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**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 17987/2020**

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED NO  
**30 March 2021**

In the matter between:

**ZANDILE PERTUNIA SITHOLE N.O.**  
(Identity No. [...])

**First Applicant**

**DUMISANI BUKU**  
(Identity No. [...])

**Second Applicant**

**And**

**EVANGELOS GIANNAKIS**  
(Identity No. [...])

**First Respondent**

**THE REGISTRAR OF DEEDS,  
PRETORIA**

**Second Respondent**

**JUDGMENT**

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 30th of March 2022.

**DIPPENAAR J:**

[1] The genesis of this application lies in a written sale agreement pertaining to Unit 1, Villa Dante Morningside Johannesburg<sup>1</sup> ("the property"), concluded between Mr Mpumelelo Buku ("the deceased") and the first respondent, represented by his attorney and agent, Attorney Bisessar Jairaj Badel ("Mr Badel") of Badal Inc attorneys at law, on 7 October 2016. The property was registered in the name of the deceased after it was purchased by the applicants and given to the deceased as a gift. The deceased was murdered on 18 January 2017 in a botched attempted high-jacking. The first applicant is the executrix of the deceased's estate.

[2] Mr Badal had from time to time rendered legal assistance to both the deceased and the second applicant. He also provided legal assistance to the first respondent. Mr Badal passed away on 24 May 2017.

[3] The applicants, by way of motion proceedings, seek orders declaring the sale agreement and the sale and transfer of the property invalid and unlawful and setting it aside and directing that the property be transferred to the estate of the deceased,

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<sup>1</sup> Erf [...] Morningside, Extension 179.

alternatively to the first applicant to be administered on behalf of the estate, together with ancillary relief. Orders are further sought directing the first respondent to pay amounts of R252 000 and R909 000 to the deceased estate and/or the applicants, together with interest. Costs are sought on the punitive scale as between attorney and client.

[4] It is common cause that a mortgage bond in favour of Investec was registered over the property pursuant to a loan granted to the first respondent on 6 November 2019. A copy of the application papers was served on Investec Bank Ltd, but it has not been formally joined as a party. Investec Bank Ltd has not involved itself in the present proceedings.

[5] Pursuant to Mr Badel's death, the files under his control were handed over to the Legal Practitioners Council and allocated to another firm of attorneys. Those attorneys queried the propriety of the transaction and the transfer of the property.

[6] Legal proceedings are further presently pending in the Gauteng Division, Pretoria between the first respondent and the Legal Practitioners Fidelity Fund pertaining to pecuniary losses allegedly suffered by the first respondent in respect of funds placed in trust with Mr Badal's firm.

[7] The validity of the sale agreement lies at the heart of the present dispute. In sum, the applicants' case is that the deceased fell victim to a fraudulent scheme similar to the so-called Brusson finance scheme<sup>2</sup> orchestrated by the first respondent and his attorney, Mr Badal, as a result of which he became a party to an unlawful *pactum commissorium* which ought to be voided with restitution of the property to the deceased estate and restoration of all amounts paid. According to the applicants, pursuant to this scheme the property was unlawfully transferred to the first respondent as part of the fraudulent scheme in circumstances where the deceased was led to believe that he was pledging the property as security for a loan from the first respondent.

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<sup>2</sup> Explained by the Constitutional Court in *ABSA Bank Ltd v Moore and Another* [2016] ZACC 34 at paras [3]-[5]; *Ditshego and Others v Brusson Finance (Pty) Ltd and Others* [2010] ZAFSHC 68 (22 July 2010)

[8] The first respondent's case on the other hand is that a valid sale agreement was concluded between him and the deceased and that the transaction and the payments made by the applicants are not impeachable. He further denies any fraudulent scheme and contends that the applicants' claim has prescribed and that the application falls to be dismissed with costs. In the alternative it is argued that the matter should be referred to trial in the light of the factual disputes on the papers.

[9] The issues requiring determination are wide ranging and are:

[9.1] whether the written deed of sale of immovable property ("alleged sale agreement") concluded between the deceased and the first respondent constitutes a valid and enforceable sale of immovable property or an invalid and unenforceable simulated transaction;

[9.2] whether the alleged sale agreement is subject to, and failed to comply with the requirements of the National Credit Act<sup>3</sup>, rendering the agreement void and capable of being set aside;

[9.3] the applicants' claim for payment, particularly: (i) whether the deceased paid R252 000 to first respondent in consequence of the alleged sale agreement; (ii) whether applicant paid the sum of R909 000 to first respondent; (iii) the purpose of the payments which the first respondent admits receiving from the deceased and whether they constitute occupational interest or repayment of an unlawful loan;

[9.4] whether the applicants' claims have prescribed;

[9.5] the applicants' reliance on supervening impossibility because of the death of the deceased which it is contended rendered it impossible for the deceased to perform in terms of the alleged sale agreement in consequence of this the

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<sup>3</sup> 34 of 2005

deceased's estate is entitled to restitution of the property and repayment of the sum of R252 000; and

[9.6] If the court determines that performance in terms of the alleged sale agreement was made as a result of excusable error, whether the sale agreement is invalid and the applicants have an enrichment claim.

[10] The applicants' arguments invoke the application of various principles applicable to the various categories of relief relied on. First, the absence of an intention to sell or permit the transfer of immovable property; second, restitution on the grounds of fraudulent misrepresentation; third, the unlawfulness of the Brusson financial scheme; fourth, restitution of performance effected under an illegal contract; fifth, the failure to comply with the NCA and finally, unjustified enrichment.

[11] The applicant seeks final relief. The matter is thus to be determined on the basis of the so called Plascon Evans test<sup>4</sup>. It is well established that motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Where there is a genuine dispute of fact, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.<sup>5</sup>

[12] In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another*<sup>6</sup>, the Supreme Court of Appeal enunciated the approach to be followed in relation to whether disputes of fact are bona fide thus:

*"The court should be prepared to undertake an objective analysis of such disputes when required to do so. In J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA), it was suggested how that might be done in appropriate circumstances. ....*

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<sup>4</sup> Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; NDPP v Zuma 2009 (2) SA 277 (SCA) para [26]

<sup>5</sup> J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para 12

<sup>6</sup> 2011 (1) SA 8 (SCA) at paras [19] and [20]

*A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take a stronger line to avoid injustice. In Da Mata v Otto 1972 (3) SA 858 (A) at 689 D-E, the following was said:*

*In regard to the appellant 's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:*

*“it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts-testimony which no sensible man can believe-goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded.”*

[13] The papers are replete with factual disputes on numerous issues, including how the various parties interacted and how the sale agreement is to be interpreted. It is not necessary to particularise all the factual disputes raised on the papers in detail. Suffice it to state that to illustrate the point, the first respondent provided a detailed schedule in excess of ten pages particularising such factual disputes.

[14] The applicants argued that the first respondent's version should be rejected as untenable on the papers. I do not agree. The test for rejection of a respondent's version on paper as palpably false or untenable<sup>7</sup> is a stringent one<sup>8</sup> and I am not persuaded that such threshold has been met. The first respondent has not persisted with bald denials but has grappled with the issues raised by the applicants in their founding papers and provided a detailed version of events supporting his contention that the sale agreement is valid and is not a simulated transaction. That version cannot be rejected on the basis of probability findings, as the applicants urged me to do in various respects.

[15] It is further apposite to refer to *Seumungal and Another NNO v Regent Cinema*<sup>9</sup>, wherein Leon J held:

*“In approaching this particular type of problem, it is not wrong for a Court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he has been seen and heard by a Court. An incautious answer in cross-examination may change the whole complexion of a case”.*

[16] The realities of litigation in my view require full trial proceedings in which oral evidence must be led. The complexities pertaining to the validity of the sale agreement are exacerbated by the untimely demise of both the deceased and Mr Badal, who could have shed much light on the issues. It would in my view be vital for oral evidence to be led to determine the central issues pertaining to the validity of the sale agreement and

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<sup>7</sup> PMG Motors Kyalami (Pty) Ltd (in liquidation) v Firststrand Bank Ltd, Wesbank Division 2015 1 All SA 437 (SCA); 2015 (2) SA 634 (SCA); Wightman supra para 13

<sup>8</sup> National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others 2012 (5) SA 300 (SCA) paras [21]-[22]

<sup>9</sup> 819 A-C,

to ensure a proper interpretation of the sale agreement, applying the relevant principles<sup>10</sup>.

[17] I am fortified in this view by the principle that motion proceedings are by their very nature generally inappropriate for the purpose of making findings of fraud<sup>11</sup>. In my view similar considerations would be applicable in relation to simulated transactions.

[18] I am not however persuaded that the application should be dismissed, as argued in the first respondent's heads of argument. It is trite that a court has a discretion as to the future course of the proceedings<sup>12</sup>. Considering the wide ambit of the disputes between the parties it would be appropriate to refer the matter to trial rather than to oral evidence. It would be appropriate to reserve the issue of costs.<sup>13</sup>

[19] I grant the following order:

[1] The application is referred to trial;

[2] The notice of motion shall stand as a simple summons;

[3] The answering affidavit shall stand as a notice of intention to defend;

[4] The applicants are directed to deliver their declaration within 20 days of date of this order;

[5] The Uniform Rules of Court dealing with further pleadings, discovery and the conduct of trials shall thereafter apply;

[6] The costs of the application are reserved.

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<sup>10</sup>Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para [18]

<sup>11</sup> Commissioner South African Revenue Service v Sassin and Others [2015] 4 All SA 756 (KZN) ("Sassin") paras [45]-[49] and the authorities cited therein

<sup>12</sup> Sassin supra para [71] and the authorities cited therein; R6(5)(g)

<sup>13</sup> Gray v Goodwood Municipality 1943 CPD 78



**EF DIPPENAAR  
JUDGE OF THE HIGH COURT  
JOHANNESBURG**

**APPEARANCES**

**DATE OF HEARING** : 09 February 2022

**DATE OF JUDGMENT** : 30 March 2022

**APPLICANT'S COUNSEL** : Adv. CT Vetter

**APPLICANT'S ATTORNEYS** : Shepstone & Wylie Attorneys

**1<sup>st</sup> RESPONDENT'S COUNSEL** : Adv. JL Kaplan

**1<sup>st</sup> RESPONDENT'S ATTORNEYS** : Ian Levitt Attorneys