusi committed fraud . I understand that she was married to the deceased and would have been entitled to have the property registered into her name by virtue of the law of intestate succession."

He does not deny the knowledge alleged in paragraph 8.13 and records as the only answer to the above allegations:

"I was aware of the criminal case against E[....] T[....] Mmusi but I say that a criminal case has got nothing to do with the alleged rights that the applicant alleges that she has."

[13] T[....] was subsequently prosecuted in the Regional Court and convicted on charges of fraud and theft pursuant to her fraudulent impersonation of the applicant which led to the conclusion of the deed of sale. She was sentenced on 14 June 2014 at the Regional Court of Boksburg for 8 years, three of which were suspended for five years.

[14] Although the details were not before the court, it was common cause that, since 2010, the applicant was not supine and has brought two prior applications claiming the re-transfer of the property – under Case No. 4535/2014 and 46891/2017. Neither of these applications was pursued to completion. In the answering affidavit, the respondent raised the fact of these other applications and accused the applicant of abuse of court process, but he did not expressly plead a

defence of *lis alibi pendens*. In the replying affidavit, the applicant explained what had happened to those two prior applications. She recorded that: the attorney in the 2014 matter "*kept on delaying to proceed*" and then stopped practising as an attorney; the attorneys in the 2017 action also did not proceed with the matter despite her visiting their offices and enquiring about the process. When she obtained no assistance from those attorneys she decided to take the matter to her current attorneys. In argument before me, respondent's counsel confirmed that no defence of *lis pendens* was pursued and that the respondent accepts that both the 2014 and 2017 applications have been abandoned.

The disputed issues

[15] The applicant contends that the fraud committed by T[....] unravels the deed of sale and the transfer which occurred in 2010. Relying on *Legator McKenna,*[1] *Randalls Bros*[2] and *Mendelow*[3] the applicant argued that the fact of registration in favour of the first respondent did not result in a transfer of ownership, because she was the owner at the time and was not a party to the sale agreement. As the registration of transfer was pursuant to this fraudulent underlying sale agreement, ownership did not pass.

[16] The respondent did not dispute these cases but sought to distinguish them on the basis of a denial that "the applicant had any ownership right in the property". This assertion rests on two grounds. The first is that, as at the date of divorce in May 1991, R[....] was leaseholder and not owner of the property and R[....] only became the owner in September 1991 (after the divorce) by virtue of the provisions of section 2 of the Upgrading of Land Tenure Rights Act 112 of 1991 which converted leasehold rights to ownership rights. The respondent argues that R[....]'s right of ownership was only conferred on him after the divorce and consequently the property was not available to be distributed in the divorce.

[17] The respondent also alleges that the applicant defrauded the Registrar of Deeds and obtained registration of the property into her name in 2009 in a fraudulent

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[1] Legator McKenna Inc v Shea 2010 (1) SA 35 (SCA) at para 21 and 22.

[2] Commissioner of Custos and Excise v Randalls Bros and Hudson 1941 AD 369

[3] Nedbank Ltd v Mendelow NO 2013 (6) SA 130 (SCA)

manner when she represented that she was the “surviving spouse”. For this reason, he asserts that the applicant does not have “clean hands” and therefore cannot challenge the ownership of the first respondent.

[18] There are fundamental difficulties with the respondent’s approach. *First*, the transfer of the property to the applicant in 2009 was not set aside and there is no application before me to have that transfer set aside. *Second*, the Claassen J order confirmed the applicant’s entitlement to transfer of the property after 2006 and so determined the rights of the applicant in relation to the property after R[....]’s death. R[....]’s executor and T[....] were both respondents in those proceedings. The respondent has not sought to overturn the Claassen J order or to set out any basis on which it should be ignored. In the circumstances, where the applicant was entitled to transfer of the property in 2009 by virtue of the Claassen J order, the misdescription of her right in the transfer papers is unlikely to be found to constitute a fraud on any party, as no party had a better right than hers. *Third*, at the time that the respondent concluded the deed of sale with T[....] (pretending to be the applicant), the property was registered in the name of the applicant and the deed of sale and transfer documents relied upon by the respondent for his rights are documents which purport to transfer the rights of the applicant to the respondent. As such, the very rights which the respondent relies upon are those which he purportedly received from the applicant. He cannot approbate and reprobate: he cannot resist the relief seeking to set aside the transfer to him and assert that he has validly acquired ownership from the applicant; but at the same time, assert that the applicant was never the owner. *Fourth,* the focus of this matter is on whether the 2010 transfer to the respondent was valid and there is no dispute that the underlying sale agreement on which the transfer was based, was fraudulent. *Fifth* and in any event, the leasehold right was a right which formed part of the marital estate in community of property at the time of the divorce in 1991 and converted to ownership *ex lege* later that year. That leasehold right was registered against the property and, as pointed out by applicant’s counsel during argument, was capable of identification and of forfeiture to the applicant pursuant to the divorce order.[4] The conversion to ownership would not have changed that position.

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[4] *Nzimande v Nzimande and Another* 2005 (1) SA 83 (W) para 34.

[19] There are two crucial facts which have been established on the papers and which must inform the outcome of this matter. The first is that prior to the transfer to the respondent in December 2010, the applicant held a real right in the property. Her right to own the property was confirmed by the Claassen J order and her ownership of the property was registered in the Deeds Office. The second critical fact is that the transfer of the rights of ownership in the property to the first respondent in 2010 was effected pursuant to a fraudulent deed of sale in which T[....] pretended to be the applicant, as owner. Aligned to this is the fact that the respondent has not disputed that he was aware of that T[....] was not the applicant, and had misrepresented her identity on the sale agreement, before the transfer to him took place.

Prescription

[20] The respondent also raised the defence of prescription, contending that *"any possible claim that the applicant might have had has become prescribed in terms of the provisions of Act 68 of 1969. It seems that the applicant relies upon a fraud that was perpetrated on her and she was aware of all facts relating to such fraud during 2014 when she brought the first application. The present application was only served on me on 1 October 2019, so that any right that the applicant might have had has become prescribed in terms of the provisions of section 11(d) of the Prescription Act 68 of 1969."*

[21] The question of whether the applicant's claim has prescribed involves a careful consideration of whether the claim is one to enforce a real right or one to enforce a personal right. [5] If the claim is one for *rei vindicatio*, it does not constitute a debt which is struck by extinctive prescription and the right to claim re-transfer of the property does not prescribe after three years.

[22] In the current matter, the applicant asserts that she was the registered owner of the property prior to December 2010 and, as such, held a real right in the property. No attempt has been made by the respondent to set aside the transfer in terms of which the applicant acquired her real right.

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[5] *Absa v Keet* 2015 (4) SA 474 (SCA) para 20 - 25. See also *eThekwini Municipality v Mounthaven (Pty) Ltd* 2019 (4) SA 394 (CC).

[23] By claiming cancellation of the transfer to the first respondent and claiming re-transfer to herself, the applicant's claim is a classic *rei vindicatio* in respect of immovable property and an assertion of her real right in the property. As such, it does not constitute a claim for a "debt" as contemplated in the Prescription Act 68 of 1969 and is not extinguished by extinctive prescription.

[24] In the circumstances, I find that the transfer to the first respondent was invalid and the applicant is entitled to set that transfer aside and to have the property registered in her name again.

Service on Standard Bank

[25] During argument, counsel for the first respondent raised a question as to whether service had been effected on the second respondent, Standard Bank, as a return of service on Standard Bank did not appear from the papers filed on Caselines. Counsel for the applicant recorded immediately that she had seen proof of service on Standard Bank and, shortly after the hearing adjourned, the applicant produced a copy of the notice of motion, issued by this court on 1 August 2019, on which a Standard Bank stamp appears. The stamp records:

> *"*The Standard Bank of
>
> South Africa Limited
>
> Without prejudice
>
> 2019-08-05
>
> Received by: Mike *[handwritten]*
>
> Time: 9:45 *[handwritten]."*

[26] Soon after the conclusion of the hearing, the applicant also delivered two affidavits. The first, by Lerato Mokapi, which records that Ms Mokapi is a legal secretary at Masina Attorneys and that she served the notice of motion and founding affidavit on the second respondent on 5 August 2019 at 09h45. She states that the documents were received by Michael Mkhize. The second affidavit is by Patuxolo Sonwabiso Socikwa, a candidate attorney at Masina Attorneys who records that on

11 June 2021, she went to Standard Bank to ask for a confirmation letter from Michael Mkhize that he had affixed the stamp to the notice of motion on 5 August 2019. She states that Mr Mkhize refused to give her a confirmation letter and told her that "*the signature with the bank stamp is enough and that is the way they do it"*. He referred Mr Socikwa to his manager.

[27] Having regard to the above evidence, it appears *prima facie* that the founding papers were delivered to Standard Bank. However, they were not delivered by the Sheriff.

[28] It is obvious that any person against whom final relief is sought in any legal proceedings is entitled to receive notice of those legal proceedings and a court will not grant final judgment affecting the rights of a party if such notice has not been given. Although the court rules require service of any document initiating application proceedings to be effected by the Sheriff, this court has held that non-compliance with the rule does not necessarily and automatically lead to a nullity if service was effected in another manner.[6] If the proceedings were served on Standard Bank and Standard Bank received notice of the proceedings, then the fact that the service was not effected by the Sheriff ought not to constitute an absolute bar to the applicant succeeding. *Prima facie*, the founding papers were delivered to Standard Bank on 5 August 2019 and received by Mr Mkhize in the ordinary course and so Standard Bank did receive service of the papers and effective notice of the proceedings instituted by the applicant.

[29] However, Standard Bank has not had an opportunity to respond to the allegations regarding proof of service. In the circumstances, although it does mean a further delay to the applicant in vindicating her rights, I am reluctant to deliver a final judgment affecting the rights of Standard Bank without ensuring that it received notice of these proceedings. In the circumstances, I intend to issue a *rule nisi* recording the order which, in the absence of any contrary fact, I consider should be granted in this application. If, on the return day, Standard Bank is unable to dispute the delivery of the founding papers, the order will become final.

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[6] *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies* 2012 (5) SA 267 (GSJ) at 272 I-J *and Investec Property Fund Ltd v Viker X (Pty) Ltd and Another* [2016] ZAGPJHC 108.

[30] I make the following order:

(1) A *rule nisi* is hereby issued calling upon the second respondent to show cause, if any, to this Court, why the final order set out in (2) below should not be granted.

(2) A final order be granted in the following terms –

a. The registration of transfer of the immovable property described as Erf [....] Ext 9, Marimba Gardens, Vosloorus, in the name of the first respondent is hereby declared null and void.

b. Title Deed No. T44041/2010 registered on 15 December 2010 in the name of Thulani Cyril Magudulela for Erf No. [....], Vosloorus Ext 9 Marimba Gardens I.Q. Ekurhuleni, Gauteng Division, is hereby cancelled.

c. The Registrar of Deeds, Johannesburg, is directed and authorised to cancel the Deed of Transfer T44041/2010.

d. The Registrar of Deeds, Johannesburg, is directed after cancellation to transfer the property known as Erf [....], Vosloorus Ext 9 Marimba Gardens, Ekurhuleni, Gauteng Division, into the name of J[....] M[....]**.**

e. The Sheriff for the District of Boksburg is authorised to sign all documents necessary to give effect to the aforesaid transfer of the property.

f. The first respondent is ordered to pay the applicant's costs on a party and party scale.

(3) The applicant shall procure that a copy of this judgment is delivered by the Sheriff to the second respondent, Standard Bank.

(4) The Registrar shall ensure, if requested to do so by the second respondent, that the second respondent and its representatives are given access to the CaseLines file in this matter.

(5) In the event that the second respondent wishes to oppose the final order set out in (2) above, it shall deliver an answering affidavit within 15 days of the date of service on it in terms of (3) above. Such answering affidavit must include a full explanation of why the application was not opposed or answered by the second defendant in 2019.

(6) The applicant may apply to the Registrar to set down the return day after the 15 day period referred to in (5) above, has expired.

DA Turner AJ

28 September 2021