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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 17960/2012

DATE: 22 AUGUST 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

KENNETH SELLO LEPULE First Applicant

INGRID ELLEN LEPULE Second Applicant

And

FIRSTRAND BANK LIMITED First Respondent

PREVIN CHETTY Second Respondent

THE SHERIFF, ODI Third Respondent

JUDGMENT

STRAUSS, AJ:

1. This is an application brought by the applicants for:

1.1 the setting aside of a default judgment granted on 30 August 2012 in favour of the first respondent under the above case number;

1.2 setting aside of any writs of attachment on their property;

1.3 granting the applicants leave to intervene as defendants in an action instituted by the first

respondent under the above-mentioned case number;

1.4 to have all processes and pleadings served on the applicants within 10 days after granting of an order; and that the applicants may then file their plea within 15 days thereafter.

2. The first respondent is opposing the application and has persisted with only two points *in limine* against the application but does not oppose the application on the merits. The first point *in limine* is that the claim in the main action in which the applicants will be joined has become prescribed and, secondly, that the applicants do not tender any evidence or prospects of success that they can tender restitution to the first respondent. I will deal with these points *in limine* later.

3. The background of the matter is that the applicants are husband and wife and up until 8 December 2009 the registered owners of Erf [...] M[...] Township. During the second half of 2007 the first applicant approached an entity known as Bruson Finance through an advertisement he saw in the news paper, and obtained a loan in the amount of R116,000.00 from the said Bruson. In the process the applicants signed documents that were presented to them by an employee of Bruson. The first applicant could not recall which documents he signed, but he insists in the founding papers that he did not sign a deed of sale in respect of the property. The applicants paid the loan from Bruson in monthly instalments up and until 30 September 2011, when they were notified that Bruson was liquidated based on the fact that the company operated an illegal scheme. Some time thereafter the applicants learnt from a member of the South African Police who was investigating Bruson's activities that their immovable property had been transferred into the name of the second respondent, one Previn Chetty.

4. Hereafter and during September 2012, the applicants were served with a notice of sale of their property in execution and an investigation by their attorney thereafter showed, that their property had been registered into the name of the second respondent already on 8 December 2009, by virtue of a power of attorney granted by one Conference Letshabang Totella who represented Bruson.

5. The reference in the deed of transfer to Totella representing Bruson, it is respectfully submitted by counsel, was erroneous. The deed of transfer was attached to the papers. The property was declared executable by this Honourable Court pursuant to a default judgment granted on 30 August 2012, against the second respondent, due to the fact that the second respondent was not paying. The first respondent thereafter caused the property to be sold in execution by the Sheriff.

6. The first applicant points out that he did not sign a special power of attorney on the date as stated in the deed of transfer. The applicants also deny that they at any stage consented to the sale of their property. If they did so they, did so under the mistaken belief that they were signing a document that was necessary to obtain a

loan from Bruson. They also state that they would never have consented to an agreement that their property be sold, and they deny that their attention was ever drawn to the fact that the documents they signed, may result in the sale of their property.

7. At the time of making the loan with Bruson the property of the applicants was not bonded and they did not owe any banking institution money on the property. It was therefore an asset in their estate and in these circumstances, I find, highly unlikely that the applicants would tender their property and sell their property, which is worth much more and which is unencumbered, for an amount of R116,000.00 to another party unknown to them.

8. Further, the applicants were never put in breach in respect of their agreement with Bruson as they always complied with the terms thereof and paid the R2,500.00 per month on the loan account.

9. The 2nd respondent, also denies that he had any knowledge of the transfer into his name, and he states that the property was fraudulently transferred into his name, and he never consented to transfer to him. He stated that Bruson stole his details and purchased the property in his name without his consent and knowledge.

10. Thus it is clear, and this is not disputed by the respondents, that the applicants were the victims of a fraudulent scheme perpetrated by Bruson. This was in fact, the finding of the High Court Bloemfontein, in a matter involving another party against the said Bruson in which Jordaan J, gave judgment. In terms of this judgement any agreements entered into between the parties in the aforementioned case and Bruson Finance where declared null and void.

11. The applicants submit that the transfer of the applicants' property to Bruson occurred on the strength of an invalid, alternatively, void, further alternatively, illegal causa. I must agree with this submission on behalf of the applicant's. It can also not be disputed by the 1st Respondent, it seems.

12. It is set out **Legator McKenna Inc v Shea** 2010 (1) SA 35 (SCA) as follows:

> "*Some uncertainty remained, however; with regard to the transfer of immovable property. In the High Courts that uncertainty has been eliminated in a number of recent decisions where it was accepted that the abstract system applies to movables and immovable alike (see e.g. Britz &Another v Eaton N.O. & Others 1984 (4) SA 728 (T) at 735E...). These decisions are supported by academic authors advancing well-reasoned arguments. (See e.g. DL Carry-Miller, The Acquisition and Protection of Ownership at 128 to 30 and 168, CG Van Der Merwe Sakereg op cit 305 to 10...). In view of this body of authority I believe that the time has come for this court to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well.*

In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery, which in the case *of immovable property is effected by registration of transfer in the Deeds Office; coupled with the so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. (See e.g. Air- Kel (Edms) Beperk h/a as Merkel Motors v Bodenstein & 'n Ander 1980 (3) SA 917 (A) at 922 E-F, Dreyer & Another NNO v AXZS Industries (Pty) Ltd, supra, at paragraph 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg., sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (See eg Preller & Others v Jordaan 1956 (1) SA 483 (A) at 496: Klercq N.O. v Van Zyl & Maritz NNO supra at 274A - B, Silberberg & Schoeman op cit at 79 - 80)"*

13. In a rescission application such as this, the applicants must show good cause in the sense of a reasonable explanation for their default, and reasonable prospects of success in the main action, and show as such, a prima facie case or the existence of an issue which is fit for trial.

14. The first respondent raised a point in limine and averred that the applicants' claim has become prescribed. It is trite that prescription commences to run as soon as a debt becomes due and a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arose, provided that the creditor is deemed to have such knowledge if he could have acquired it by reasonable care.

15. The running prescription is thus not postponed until the creditor becomes aware of the full extent of his rights nor until the creditor has evidence that would enable it to prove a case comfortably.

16. The first respondent states that the applicants should have become aware by exercising reasonable care that there was a fraudulent scheme when the Bruson scheme failed to pay them the total loan amount of R116,000.00 in October 2008. As per paragraph 21 of the applicants' founding affidavit they state that they applied for a loan in May 2007 and they received an amount of R37.379.38 on 14 October 2008. They also evidenced that the never obtained a detailed statement from Bruson setting out why having applied for a loan of R116,000.00 they only obtained an amount of R37,379.38.

17. The said applicants dealt with one "Elias" who they had met at Bruson's offices and he advised them that although they only requested a loan of R50.000.00 they qualified for an amount of R116,000.00. All the documentation was completed at the offices of Bruson and they signed it there and gave it to the said Elias.

18. After they received the amount of R37,379.38 they did ask Elias for an explanation and were told that

Bruson had paid over the rates and taxes in respect of the property. They left it there and continued to pay the R2,500.00 per month. They did so up until 30 September 2012, when they received a letter from TC Hitge Inc who notified them that they had terminated their mandate with Bruson, of the granting of a provisional liquidation against Bruson and that the provisional order was granted based on the fact that Bruson was declared an illegal scheme in terms of section 40 of the National Credit Act. They advised the applicants that they should contact the trustees in order to report their transaction and to claim losses that they might have suffered. Further, that no payments should be made to Hitge, Bruson or any other investors.

19. Immediately hereafter the applicants contacted their attorney and their attorney started with the necessary investigation. They also stopped making further payments to Bruson.

20. The first respondent now argues that the applicants, if they investigated in 2008, would have realised that there was a Bruson scheme and that if they acquired such knowledge by exercising reasonable care they would have realised that they had a claim already in 2008. It is unclear how the 1st respondent argue that the defence of the applicants of fraud, is a defence that prescribed in the action launched by the 1st respondent against the 2nd respondent.

21. Further, having regard to the judgment by Jordaan, J in the matter in the Free State High Court, it is set out in this judgment that this scheme was run by Bruson since 2007, and that he advertised being a broker in the papers in assisting people who had problems with credit, it was set out in the judgement that Bruson did so in more than 100 agreements. This was not refuted by Bruson in any manner in the judgement.

22. One can therefore accept that not only were the applicants in this matter in casu defrauded, but several other members of the public were defrauded and it only came to several other members' of the public's notice that such fraudulent transaction was taking place, only after the court order in Bloemfontein in 2010 was delivered, The defence of fraud of the applicants is therefore an issue, I find, fit for trial.

23. It is unclear to me how the first respondent expected the applicants to investigate or even to have a notion that they were being defrauded due to the fact that they did not receive the full amount, but they were paying off the loan which was provided to them, and they were provided with an explanation why the balance was not granted to them. It would never have come to their knowledge that the documents they signed and the thereafter sale of the property to the 2nd respondent, was the real causa of the agreement, as they simply entered into a loan agreement and never entered into an agreement to sell their property. I can therefore not understand how the respondents want to rely on the fact that the applicants should have known of their claim in relation to their property earlier.

24. This suggestion is untenable. It is clear that this fraudulent scheme was run with the underlining principal that the applicants when applying for the loan would have no knowledge of what was happening behind the scenes, inter alia the selling of their property without them having any knowledge thereof, and also the fraudulent transfer into the bona fide purchaser name. The summons and default judgement was served on the address [...] M[...] S, the address if the applicants, but never was personal service effected, thus I can also not find that the applicants should have foreseen or realised a problem or claimed existed in regards to their immovable property sooner than 2012 when they received the notice of attachment in execution.

25. The property was sold in execution to one James Chepane, however this sale was cancelled on request by the 1st respondent with a judge in chambers in terms of Rule 46 (11), thus Mr. Chepane is no longer a so called bona fide purchaser, and does not have to be joined in these proceedings any longer

26. The applicants tender restitution of the R37,000.00, borrowed to them. It is unclear what objection the first respondent holds to restitution being granted. The applicants never had a loan with Firstrand Bank the 1st respondent, the first respondent must once again be placed into the position they were before the fraudulent agreement was entered into. This restitution will be address in trial, as the property has always belonged to the applicants they never sold it, and it has always been unencumbered. This, however, must be sorted out by the trial court and it is not for this court to deal with who will be responsible for restitution to the first respondent or not.

27. The applicants have made out a *prima facie* case. They have also shown good cause and they have given this court, a reasonable explanation for their default. They simply did not know what was going on and how this fraudulent scheme was being perpetrated. It must have come to them as quite a big shock and surprise when they were informed that their property had been transferred and register in another parties name in 2009.

28. On the other side of the coin it is unclear why it took so long, from 2009 up until 2012, to bring default judgment against the second respondent, and it seems as if the 1st respondent also only found out about this scheme and their subsequent claim in 2012, although the property had already been transferred in 2009.

29. It could be that if judgment had been given earlier, the applicants would have been aware of the fact that their house had been sold in execution. But, I cannot find that prescription is an issue that I need to deal with currently, as in the trial court will be in the best position to ventilate the question of prescription, if any.

30. I find that in the circumstances the opposition by the first respondent has not been *bona fide* and has caused a further delay in this matter, and has also caused the applicants to bring an application which has was opposed and had to be argued by counsel, the first respondent could certainly have agreed to such an order

being granted and the matter being properly ventilated in the trial court. The first respondent chose not do so. The 1st respondent is not an institution without financial means, in contrast to the applicants who are normal working class people, people who earn a salary and certainly do not have funds to litigate against an institution who has access to sufficient funds to litigate.

31. I thus make the following order:

1. Default judgment granted on 30 August 2012 in favour of the first respondent under case number 17960/2012 is rescinded.

2. Any and all writs of attachment issued in connection with the property of the applicants situated at Erf [...] M[...] S, J R North West Province, are set aside.

3. Applicants are granted leave to intervene as second and third defendants in the action instituted by the first respondent under case number 17960/2012.

4. The first respondent are ordered to serve all processes, pleadings and notices served and/or exchanged under case number 17960/2012 on the applicants' attorney of record within 10 days from date of this order.

5. Applicants are ordered to file their plea within 15 days thereafter and the rules of court in respect of the filing of subsequent pleadings and notices will apply.

6. Costs of this application to be paid by the first respondent.

S STRAUSS, AJ