IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 23639/2015

Heard on: 18 June 2019

Date of judgment: 30 July 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:

BETTY MISENGA LETA **Applicant**

and

TRAVIS BENNET **First Respondent**

OMEGA PROPERTY GROUP (PTY) LTD **Second Respondent**

SA HOMELOANS (PTY) LTD **Third Respondent**

CHANGING TIDES 17 (PTY) LTD **Fourth Respondent**

THE SHERIFF PRETORIA EAST **Fifth Respondent**

THE REGISTRAR OF DEEDS, PRETORIA **Sixth Respondent**

JUDGMENT

SWANEPOEL AJ:

[1] Applicant seeks an order that a sale agreement in respect of the sale of an immovable property, and the transfer of ownership of the property to first respondent pursuant to the agreement be set aside on the grounds of fraud. First respondent is the owner of the property situate at Erf 558 Murrayfield Ext 1, Pretoria, having allegedly purchased the property from applicant on 12 June 2014. Second respondent is the estate agent who allegedly brokered the sale. Third respondent is the administrator of the South African Homeloan Guarantee Trust ("the trust"). The trust financed first respondent's purchase of the property and holds a mortgage on the property as security for the loan. Fourth respondent is the sole trustee of the trust. Applicant seeks the setting aside of the transfer of the property, and tenders payment of the sum of R 1 108 893.82 to first applicant, in restitution of the monies which she received pursuant to, what she alleges, was a fraudulent transaction. The relief sought does not concern second, fifth and sixth respondents in any material fashion.

[2] Applicant is in her words, the victim of a scam similar to the infamous Brusson financing scheme. Brusson provided "loans" to property owners who were made to believe that they were borrowing money and putting up their properties as security for the loan. The fraud that lay at the center of the

scheme was that the victims were made to believe that they would not lose ownership of their properties. Under that misapprehension, the victims signed sale agreements selling their properties to so-called “investors”. The scheme resulted in many hundreds of victims losing their homes.

[3] During 2014 applicant found herself in financial difficulty, and having seen an advertisement which offered a loan payable within 10 days, she telephoned the person named in the advertisement. That person was the first respondent. She told first respondent about her financial woes, and when he heard that her home was not bonded, he offered to lend her between 70% and 100% of the value of the property, with the property serving as security for the loan. The interest rate was set at 20% of the borrowed sum.

[4] Applicant alleges that she thought that a “loan against the house” was similar to a pawn transaction, in which one borrows money, putting up (for instance) a vehicle as security, but one is still allowed to drive the vehicle. Applicant decided to borrow R 1 million, which would attract interest of R 200 000.00. She intended to use the money to erect a number of residential units which she would rent out, and she envisaged that the rental on the units would enable her to service the loan. As will emerge hereunder, the “loan” escalated to over R 1.7 million, of which applicant stood to receive just over R 1.2 million.

[5] On 8 June 2014 first respondent sent applicant an email in which he outlined the proposed terms of the agreement. The relevant portions of the email read as follows:

"We address you at the instance of you needing financing against your property

The deal will be done at R 1 719 500.00

Repayment which is due and payable one month in advance is R 16 753.73

You are still the owners of the property and it won't be sold to anyone. You will be required to pay the monthly instalments, rates and keep the property in good order……

The R 1 719 500.00 will cost you R 16 753.73 which you will pay until we refinance an sell the property back to you at whatever the bond amount is at that stage, the deal will be done over a period of 30 months, but at most the deal back to you will take 5 to 8 months at most. Megabond home loans and property finance (Pty) Ltd, my in-house finance company will make sure you get a homeloan of R 1 719 500.00, or whatever the bond amount is at that time."(sic)

[6] There is no explanation why the loan escalated from the original amount sought by applicant, somewhere between R 200 000.00 and R 300 000.00, to an amount approaching the market value of the property which had been purchased for R 2.2 million. Whatever the reason though, it seems that a substantial portion of the "loan" was intended for first and second applicants' pockets.

[7] Once the general terms of the agreement were settled upon, applicant was asked to sign several documents. The first, dated 12 June 2014, was a document headed “OFFER TO PURCHASE”. It provided for the sale of the property to first respondent at a purchase price of R 1 800 000.00 (a deposit of R 80 500.00 in cash and the balance by way of a mortgage bond). Occupational rent would be payable by the purchaser at the rate of R 16 753.73 per month. The document was replete with references to “the purchaser” and “the seller”. It stated that the property was sold voetstoots, and that transfer costs would be payable by the purchaser. The agreement provided for second respondent to receive commission of R 110 000.00 for its services as estate agent. All in all, the agreement was a typical sale agreement.

[8] Applicant produced a receipt dated 20 June 2013 (which I assume should read “2014”), in which she acknowledged receiving the deposit of R 80 500.00 in cash. On 26 June 2014 applicant signed a lease agreement in respect of the property for a thirty-month period commencing on 1 August 2014, at a monthly rental of R 16 753.73. The lease agreement terminated on 1 February 2017, on which date the applicant as lessee had to repurchase the property.

[9] On 11 July 2014 a further R 500 000.00 was paid to applicant by the conveyancing attorneys. Out of those monies applicant paid R 110 000.00 to first respondent “*so that he could pay the attorney’s fees for the registration of the loan*.” A further R 530 271.00 was later paid to applicant, and R 188 622.82 was paid to third parties on her behalf. Applicant alleges that a

total of R 1 218 893.22 was paid to her instead of the agreed sum of R 1 275 600.00 (after deduction of first and second respondent's cut). She alleges that, due to her not having received the full loan amount, she never made any repayments towards the alleged loan whatsoever.

[10] On 8 July 2014 applicant signed a number of documents relating to the transfer of the property. The first is a document headed:

> *"INSTRUCTION TO REGISTER TRANSFER*
>
> *TO: VELILE TINTO CAPE INC.*
>
> *TRANSFER OF ERF 685 MURRAYFIELD EXT 1 TOWNSHIP TO TRAVIS AVERY JUSTIN BENNETT"*

[11] Applicant also signed two affidavits confirming certain personal details. In an attempt to obtain bridging finance pending the finalization of the transaction applicant also signed a "Discounting Agreement" which resulted in her being paid in advance of the registration of transfer. Under applicant's name on the front page of the agreement are four boxes, one of which must be checked to identify the person signing the agreement. Applicant was identified as being the "seller".

[12] The property was transferred to first respondent on 5 November 2014. Applicant alleges that during December 2014 she telephoned one Bazil Naidoo an employee of the second respondent. It was during this call she says, that she found out that she had unwittingly sold the property, instead of

merely putting it up as collateral for a loan. Applicant states that first respondent had misled her into believing that she would remain owner of the property. She had never intended to sell the property, and had signed the documents in the mistaken belief that they were simply there to formalize the loan agreement.

[13] First respondent raised the money to pay applicant by taking a loan from fourth respondent, but did not pay the agreed upon monthly instalments. On 6 November 2015 judgment was granted in fourth respondent's favour for payment of the sum of R 1 763 454.98, plus interest and costs. In the meantime applicant had apparently sought legal advice, and had been told that her prospects of success in setting aside the sale were dismal. She was advised rather to obtain a home loan in order to repurchase the property from first respondent, which she was ultimately unable to do. During July 2017 applicant became aware of the ABSA Ltd v Moore-judgment (to which I refer hereunder), which she says gave her hope that she could recover her home. That led to the urgent application interdicting the sale of the property in execution, and to this application to set aside the entire transaction.

IS THIS A BRUSSON-TYPE SCAM?

[14] The Brusson scheme displayed somewhat different distinguishing features if compared to this transaction. The Brusson agreements comprised of three components. Firstly, the investor and the victim signed a sale agreement whereby the victim sold his/her home to the investor. Secondly, the investor immediately resold the property to the victim in terms of a deed of

sale whereby the victim undertook to repay the “loan” amount in instalments. The third component was an agreement between the three parties to the transaction, the victim, Brusson, and the investor. The profit for Brusson lay in the fact that the money raised by way of a mortgage bond was split between Brusson and the investor, and a portion was paid to the victim to keep him or her happy. Brusson received monthly payments from the victim in repayment of the loan, and it guaranteed the obligations of the investor towards the financial institution that provided the loan. Brusson administered the entire transaction.

[15] In ***Ditshego and others v Brusson Finance (Pty) Ltd [2010] ZAFSHC 68 (22 July 2010)*** (at par 28) the Court was confronted with a classic Brusson scam, and it identified the essential elements of the scam as follows:

15.1 A third party, the investor, “purchases” the victim’s property, but does not truly intend to do so;

15.2 The victim does not intend selling the property and does not lose occupation thereof;

15.3 The investor pays nothing and stands to lose nothing if anything goes wrong;

15.4 Brusson arranges everything, receives payments, effects payments to the bank, and in the event of default by the victim, Brusson ends up owning the property;

15.5 The victim of the scam “sells” the property for far less than the market value, and immediately buys it back for R 42 000.00 more;

15.6 The R 42 000.00 accrues mostly to Brusson with a small portion going to the victim.

[16] In ***Ditshego*** the Court, in considering the test to be applied to determine the essence of a contract, referred to the *dictum* in ***Maize Board v Jackson 2005 (6) SA 592 (SCA) at 596*** with approval:

> *“The true enquiry in a matter such as this is to establish whether the real nature and the implementation of these particular contracts is (sic) consistent with their ostensible form. In pursuit of that enquiry one must strive to ascertain, from all the relevant circumstances, the actual meaning of the contracting parties. It therefore becomes necessary to examine in greater detail the agreements in question and the manner in which they were implemented.”*

[17] The Court found that all three of the agreements should be considered together, instead of in isolation. When so considered, the Court held that the transactions were simulated and amounted to an unlawful *pactum commissorium.* The Court set aside the transactions, and ordered that the property should be transferred to applicants.

[18] In ***Radebe and another v The Sheriff for the District of Vereeniging [2014] ZAGPJHC 228 (25 September 2014)*** the Court found that the

Brusson agreements were tainted by fraud which vitiated consent. It held (at par. 20) that the requirements for transfer of immovable property were twofold, firstly, delivery by registration of transfer of ownership, and secondly, the existence of a 'real agreement' of which an essential part was the intention on the part of the transferee to transfer ownership, and the intention of the transferor to acquire ownership. If there is any defect in the real agreement, then ownership does not transfer.

[19] The same scheme was the subject of the dispute in ***Moore and another v The Sheriff for the District of Vereeniging and others [2014] ZAGPJHC 230***. The Court applied the principle enunciated by the Supreme Court of Appeal in ***Nedbank Ltd v Mendelow 2013 (6) SA 130 (SCA)***, where it was held:

> *"Where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect."*

[20] The court *a quo* made the point that at the heart of the applicants' claim (for a declarator that the agreements were unlawful and for restitution of the property) was the fact that applicants never intended to transfer ownership of the property, and were misled into believing that they would remain owners. The court held that the agreements were consequently invalid and ordered the restitution of the property to applicants. The court also ordered that five previously registered mortgage bonds in favour of the bank, that had been

cancelled upon the property being transferred to the investor, should be reinstated.

[21] On appeal to the Supreme Court of Appeal, (***ABSA Bank Ltd v Moore and another 2016 (3) SA 97 (SCA)***) the Court held that the Brusson transactions were not simulated in the normal sense of the word. The victims of the scam were not trying to disguise their contracts as something that they were not. Rather, they were hoodwinked into believing that the true nature of the transaction was such that they would not lose ownership of their properties, nor did they ever intend to transfer ownership. They were the victims of a fraud. Both the sale agreement and the resulting transfer of ownership were therefore of no effect. The Court confirmed the order of the court *a quo* that the Moores were the owners of the property. However, the Court found that the order reinstating the mortgage bonds had no basis in law, and thus it set aside that part of the order.

[22] On further appeal to the Constitutional Court (***Absa Bank Ltd v Moore and another [2016] ZACC 34****)* the Court held that it was correct that the agreements were invalid not for simulation but for fraud. The Moores had no intention to transfer ownership of the property, and the resulting transfer could not convey valid title to the investor. Due to the fact that the sale agreement was invalid, the mortgage bond registered pursuant thereto was also invalid.

[23] It is against the aforesaid background that one should consider this case. Applicant's counsel submitted that the agreement in the instant matter was identical to the agreements in the Brusson scam. I disagree. There are a

number of distinguishing factors. Firstly, the deal was not brokered by a third party, but by the “purchaser” himself. In the Brusson scheme the victim and the third party signed a deed of sale selling the property back to the victim at the same time as they signed the sale agreement selling the property to the investor. That was not the case in this matter. Here the parties entered into a 30-month lease, after which the applicant could elect to repurchase her property. There are therefore substantive distinguishing features between the two scenarios.

[24] A further point of departure from the Brusson transactions was that the Brusson victims, to one extent or another, started repaying the “loans” to Brusson. Brusson would in some cases make a few payments to the bank, but invariably the payments would cease and the bank would foreclose on the property. However, despite the obvious differences between the Brusson scheme and the current matter, the core question is still whether applicant was the victim of a fraud which led her to believe that she was not relinquishing ownership of her property.

[25] On a perusal of the exhibits in this matter one is astounded that anyone in these circumstances could be misled into believing that they were entering into anything other than a sale agreement. However, that is what seems to have happened in the Brusson transactions. Hundreds of victims were duped into believing the fraud that they would continue to own their property, despite having signed agreements which clearly recorded that they were selling their properties.

[26] The crux of this matter is therefore still whether applicant, despite the evidence to the contrary, was duped into believing a lie. On the face of it, she had no reason to believe that she would remain owner of the property. She signed documents that freely used the words “sale”, “seller”, and “purchaser”. Applicant signed transfer documents to transfer ownership of the property, and she entered into a lease agreement in respect of the property which contained the provision that she had to repurchase the property after 30 months.

[27] Applicant’s version is essentially uncontradicted. The conveyancing attorneys’ Pretoria correspondents, before whom applicant signed the transfer documents, stated in a letter that applicant knew that she was transferring ownership of the property. This statement was not made under oath, is devoid of context, and I take no cognizance thereof. First respondent did not file papers, and third and fourth respondents cannot dispute her version of events, save by pointing out possible contradictions or inherent improbabilities. Applicant’s version is thus the only version before me, and must be considered against the objective evidence.

[28] Simply perusing the vast majority of the exhibits would lead one to believe that applicant could not possibly have believed that ownership would not be transferred. A number of documents alerted applicant to the fact that she was selling the property and not simply borrowing against it.

[29] Applicant’s version of events is not particularly convincing. It is understandable that she would want to borrow a few hundred thousand rand

to erect residential units on her property, hoping to generate an income. Why then, would the loan amount suddenly escalate to over R 1.7 million, an amount close to the market value of the property (which had been purchased for R 2.2 million)? Once applicant had received the money, she did not make a single repayment on the loan. She says that she had received short payment of approximately R 56 000.00 on the loan and therefore she refused to make any repayments. That explanation is unconvincing. If she truly believed that she had been short-paid, one would have expected her to demand payment of the alleged shortfall. I find it strange that, knowing that she had an obligation to repay more than R 1.2 million (and that within 30 months), she never made any attempt to do so.

[30] A further aspect of concern is applicant's version regarding the terms of repayment of the loan. On her own version, she had to repay more than R 16 000.00 per month, which, as a person who was already under such financial strain that she had to approach a loan shark to raise funds, she would have been hard pressed to do. At that rate the loan could not have been repaid within 30 months. Her nebulous explanation that at some stage, once the residential units had been erected, she would increase the monthly repayment to either R 42 000.00 or R 50 000.00 per month is unsatisfactory.

[31] There are therefore many aspects of applicant's case that raise questions. The difficulty I have though in rejecting applicant's version out of hand, is to be found in the first email that first respondent addressed to applicant dated 8 June 2014 which is quoted above. This email set out the

structure of the deal as first respondent saw it. It specifically stated that first respondent would remain the owner of the property, and that the property would not be sold to anyone. There is a further passage in the same email that provides an undertaking that "we" would refinance the property at whatever the bond amount was at the time when the property was resold to applicant. Those passages are contradictory, but the question remains whether the belief was created in applicant's mind that the property would remain hers. If that was truly her belief, then applicant could not have had the intention to transfer ownership to first respondent, and the property must be returned to her.

[32] I believe that the truth lies in an email dated 11 March 2016, sent by applicant sent to third respondent. The purpose of the email was to seek third respondent's assistance in resolving the property dispute, and she wanted to state her version of events. She started off by saying that she had signed a deed of sale "*by ignorance with the person who is now the new legal owner of 'my' property*". The significant part of the email, in my view, is where applicant stated the following with reference to the representations made to her by first and second respondents:

> *"They told me that loan I took will be payed (sic) by their company and I'll be repaying monthly* ***until I take back ownership of the house****. I realized later on that what I signed at the attorney's office is not what I signed with them via email….. Namely Mr. Travis buying the house via homeloans SA at 1.8 mill"* (my emphasis)

[33] Applicant went on to state that first respondent was refusing to resell the property to her and she requested third respondent to do so. The main concern that applicant had at that stage was that first respondent had placed the property in the market and was selling it for R 2.4 million, whilst she had only received R 1.2 million. Applicant did not say that she had believed that the property would remain hers, or that it should never have been transferred to first respondent, which would have been the obvious position to take had that been her belief at the time. In my view the email is a clear indication that when she signed the agreement applicant knew that the property would be transferred to first respondent, but she held the belief that it would be resold to her at some future stage. This is, in my view, where the current matter is distinguishable from the Brusson scam. In the latter, the victims never had the intention of effecting transfer of ownership in the first place. In this matter, applicant knew that she was transferring ownership of the property, but she had the expectation that at some stage in future she could elect to repurchase the property at whatever the bond amount was at that point in time.

[34] My interpretation of applicant's email of 11 March 2016 would explain why applicant would sign numerous documents that pointed unequivocally to the agreement being for the sale of land. It would also explain why applicant remained in the property for some years: she had the belief that she could at some point repurchase the property. It furthermore explains why there was no definite repayment plan, because, even if applicant could not repay at a rate that would result in the loan being settled within 30 months, she would still be entitled to raise a bond to repay the loan at whatever it was at the time when she made the election to repurchase the property. This is also consonant with

the lease agreement which specifically stated that after 30 months applicant would have to repurchase the property.

[35] It is significant, in my view, that before applicant found out about the Moore judgment, her understanding of the agreement (as expressed in her emails) was that she was selling the property with a view to repurchasing it at a later stage. Only after she heard of the Moore judgment did the version emerge that she had never intended to sell the property nor relinquish ownership thereof.

[36] Applicant was not misled regarding the true nature of the transaction. Applicant intended to enter into a sale agreement and to transfer ownership of the property, and effect was given to her intention and to the true nature of the transaction. In the circumstances, the application must fail.

[37] Fourth respondent filed a counter-application to the effect that applicant should be ordered to pay to fourth respondent whatever proceeds she had received from first respondent pursuant to the allegedly void agreement and transfer. In argument fourth respondent's counsel submitted that its claim was based on unjustified enrichment. I am not convinced that the claim is good in law, but because of the view that I take on the main application, I do not have to make a finding thereon.

[38] In the circumstances I make the following order:

38.1 The application is dismissed;

38.2 Applicant shall pay the costs of the application.

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J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria