

**. REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

**CASE NO: 89400/16**

**22/2/2019**

In the matter between:

**STEPHEN TAPALA**

**1<sup>st</sup> APPLICANT**

**JOHANNA TAPALA**

**2<sup>nd</sup> APPLICANT**

And

**LESIBA JONNY TLEBETLA**

**1<sup>st</sup> RESPONDENT**

**THE MASTER OF THE HIGH COURT**

**2<sup>nd</sup> RESPONDENT**

**THE REGISTRAR OF DEEDS**

**3<sup>rd</sup> RESPONDENT**

**THE CITY OF JOHANNESBURG MUNICIPALITY**

**4<sup>th</sup> RESPONDENT**

**THE DIRECTOR GENERAL**

**5<sup>th</sup> RESPONDENT**

**HUMAN SETTLEMENTS**

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**JUDGMENT**

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[1] The applicants apply for an order declaring wrongful and/ or illegal the sale and subsequent registration in the names of the first respondent of the property known as erf [.....] (the property). They seek an order setting aside the transfer and registration of the property, and declaring the first applicant to be the beneficiary of the property. They further seek an order directing the fourth and

fifth respondents to provide the Court with a comprehensive report regarding sales of state subsidised properties, the effect of non compliance with section 10A(1) of the Housing Act 107 of 1997 (the Housing Act) and particularly whether Nkhwile Alpheus Moropo (the deceased) who was the initial owner of the property had the authority to sell it to the first respondent. Finally, an order directing the third respondent to cancel the title deed T56991/13 in favour of the first respondent is also sought.

## Background

[2] The property was sold by the deceased, (who had obtained title thereto in June 2006), to first applicant and separately to first respondent, without apparent compliance with section 10A(1) of the Housing Act. The deceased's title deeds contained the condition that the property could not be lawfully alienated within eight years of transfer without the consent of the relevant provincial housing department, and unless it had first been offered to the relevant provincial housing department.

[3] The parties do not dispute that this did not take place and that the property was sold to first respondent within the eight year period. The most recent deed of transfer reflects that the property was sold and transferred to the first respondent on 31<sup>st</sup> July 2013. As a result the deceased clearly did not have the requisite authority to sell the property to the first respondent. It is conceded by the applicants that the sale to first applicant likewise did not comply with section 10A(1) of the Housing Act.

[4] This concession by the parties has removed the need to consider whether the fourth and fifth respondents should be directed to provide any report pertaining to the sale of state subsidized properties and the effect of non-compliance with section 10A of the Housing Act.

[5] Ms Steenekamp argued on behalf of the applicants that the seller cannot transfer more rights than it has, and the seller also had no right to sell the property because of the restrictions on sale contained in section 10A of the Housing Act. Secondly it had been proved by the applicants that the sale of the property to second applicant, whereas he had also sold the property to first

respondent. As a result of the taint of fraud, notwithstanding registration in the deeds office, the sale to first respondent resulted in being void *ab initio* and it was argued that this sale should be set aside by the Court.

[6] It was further argued for the applicants that at the time of the sale to the first applicant, the property was not in the possession of the deceased and it had therefore reverted back to ownership by the province. It was argued that if the first respondent's deed of sale is set aside the property will revert to the relevant provincial housing department, and in the light of these non compliant sales the provincial housing authority must make a determination of who the rightful owner is.

[7] Mr Ntsoane argued for the first respondent that at all material times he was not aware of the sale to any other party or disputed ownership, and that the applicants bear the onus of proving the sale was fraudulent, which they have failed to do. He was entitled to the property because it had been transferred to him, and it had never been transferred to the applicants. The deceased had never intended to defraud the first respondent and that for this reason the sale should be upheld. The applicants are benefitting unlawfully from possession of the property and are relying on a fraudulent sale. The abstract theory of transfer applies to immovable property and the requirements thereof had been fulfilled in the sale. This theory states that there are two requirements for ownership to pass to the transferee. The first is delivery which is effected by registration of transfer in the deeds office. The second is a real agreement whose main element is an intention by the transferor to transfer the ownership and the intention of the transferee to become the owner of the property.

[8] Further, it was submitted that the applicants adopt a contradictory position in their application. In their founding affidavit they aver that the property was lawfully sold to them but contrarily submit that in terms of section 10A of the Housing Act the deceased was precluded from selling the property to the respondent.

#### *Prohibited sales*

[9] Since there is no dispute that the deceased had failed to comply with

section 10A(1) of the Housing Act in both sales, these were therefore prohibited, and therefore void. The invalidity of the deed of sale is therefore established but that is not the end of the matter. It is still necessary to determine whether the transfer is valid despite the invalidity of the underlying sale.

[10] Ms Steenekamp arguing for the applicants responded by referring to the abstract theory of the transfer of property, as set out in *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* (768/2012) [2013] ZAS9 A 150 (01/11/2013), and submitted that the first respondent could not rely on this approach to defend his title to the property. In *Quartermark* the court held that the validity of a sale does not depend on the underlying transaction. However, if the sale is tainted by fraud, ownership will not pass despite the registration of transfer.

[11] The sale of the property to first respondent was tainted by fraud. The deceased seller pleaded guilty to fraud admitting to having sold it to second applicant with intent to defraud her, and he was convicted of fraud. His non disclosure of this sale to the first respondent was a material misrepresentation. Fraud is defined by Snyman CR, *Criminal Law* 5<sup>th</sup> ed at 531 as follows:

*"Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another".*

[12] The sale to first respondent was clearly based on an intentional misrepresentation by the seller, but for which he would not have entered into the sale. He states as much in his answering affidavit:

*"At all material times before the transaction I was not aware and could not have been expected to be aware of the sale between the applicants and Mr Moropo (the deceased). I could not have proceeded with the sale should I have been aware in that this would have only meant that I will lose my hard earned cash and also be charged with fraud". (emphasis added)*

[13] The deceased represented himself as the owner of a property without disclosing that the property was encumbered by claims arising from another

purchaser or .purchasers to whom he had sold the property fraudulently. The deceased's misrepresentations had the potential of causing the first respondent prejudice and shortly thereafter such prejudice indeed eventuated, taking the form of legal disputes over ownership and occupation with the applicants.

[14] In *Quartermark Investments (Pty) Ltd v Mkhwanazi and another* 2014 SA 96 (SCA) the court affirmed the principle that ownership will not pass despite registration of transfer, where the underlying transaction was tainted by fraud, or where the essential requirements of the "real agreement" viz and intention on the part of the transferor to transfer ownership of the property, and on the part of the transferee to become the owner thereof, were not met. The court held as follows:

*"[24] This court, in Legator McKenna Inc & another v Shea & others, confirmed that the abstract theory of transfer applies to movable as well as immovable property. According to that theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction. However, the passing of ownership only takes place when there has been delivery effected by registration of transfer coupled with what Brand JA, writing for the court In Legator McKenna, .referred to as a 'real agreement'. The learned judge explained that '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.*

*[25] As has already been mentioned, a valid underlying agreement to pass ownership, such as in this instance, a contract of sale, is not required. However, where such underlying transaction is tainted by fraud, ownership will not pass despite registration of transfer."*

[15] The sale to the first respondent was tainted by fraud and ownership has not passed despite registration of the transfer into the name of the first respondent.

[16] The Court has inherent powers implicit from section 6 of the Deeds Registry Act to order the cancellation of rights registered in the Deeds Register *Ex Parte Raulstone* NO 1959 (4) SA 606 W and *Indurjith v Naidoo* 973(1) SA 104 (D).

### *Ownership of the property*

[17] Section 6 of the Deeds Registry Act provides that upon cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond, 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.

[18] The deceased's title deed will however not be revived by the cancellation of the first respondent's deed if the property had, prior to his death reverted to the provincial housing department as is contended by the applicants.

[19] Section 10A(3) of the Housing Act states that:

*“When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the Provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of the property.”*

[20] There does not appear to be a real dispute of fact regarding the issue of whether the deceased had vacated the property when he sold it to the second respondent. The first respondent does not allege that he was in occupation. He tentatively states in his answering affidavit that *"upon arrival at the property there was no one and he seemed to be the owner."* Ownership is not synonymous with occupation.

[21] The applicants' founding affidavit states that they occupied the property in 2006 after it was purchased as a vacant stand, from the deceased. In other words they were given vacant occupation of the stand by the deceased. The deceased never kept promises to transfer the documents and eventually they could no longer trace his whereabouts. Annexed to the founding affidavit is a contract of sale, valuation certificate and accompanying statement of account all dating back to 2006 and 2007.

[22] The applicants answering affidavit in the eviction application under case

number 3150/2016 in the Magistrates Court for the District of Ekurhuleni North held at Tembisa, which is incorporated into the founding affidavit states the same and refers to the erection of an RDP house on the stand in 2013 which the applicants improved by adding three further bedrooms. After receiving an eviction letter from attorneys for the first respondent in 2013 the applicants aver that they struggled to ascertain the whereabouts of the seller.

[23] These averments by the applicants, are baldly denied by the first respondent. However there is no suggestion that this issue could be referred to oral evidence or evidence procured to prove the contrary. I am satisfied that notwithstanding the first respondent's denial of these assertions the applicants have proved that they were given vacant occupation of the property by the deceased and were in possession of it when it was purportedly sold to the first respondent and first respondent has not deposed to facts indicating that the deceased was in occupation of the property when it was sold to him.

[24] As the deceased had vacated the property at the time of sale to the first respondent, his ownership had lapsed and the relevant provincial housing department was the deemed owner. An order setting aside the sale to the first respondent will result in the property reverting to the provincial housing as deemed owner and application must then be made to the Registrar of Deeds by the Provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of the property.

#### *Determination of beneficiary*

[25] The applicants seek an order that first applicant be declared as beneficiary of the property, on the basis that the sale agreement between] the deceased and first applicant was *bona fide*. In the light of the fact that the sale was both prohibited in terms of the Housing Act and fraudulent, per the charges admitted it by the deceased, cannot be described as a *bona fide* sale. Any further basis for declaring first applicant as beneficiary, has not been set out in this application. The issue of beneficial occupation is a matter that can be taken up with the relevant provincial housing department.

*Applications for condonation*

[26] The applicants requested condonation for the late filing of their replying affidavit and the first respondent requested condonation for the late filing of their answering affidavit. In both instances the delays were attributable largely to personal circumstances and challenges. Correspondence from the first respondent's attorneys indicated a willingness to indulge the late filing of the first applicant's replying affidavit, which was ultimately filed a few days after the deadline set by them. The first applicant did not oppose the first respondent's application for condonation but challenged the factual basis of this application. No prejudice will result to either party if condonation is granted.

[27] Accordingly condonation for the late filing of the answering and replying affidavits is condoned.

I therefore make the following order:

- a) The sale of the property known as erf [...] by the deceased (Nkhwile Alpheus Moropo) to first respondent is declared unlawful and is set aside;
- b) The third respondent is ordered to cancel the deed of transfer T56991/13 registered in favour of the first respondent, (Lesiba Johnny Tlebetla (identity number [...])) over erf [...], with four weeks of the date of the service of this order in terms of section 6(2) of the Deeds Registry Act no 47 of 1937;
- c) The first respondent is ordered to pay costs of the application.

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**A E ANDREWS**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**



DATE HEARD : 4<sup>th</sup> February 2019

DATE DELIVERED : 22<sup>nd</sup> February 2019

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