IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

26 JUNE 2014
DATE

SIGNATURE

CASE NUMBER 67456/2010

26/6/2014

In the matter between:

MABUZA, MDELI LETTIE — **APPLICANT**

AND

NEDBANK LIMITED — **FIRST RESPONDENT**

STEYN, WALTER — **SECOND RESPONDENT**

JUDGMENT

MAVUNDLA. J,

[1] The applicant sought an order rescinding the judgment and order granted by default on the 4th January 2011, in favour of the first respondent against the second respondent for payment of an amount of R65 543. 80 together with interest thereon as well as costs and declaring the immovable property stand 4260, Extension 5 Embalenhle, executable.

[2] It is trite that the question of granting rescission is a matter in the discretion of the court. I am of the view that, in the exercise of my discretion, I must grant rescission to the applicant, for the reasons set herein below. In this regard, this court is exercising its inherent common law powers, which are not limited to but go beyond those mentioned in rule 31 and rule 42(1).[1]

[3] The court has inherent jurisdiction in terms of the common law to set aside a judgment on grounds of fraud. In the matter of Gollach *& Gomerts v Universal Mills & Produce Co*[2] it was held that: like any contract (and like any order of Court) a *transactio* may be set

[1] *Vide Nyingwa v Moolman NO 1993 (2) SA 508 (Tk GD) at 511h*
[2] 1978 (1) SA 914 (AD) at 922C-D.

aside on the ground that it was fraudulently obtained or by mistake where the error is Justus; In the matter of Schierhout v Union Government[3] De Villiers JA held that: "Now a final judgment of a court of law being *res judicata* is not to be lightly set aside. On the other hand it stands to reason that a judgment procured by the fraud of one of the parties whether by forgery, perjury or in any other way such as fraudulently withholding material documents, cannot be allowed to stand. That was the Roman law (C. 7.58), and that is our law (Voet 42.1.28)."

[4] According to the applicant, which is not disputed, she was the original title holder of the stand 4260, Extension 5 Embalenhle. She has been and still is residing at the said stand since 1991. She purchased the immovable property for an amount of R45, 000.00. She subsequently sought and obtained a loan from a financial institution by the name of *Brusson Finance CC* ("Brusson") for an amount of R65, 000. 00. She subsequently signed and faxed back certain documents which were remitted to her. She assumed that the documents she signed were part of the loan application. She only received R35, 000. 00 of the loan amount she had been granted. She was requested to make monthly payments into the account of Brusson. The initial monthly

[3] 1927 AD 94 at 98.

instalment towards repayment of the loan was an amount of R983.73. This repayment amount increased to R1258.25, thus resulting in the applicant defaulting in the monthly repayment. She was then telephonically informed by Brusson that, because of her defaulting, the property was transferred to the second respondent. She subsequently received summons from the second respondent's attorneys, for the cancellation of the deed of sale as well as her eviction. The second respondent subsequently informed her that he did not want the property but she must pay the mortgage with the first respondent, into his account. In a further discussion with the second respondent's attorneys, she was advised to pay an amount of R12 000.00 towards the arrears and a further amount of R2800.00 for the bond.

[5] The applicant contended that she was made to sign documents, which she believed were towards the loan. It was never explained to her that the documents were in fact the purchase and sale agreement and transfer documents in respect of her immovable property. At all relevant times she remained in house. She never had an intention to sell and transfer her house to any person, in particular the second respondent. She contended further that the

purchase and sale agreement and the transfer were obtained fraudulently.

[6] The applicant in seeking rescission, further contended, *inter alia,* that the first respondent, in granting the second respondent a loan, in respect of which the relevant property was bonded as security, was reckless in terms of s80 of the Credit Act in that at some point in time, the second respondent had 11 (eleven) properties registered in his name from various banks to the value of R3 500 000. 00. The first respondent failed to properly assess the credit worthiness of the second respondent and therefore the natural consequences is the invalidity of the agreements in terms of s83 of the NCA.

[7] She further contended that she had a reasonable and *bona fide* defence against the default judgment and writ of execution. She was not in wilful default in opposing the judgment against her property.

[8] She further relies on the in the matter of She further relied on the *Ditshego v Brusson and Others* case number 5144/2009 in which the Bloemfontein High Court held that the Brusson Finance contracts are illegal and void. The scheme employed by Brusson was as follows:

"1. The client / homeowner temporarily transfers their property to a Brusson investor and in turn receive the financial relief applied for,

2. The Brusson investor applies for a mortgage loan through a financial institution (indicated as A) to cover the costs on the initial transaction, thus making the funds available for the client. The financial institution debits Brusson (indicated as B) and Brusson debits the client. Brusson guarantees the monthly instalments to the financial institution

3. The Brusson investor sells back the property to the client using a 'sale by investor" agreement, allowing the client to retain ownwrship of his home. On fulfilment of the "sale by instalment' agreement the client transfers back his property into his name."

The court that found that "the only reasonable conclusion, that the real intention was and is that, the applicants are obtaining a loan from Brusson against the security of their property. The agreements are nothing but simulated transactions. From the aforesaid it is clear that Brusson, in partnership or association with so-called investors, lends money to borrowers. Brusson guarantees the obligations of the parties to different agreements and in effect bears the eventual risk of default on the part of the

borrower. In turn, Brusson has effective control of the whole transaction and, in the event of default, it becomes entitled to obtain and retain ownership of the property. The whole scheme amounts to nothing less than unlawful *pactum commissorium.*"The Court further ruled that the original owners of the properties in the aforesaid Brusson scheme are entitled to restitution of their properties and ordered as such.

[9] The applicant further contended, i*nter alia*, that the first respondent failed to conduct a proper assessment of the financial position of the second respondent before granting him a loan which he secured with her immovable property. Had a proper assessment and investigation been done, the first respondent would have realised that there are about 11 properties registered in the name of the second respondent from various banks to the value of about R3 500 000. The first respondent failed to conduct an enquiry, as obliged in terms of s81(2) of the National Credit Act 34 of 2005 into the existing financial means of the second respondent before the loan was granted. The applicant contends further that the first respondent was reckless in lending the second respondent a loan. The applicant contended further that the manner in which Brusson obtained her property was illegal

and the first respondent is in effect a beneficiary to an illegal sale of her property.

[10] The applicant further contended that the transaction concluded between the second respondent and the first respondent is void and consequently cannot give rise to a legitimate loan agreement.

[11] On behalf of the first respondent it was submitted that the application stands to be dismissed for the following reasons:

Firstly, the applicant was not a party in the action between the first respondent and the second respondent and had no bona fide defence to the first respondent's claim.

The secondly, the second respondent, against whom the judgment was granted, has not applied for the rescission.

Thirdly, the judgment of Ditshego upon which reliance for rescission is made, found that the agreement between the bank and the consumer was not affected by the illegality. The bond remains in place and accordingly the first respondent is within its rights to enforce the agreement.

[12] According to annexure "M2" the second respondent sold to the applicant the immovable property known as stand 4260 Ext 5 Embalenhle, which the first respondent was a bond holder. The contract terms were, *inter alia*, that: The purchase price was an amount of R94, 550. 00, to be paid off at a rate of R1077. 00 linked to prime over a period of 60 months. Of the purchase price, an amount of R33 550. 00 was interest free for the whole period of the contract. The amount of R61 000.00 of the purchase price was subject to an interest of 11.5%, *inter alia* which equals an amount of R743.53 per month plus. The interest amount was to be utilised to reduce the bond registered over the property. The payable interest by the purchaser to the seller shall be utilised to reduce the bond amount registered over the property. The agreement further recorded that the seller shall pay an amount of R33 550. 00, from the proceeds of the sale to Brusson Finance CC in his capacity as surety for the obligations of the seller as the owner of the property and irrevocably instruct the transferring attorneys Namford Inc (the transferring attorneys) to pay the said amount to Brusson Finance CC on registration of the transfer of the said property. The seller will receive R101-67 per month and

Brusson will receive R269. 42 per month. It was also part of the agreement that the purchaser shall continue to remain in occupation of the allegedly sold property.

[13] In the matter of Gollach & *Gomerts v Universal Mills & Produce Co*[4] it was held that: "...like any contract (and like any order of Court) a *transaction* may be set aside on the ground that it was fraudulently obtained or by mistake where the error is Justus."

[14] It would seem, in my view, that the applicant never had any intention to sell the immovable property to *Brusson,* nor to buy it back from the second respondent, nor the second respondent having any intention to take transfer of the property, the relevant transactions stand to be set aside.[5] In my view, the applicant was caught in a similar scheme as referred to in the *Ditshego* matter.

[15] In the event of the transaction which resulted in the applicant's immovable property being transferred to the second respondent, being set aside, the implication would be that the underlying

[4] 1978 (1) SA 914 (AD) at 922C-D.
[5] *Vide Legator McKenna v Shea* 2010 (1) SA 35 (SCA) at par [22].

structure upon which the bond was provided as security, would be adversely affected. The immovable property would invariably have to be restored to the applicant; vide the (*Ditshego)* decision (supra) para [34].

[16] The applicant, in my view, has a direct and substantial interest in this matter[6] by virtue of the fact that the immovable property involved herein was initially registered in her name, fraudulently transferred out of her name into the name of the second respondent, and she continues to remain in occupation thereof. In the event the judgment is not rescinded, her right and title to the immovable property and even occupancy would be prejudicially affected.[7]

[17] In the matter of *Minister of Local Government v Sizwe Development*[8] *it* was held that:

> "The principles governing the setting aside of a final judgment on the grounds of fraud are succinctly set out by the learned authors *Herbstein and van Winsen in the Civil Practice of the Superior Courts of South Africa* 3rd ed at 470. These principles are set out hereunder:

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[6] *Minister of Local Government and Land Tenure* 1991 (1) SA 677 Tk GD at 678H.
[7] *vide United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415A-B; *Parkview Properties Ltd v Haven Holdings (Pty) Ltd 1981* (2) SA 52 (T) at 55C; *Standard General Insurance Co Ltd v Gutman NO* 1981 (2) 426 (C) at 433H-435C.
[8] 1991 (1) SA 677 9Tk GD at 679I-680C.

(1) A final judgment is *res judicata* and will not be lightly set aside, but the Court will do so if it was procured by the fraud of one of the parties, whether such constituted forgery, perjury or any other way fraudulently act such as the fraudulent withholding of material documents-- *Schierhout v Union Government* 1927 AD 94 at 98.
(2) The successful party must have been a party to the fraud--- *Makings v Makings* 1958 (1) SA 338 (A).
(3) It must be shown that, but for the fraud, the Court would not have granted the judgment—*Robinson v Kingswell* 1915 AD 277 at 285.
(4) There must have been causal connection between the fraud and the judgment.
(5) The fraud can consist of withholding material information from the Court with fraudulent intent.
(6) The fact that the judgment was obtained by consent is not a bar to action to have it set aside on the grounds of fraud—*Rossouw v Haumann* 1949 (4) SA 796 (C)800".

[18] In my view, the fact that the second respondent has not applied for rescission is no bar at all for the applicant to approach, as she had done, to have the judgment rescinded.

[19] In as much as the first respondent cannot be said to have had any dealing in the fraud which resulted in the property being transferred out of the domain of the applicant, the fraud of the second respondent, in my view, indirectly contributed in first respondent granting the loan to the second respondent. But for this fraud, the loan would not have been granted to the second respondent.

[20] Taking into consideration all what is stated herein above, as well as the fact the fact that this court need not decide whether the defence of the applicant would succeed, I am however satisfied that the applicant has placed sufficient facts, which *prima facie* disclose a defence.[9]

[21] It is trite that the grant of a rescission is a matter within the court's discretion. In the exercise of my discretion to grant the rescission, I took into account the fact that, a s26 fundamental right to housing in terms of s26 of the Constitution is at stake. In the matter of Government *of the RSA and Others v Grootboom and Others*[10] Yacoob J held that "The poor are particularly vulnerable and their needs require special attention." In my view, the courts are enjoined, in interpreting the Bill of Rights, to give content to these rights and lean towards their protection.[11]

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[9] V*ide First rand Bank v Folscher* 2011 (4) SA 314 (GNP); *Nyingwa v Moolman NO* 1993 (2) SA 508 at 511E-512E.

[10] 2001 (1) SA 46 (CC) at 67E.

[11] *Vide Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at 16 footnote 35; *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* 2005 (2) SA 140 (CC) at para [52]; *Gundwana v Steko Development and Others* 2011 (3) SA. 608 (CC) at para 58.

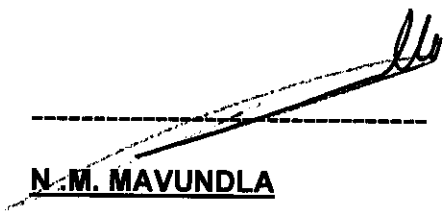
[22] The first respondent has a right to protect its commercial interest flowing from the mortgage bond agreement concluded between it and the second respondent. However, when balancing the rights of the respective parties, I found the weight inclined more towards the right of the applicant. I therefore conclude that the applicant has made a case for the relief sought.

[23] With regard to costs, it follows that an appropriate order would be to mulct the first respondent with the costs of opposing the matter. I am not inclined to grant a punitive costs order because the first respondent was within its rights to oppose the application.

[24] In the result the following order is granted:

1. That the judgment and order granted on the 4th January 2011 is hereby rescinded and set aside;

2. That the first respondent is ordered to pay the costs of this application.



N. M. MAVUNDLA

JUDGE OF THE COURT

DATE OF HEARING	**: 22 / 04 /2014**
DATE OF JUDGEMENT	**: 26 / 06 / 2014**
APPLICANT'S ATT	**: LEGAL RESOURCE CENTRE**
APPLICANT' ADV	**: ADV. O. BEN ZEEV**
1ST RESPONDENT'S ATT	**: STEGMANNS INC.**
1ST RESPONDENT'S ADV	**: ADV. H. J. SMITH**