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

CASE NO: 16835/2021

REPORTABLE: ***NO***

OF INTEREST TO OTHER JUDGES: ***NO***

REVISED:

22ND SEPTEMBER 2022

In the matter between:

BOTHA, CORNELIUS ERASMUS N O

Applicant

And

LEBOKO-RADEBE, NTHIBI DORA

First Respondent

ABSA BANK LIMITED

Second Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG

Third Respondent

Coram: Adams J

Heard: 23 May 2022 – The ‘virtual hearing’ of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 22 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 22 September 2020.

Summary: Opposed application – *rei vindicatio* – cancellation of title deed relating to immovable property – section 6(1) of the Deeds Registries Act – fraud unravels everything – if agreement is tainted by fraud, ownership of the property will not pass despite registration – the applicant's application granted.

ORDER

(1) Endorsement number [...], in terms of section 45(1) of the Deeds Registries Act, Act 47 of 1937 ('the Act'), of Deed of Transfer number [...], in terms of which Erf [...], P [...] G [...] Extension [...] Township, Registration Division IQ, Gauteng Province, in extent 255 (two hundred and fifty five) square meters, held under Deed of Transfer number [...] ('the property'), was transferred to and registered in the name of Nthibi Dora Leboko-Radebe, identity number: [...], be and is hereby cancelled in terms of section 6(1) of the Act.

(2) The fourth respondent shall forthwith cancel the aforementioned Endorsement number: [...].

(3) The fourth respondent be and is hereby ordered and directed to forthwith cancel the Continuing Coverage Mortgage Bond number: [...], registered in favour of the second respondent over Erf [...], P [...] G [...]

Extension [...] Township, Registration Division IQ, Gauteng Province, in extent 255 (two hundred and fifty-five) square meters, held under Deed of Transfer number [...] ('the property').

(4) Upon cancellation of the aforementioned Endorsement number: [...], the Deed under which the property was held immediately prior to registration of Endorsement number: [...], shall be revived.

(5) There shall be no order as to costs.

JUDGMENT

Adams J:

[1]. The applicant is the executor in the deceased estate of the late Mr Jeremiah Jerry Radebe ('the deceased'), who passed away almost two decades ago on 17 April 2004. At the time of his death, the deceased was the owner of immovable property, namely Erf [...], P [...] G [...] Extension [...] Township, Registration Division IQ, Gauteng Province, in extent 255 (two hundred and fifty-five) square meters, held under Deed of Transfer number [...] ('the property'). The deceased was married to the first respondent until the date of their divorce on 13 March 1997, and he acquired the property during 2002.

[2]. During 2005, the first respondent, through fraudulent means and by misrepresenting to the third respondent ('the Master') that she was the surviving spouse of the deceased, first obtained letters of authority, entitling her to take control of the assets of the deceased, and secondly caused the property to be transferred into her name by having the Deed of Transfer relating to the property endorsed to that effect by the fifth respondent (the Registrar of Deeds). The fraud by the first respondent did not end there. During 2006 she obtained a loan from the second respondent ('Absa Bank') and, as security for the said loan, she had a mortgage bond registered over the property in their favour.

[3]. In this opposed application, the applicant applies for vindicatory relief in relation to the property. In his notice of motion, the applicant requests that the endorsement of the title deed relating to the property and in terms of which the property was effectively transferred to the first respondent, be cancelled so as to have ownership of the property revert back to the estate of the deceased.

[4]. The application is based on the provisions of section 6 of the Deeds Registries Act, Act 47 of 1937 ('the Act') for the cancellation of Endorsement number [...], in terms of section 45(1) of the Act, of Deed of Transfer number [...], in terms of which the property was transferred the first respondent. The applicant also applies for a cancellation of the mortgage bond which the first respondent had caused to registered over the property in favour of Absa Bank.

[5]. I interpose here to note that, although the applicant's application was duly served on Absa Bank, it has to date not delivered notice of intention to oppose. I assume from their quiescence that they acquiesce and will abide the decision of the Court. In light of my finding in this matter, that seems like a prudent approach.

[6]. Section 6 of the Act provides as follows:

'6 Registered deeds not to be cancelled except upon an order of court –

(1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.

(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the

registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.'

[7]. The question to be decided in this application is whether the transfer of the property into the name of the first respondent was valid and based on a lawful and sustainable *causa*. That question should be decided against the backdrop of the relevant facts, some of which I have already alluded to *supra*, and which are expanded on in the paragraphs which follow.

[8]. As already indicated, the late Jeremiah Jerry Radebe divorced from the first respondent on 13 March 1997 and their joint estate was subsequently divided. Thereafter, he purchased the property. And he passed away on 17 April 2004. On 2 July 2004 the first respondent reported the estate of the deceased to the office of the Master, fraudulently claiming that she was the surviving spouse of the deceased. She was then issued with 'letters of authority' with the power to receive and liquidate the assets of the deceased. In that capacity, she caused the property to be registered into her name. Thereafter, she had a bond registered over the property.

[9]. When this fraudulent conduct by the first respondent came to the attention of the third respondent, the latter revoked the first respondent's letters of authority and on 4 September 2015 appointed the applicant as the Executor in the estate of the deceased.

[10]. As correctly pointed out by Mr Kellerman SC, who appeared on behalf of the applicant, the transfer of the property from the deceased estate to the first respondent was tainted by fraud and the resulting registration of ownership in the name of first respondent falls to be set aside. The same applies to the mortgage bond. The point is simply that the so-called 'fraud unravels all' principle finds application *in casu*. The transfer of the property into the name of the first respondent, as well as the registration of the bond over the property, stand to be set aside on the grounds that they were underpinned by acts of fraud. And it matters not that Absa Bank was completely innocent and not implicated at all in the fraud.

[11]. As was held by the SCA in *Namasthethu Electrical (Pty) Ltd v City of Cape Town*¹, it is trite law that fraud is conduct which vitiates every transaction known to the law. In affirming this principle, the SCA, in *Esofranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others*², referred with approval to Lord Denning's dicta in *Lazarus Estates Ltd v Beasley*³, when he said:

‘No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever ...’.

[12]. Fraud unravels everything – that is our law. And I have already found that first respondent committed fraud in that she misrepresented to the office of the Master that she was the surviving spouse of the deceased, when in fact and in truth they had divorced many years before his death. This misrepresentation resulted in the two impugned transactions, which therefore need to be ‘unravelling’ as being based on fraud. For this reason alone, the transactions fall to be set aside.

[13]. Moreover, it is trite that the requirements for transfer are twofold: (1) delivery effected by registration of transfer in the deed’s office; and (2) the existence of a real agreement, the essential elements of which are an intention on the part of the transferor to transfer the property and an intention on the part of the transferee to acquire ownership of the property.

[14]. If there is any defect in the real agreement, that is the lack of intention on the part of the transferor and the transferee to transfer and acquire ownership of the property respectively, then ownership will not pass despite registration. (Per Nicholls

¹ *Namasthethu Electrical (Pty) Ltd v City of Cape Town* 2020 JDR 1279 (SCA);

² *Esofranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] ZASCA 2; [2014] 2 All SA 493 (SCA) para 11;

³ *Lazarus Estates Ltd v Beasley* [1956] 1 QB (CA) at 712;

J in *Radebe and Another v Sheriff for the District of Vereeniging and Others*⁴). If the agreement is tainted by fraud or obtained by some other means that vitiates consent, ownership of the property will not pass despite registration in the deed's registry.

[15]. For all of these reasons, I am of the view that the applicant is entitled to vindicate the property and to the relief claimed in this opposed application.

Costs

[16]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[17]. *In casu*, the first respondent, who appeared in person at the hearing of the matter on 23 May 2022, advised the Court that she had in fact utilised the R100 000 she obtained from Absa Bank to pay some of the expenses relating to the property, such as the municipal accounts. She also indicated – and this appears to be common cause – that she has never had the benefit of occupying the property. She has been prevented from occupation by the family members of the deceased. The foregoing, in my view, justifies a costs order to the effect that each party should bear his / her own costs.

[18]. I therefore intend awarding no order as to costs.

Order

Accordingly, I make the following order: -

(1) Endorsement number [...], in terms of section 45(1) of the Deeds Registries Act, Act 47 of 1937 ('the Act'), of Deed of Transfer number [...], in terms of which Erf [...], P [...] G [...] Extension [...] Township, Registration Division IQ, Gauteng Province, in extent 255 (two hundred and fifty five) square meters, held under Deed of Transfer number [...] ('the property'),

⁴ *Radebe and Another v Sheriff for the District of Vereeniging and Others* [2014] ZAGPJHC 228 para 20;

was transferred to and registered in the name of Nthibi Dora Leboko-Radebe, identity number: [...], be and is hereby cancelled in terms of section 6(1) of the Act.

(2) The fourth respondent shall forthwith cancel the aforementioned Endorsement number: [...].

(3) The fourth respondent be and is hereby ordered and directed to forthwith cancel the Continuing Coverage Mortgage Bond number: [...], registered in favour of the second respondent over Erf [...], P [...] G [...] Extension [...] Township, Registration Division IQ, Gauteng Province, in extent 255 (two hundred and fifty-five) square meters, held under Deed of Transfer number [...] ('the property').

(4) Upon cancellation of the aforementioned Endorsement number: [...], the Deed under which the property was held immediately prior to registration of Endorsement number: [...], shall be revived.

(5) There shall be no order as to costs.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 23rd May 2022 – in a ‘virtual hearing’ during a videoconference on *Microsoft Teams*.

JUDGMENT DATE: 22nd September 2022 – judgment handed down electronically

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FOR THE FIRST RESPONDENT: In person

INSTRUCTED BY: In person

FOR THE SECOND, THIRD AND
FOURTH RESPONDENTS: No appearance

INSTRUCTED BY: No appearance