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

Case Number: 36201/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: ...26 JANUARY 2021

SIGNATURE:

MITTAH KHOBOT MOSEIA

First Applicant

SAMUEL FIKI MABULA

Second Applicant

THABO SIMON MOHALE

Third Applicant

And

MASTER OF THE HIGH COURT: PRETORIA

First Respondent

JACOB SEKGETHI MOTAUNG N.O.

Second

Respondent

CLIFFORD RAKGOLO MASHEGO

Third Respondent

MOTLALEPULE GASTINAH MASHEGO

Fourth Respondent

REGISTRAR OF DEEDS: PRETORIA

Fifth Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Second

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] This application emanates from the passing of Flora Motaung (“the deceased”) on 18 June 2015 and pertains to the subsequent administration of her deceased estate.

Parties

- [2] The deceased died testate in terms of a Last Will and Testament (“the will”) executed on 22 September 2009.
- [3] The first applicant, Moseia Mittah Khobot, is the nominated executrix and heir in terms of the will of the deceased. The deceased was the first applicant’s paternal aunt.
- [4] The second respondent, Samuel Fiki Mabula, is a co-heir in terms of the will.
- [5] The third respondent, Simon Mohale, is a beneficiary in terms of the will.

- [6] The first respondent, the Master of the High Court (“the Master”), is cited in his/her official capacity, appointed in terms of section 2 of the Administration of Estates Act, 66 of 1965.
- [7] The second respondent, Jacob Sekgethi Motuang, who was appointed by the Master on 11 August 2015 as the Master’s representative in the late estate of the deceased in terms of a Letter of Authority No: 010104/2015.
- [8] The third and fourth respondents are cited in their capacity as the co-owners of the property.
- [9] The fifth respondent, the Registrar of Deeds (“the Registrar of Deeds”), cited in her capacity as the custodian of the records of immovable properties registered in the Deeds Office.
- [10] The sixth respondent, Ekurhuleni Metropolitan Municipality, is cited in its capacity as having jurisdiction over the property in dispute.

Background

- [11] The deceased did not have any children and left no descendants when she passed away on 18 June 2015.
- [12] Prior to her death, the deceased resided with the first applicant, who cared for the deceased, for a period of five years. During this period the deceased informed the first applicant of the will and advised the first applicant that the

will was is in the custody of Pretorius Osborne & Partners, the deceased's attorneys in Kempton Park.

[13] Subsequent to the deceased's passing and during October 2015 the first applicant attended at the offices of the deceased's attorneys who confirmed the will and informed the first applicant that she was nominated as co-executor with a certain Johan van Aswegen.

[14] The attorneys undertook to report the estate of the deceased to the Master.

[15] The first applicant visited the offices of the deceased's attorneys in May 2016 to follow up on the progress in the winding up of the estate of the deceased. To her shock and amazement, the first applicant was informed that the second respondent had already reported the estate to the Master by misrepresenting to the Master that he was the son of the deceased. The misrepresentation led to the Letter of Authority being issued to the second respondent.

[16] It is not clear from the papers what the relationship between the deceased and the second respondent was.

[17] In administrating the estate of the deceased, the second respondent, purporting to be the only biological child of the deceased, caused the deceased's property known as [...] ("the property"), to be transferred from the deceased estate into his name.

[18] The second respondent, thereafter, sold the property to the third and fourth respondents for an amount of R 100 000, 00. The property was duly registered in the names of the third and fourth respondents on 2 August 2017.

[19] The first applicant upon becoming aware of the second respondent's misrepresentation and fraud enlisted the services of her attorneys of record, who submitted the will of the deceased to the Master on 17 November 2017.

Applicants' case

[20] In view of the misrepresentation and fraudulent conduct of the second respondent, the first applicant submits that the transfer of the property from the late estate to the second respondent is null and void. Consequently, the sale agreement between the second, third and fourth respondents as well as the subsequent transfer of the property to the third and fourth respondents is also null and void *ab initio*.

[21] The applicants, furthermore, state that the third respondent was well aware of the misrepresentation and fraudulent conduct of the second respondent.

[22] In terms of an amended notice of motion dated 2 March 2018, the applicants claim the following relief:

"1 Reviewing and setting aside the First Respondent's appointment of the Second Respondent dated 11 August 2015 of the representative of the Master to take control of the assets of the Estate late Flora Motaung (Identity Number: 180609

0203 083) in terms of section 18(3) of the Administration of Estates Act, 66 of 1965;

2. That the Second Respondent is directed forthwith to return to the First Respondent (**MASTER OF HIGH COURT: PRETORIA**) the aforesaid original Letters of Authority;
3. That the first Respondent is directed to appoint the First Applicant as Executrix in the late estate Flora Motaung; Identity Number : 180609 0203 083, who died on 18 June 2015 and to issue the First Applicant with the necessary Letters of Executorship;
4. That the Fifth Respondent be, and is hereby directed to cancel in terms of Section 6 of the Deeds Registries Act, Act No. 47 of 1937, registration of transfer under Deed of Transfer No. T 56469/2017 intestate inheritance in favour of second Respondent (JACOB SEKGETHI MOTAUNG);
5. That Deed of Sale entered into between the Second, Third and Fourth Respondents in respect of the immovable property more fully described as [...], Registration Division I.R., Province of Gauteng held in terms of Deed of Transfer No. T56470/2017 be declared null and void;
6. That the Fifth Respondent be, and is hereby directed to cancel in terms of Section 6 of the Deeds Registries Act, Act No. 47 of 1937, the Deed of Transfer No. T 56470/2017 registered at the Registrar of Deeds, Pretoria onto the names of the Third and Fourth Respondents;
7. An order directing the Fifth Respondent to re-register the immovable property known as [...], Registration Division I.R., Province of Gauteng held in terms of Deed of Transfer No. T56470/2017 into the name of the Deceased (Flora Motaung);”

Opposition

- [23] Only the third and fourth respondents oppose the relief claimed by the applicants.
- [24] The third respondent deposed to the answering affidavit and explained that the second respondent is his mother's boyfriend. He was aware that the first applicant resided with the deceased for a period of five years before her passing on 18 June 2015.
- [25] The third respondent was aware that the second respondent was appointed as the executor of the estate of the deceased. During the beginning of 2017, the second respondent informed him and the fourth respondent that he had acquired the property of the deceased and that he was intent on selling it.
- [26] They were interested in purchasing the property and after negotiations entered into a written sale agreement with the second respondent on 17 June 2017. Pursuant to the agreement the property was registered in their names on 2 August 2017 in terms of Deed of Transfer T1756470/2017. The third respondent denies any knowledge of the fraud perpetrated by the second respondent.
- [27] In the result, the third and fourth respondents submit that they are *bona fide* third-party purchasers and that the property cannot be vindicated in their hands.

Reports

- [28] On 10 June 2019 the Master filed a report stating that he/she does not oppose the relief claimed by the applicants.

[29] Insofar as the records kept in the Master's office is concerned, the Master confirmed the following:

31.1 the estate of the deceased was reported by the second respondent, who purported to be the biological son of the deceased, on 5 August 2015. The estate was initially reported as intestate and the second respondent was appointed as the Master's representative in administering the estate.

31.2 it has, however, subsequently been established that the second respondent is not the biological son of the deceased as the deceased did not have any children of her own;

31.2 on 18 November 2017 the Master accepted the last Will and Testament of the deceased and the estate will now be administered in terms of the provisions of the will;

31.3 the letter of authority issued in favour of the second respondent has officially been withdrawn on 9 June 2020.

[30] On 19 June 2019, the Registrar of Deeds filed a report confirming the sequence of transfers referred to in the founding affidavit. The Registrar, further, advised as follows:

"As a deed of Transfer must be lodged and registered in the Deeds Office, the Sheriff may be instructed to sign any documents on behalf of the owner, should a said party refuse to sign, such document."

[31] Save for the aforesaid, the Registrar did not have any objection to the relief being granted insofar as it pertains to the transfer process in the Deeds Office.

Issues for consideration

[32] The parties are *ad idem* that the following issues should be decided:

34.1 the validity of the actions of the second respondent whilst he was still the duly appointed representative of the Master;

34.2 were the third and fourth respondents' bona fide purchasers?;

34.3 the legal consequences emanating from the second respondent's fraudulent conduct in transferring the property into his name and thereafter in selling and transferring the immovable property to the third and fourth respondents.

Validity of second respondent's actions prior to the withdrawal of his appointment

[33] The applicants submit that the withdrawal of the second respondent's appointment on the grounds that the appointment was as a result of misrepresentation and fraud entails that the second respondent was never entitled to administer the estate of the deceased. The appointment is void *ab initio* and any actions taken by the second respondent until his authority was withdrawn by the Master suffers the same fate.

[34] The third and fourth respondents do not agree. The third and fourth respondents with reference to *MJ v Master of the High Court and Others* (15699/2017) [2019] ZAWCHC 8 (18 February 2019), submit that the appointment of an executor to a deceased estate is an administrative decision and reviewable in the terms of the Promotion of Administrative Justice Act, 3 of 2000.

- [35] Once the appointment is set aside, it does not mean that the subsequent actions flowing from the appointment is null and void. With reference to the decision in *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 SCA, the third and fourth respondents submit that even an unlawful administrative act, i.e. the appointment of the second respondent, is capable of legally valid consequences for as long as the unlawful act is not set aside.
- [36] The facts *in casu* differ somewhat from the principle relied upon by the third and fourth respondents. In the present matter the appointment of the second respondent was not due to an unlawful decision by the Master, but due to the second respondent's fraud and misrepresentation.
- [37] In *Firststrand Bank Ltd t/a Rand Merchant Bank and Another v The Master of the High Court, Cape Town* case no: 679/13 (11 November 2013), ZAWCHC, 2013, 173, the court considered the effect of a fraudulent misrepresentation by an attorney to the Master in an application to hold an enquiry in terms of section 417 and 418 of the Companies Act, 61 of 1973.
- [38] The court held as follows at paragraphs [20] to [22]:
- “[20] It is trite that the effect of fraud is far-reaching. In *Farley (Aust) Pty Ltd v JR Alexander & Sons (Qld) Pty Ltd* [1946] HCA 29; (1946) 75 CLR 487 the High Court of Australia, per Williams J, said this:

'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'

[21] And in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712 one finds Lord Denning's well known remarks:

'No court on 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.'

[22] In South Africa the 'insidious effect of fraud permeates the entire legal system'. It renders contracts voidable. It is one of the elements of delictual liability. It constitutes a crime. Fraud excludes the effect of an ouster clause in legislation. See *Narainsamy v Principal Immigration Officer* 1923 AD 673 at 675. It also nullifies a contractual exemption clause which purports to exclude a party from the consequences of fraudulent conduct. See *Wells v SA Alumnite* 1927 AD 69 at 72."

[39] It follows that the fraud perpetrated by the second respondent vitiates his appointment by the Master. This would entail that any actions taken by the second respondent as a result of the fraud is similarly tainted and has no legal effect.

[40] As stated in *Lazarus Estates Ltd* referred to in the *FirstRand Bank Ltd* matter, *supra* "Fraud unravels everything".

Are the Third and fourth respondents *bona fide* purchasers?

[41] The principle underpinning the vitiating of transactions as a result of fraud is that a fraudster should not be allowed to benefit from the proceeds of the fraud.

[42] The third and fourth respondents were, on the common cause facts, not part of the fraudulent scheme. The question then arises whether they were aware of the fraud?

[43] In the founding affidavit, the first applicant made a single bald allegation that the third respondent knew about the fraud. The allegation is not substantiated by any facts and reads as follows:

"5.4.27 I submit that the sale agreement and subsequent transfer of the property of the Deceased is null and void ab initio on the basis that it was as a result of misrepresentation and fraudulent conduct of the Second Respondent. The Third Respondent was well aware of the misrepresentation and fraudulent conduct of the Second Respondent. Further submission and argument will be adduced in Court on the date of the hearing."

[44] In response to this allegation, the third respondent answered as follows:

"18. At the time we concluded the Agreement, we were not aware nor made aware:

"18.1 That on 2 August 2017, Motuang became the owner of the Property, having acquired it from the Deceased's estate by way of intestate inheritance;

18.2 That Motaung had misrepresented himself as the son of the Deceased at any time, as alleged or at all;

18.3 *That Motaung had perpetrated fraud in relation to the Deceased's late estate, at any time, as alleged or at all;*

18.4 *Of the "misrepresentation" and "fraudulent conduct" of Motaung as alleged in paragraph 5.4.27 of the founding affidavit or any "underhand tactics" of Motaung as alluded to in paragraph 5.4.32 of the founding affidavit; or*

18.5 *That Motaung could not lawfully pass transfer of ownership in the Property to us."*

[45] The third respondent stated that he and the fourth respondent only learnt of the fraud complaints on receipt of a letter from the applicant's attorneys on 15 December 2017, some four months after the immovable property was registered in their names and six months after the sale agreement was signed.

[46] In view of the third and fourth respondents' denial that they were aware of the fraud, the first applicant's bald allegation that the third respondent knew about the fraud without any facts to substantiate the allegation is not sufficient to prove the allegation.

[47] In the premises, the third and fourth respondents' assertion that they were unaware of the fraud stands and they are considered to be *bona fide* purchasers.

The legal consequences of fraud resulting in the transfer of property to *bona fide* purchasers

[48] The applicants submit that, should the court find that the third and fourth respondents were *bona fide* purchasers, they are still entitled to vindicate the property from the third and fourth respondents.

[49] In support of the aforesaid contention the applicants rely on the following extract from *Nedbank Limited v Mendelow NO* (686/12) [2013] ZASCA 98, paragraph [12]:

“...it is trite that were registration of a transfer of immovable property is effected pursuant to fraud or a forged document ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds registry. Registration is intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office. And it is a source of information about those rights. But registration does not guarantee the title, and if it is affected as result of a forged power of attorney or fraud, then the right apparently created is no right at all.”

[50] The third and fourth respondents in answer rely on the abstract theory of transfer which was explained in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 SCA as follows at paragraph [24]:

“This court, in Legator Ms Kenna Inc and Another v Shea and Others¹ confirmed that the abstract theory of transfer applies to movable as well as immovable Property. According to that theory the validity of the transfer is not dependent upon the validity of the underlying transaction.² However, the passing of ownership only takes place when there has been delivery effect by registration of transfer coupled with what Brand JA, writing

¹ *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) paras 20-22.

² *Ibid* para 20.

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 transfer to become owner of the property.³'"

- [51] On the strength of the aforesaid authority, the third and fourth respondents submit that the second respondent in his capacity as representative of the deceased estate had the intention to transfer the property to himself in his personal capacity and the second respondent in his personal capacity had the necessary intention to become the owner of the property.
- [52] This submission, however, loses sight of the fact that the second respondent due to his fraud and misrepresentation was never authorised to represent the late estate.
- [53] As a result he could not in his capacity as “*representative*” of the late estate form an intention on behalf of the estate to transfer the property to himself. Only a true representative or executor of the deceased estate could form an intention to transfer the property. In the result there was no real agreement to transfer and the transfer is void *ab initio*.
- [54] In respect of the third and fourth respondents, the transfer from the second respondent to them suffers the same fate as correctly pointed out by the applicants with reference to the authority *supra*. (Also see: *Sterling v Fairgrove (Pty) Ltd and Others* 2018 (2) SA 469 GJ.)

³ *Ibid* para 22.

[55] In the result, the transfer of the property from the deceased estate to the second respondent was, due to the fraud perpetrated by the second respondent, void *ab initio*. Consequently, the second respondent never became the owner of the immovable property and could not pass ownership thereof to the third and fourth respondents.

[56] This contention is in line with the authorities *supra* stating that fraud unravels all subsequent transactions, even, as in this instance, a subsequent sale to *bona fide* purchasers.

[57] In the premises, the applicants are entitled to the relief sought herein.

[58] The third and fourth respondents are not left remediless. They still have a claim against the second respondent for any losses suffered by them as a result of the vindication.

ORDER

[59] In the premises, I grant the following order:

1. The Fifth Respondent is hereby directed to cancel and remove from her records the Deed of Transfer No. T 56469/2017 issued by her in respect of [...].

2. The Deed of Sale entered into between the Second, Third and Fourth Respondents in respect of the immovable property more fully described as [...], Registration Division I.R., Province of Gauteng held in terms of Deed of Transfer No. T56470/2017 is declared null and void;
3. The Fifth Respondent is hereby directed to cancel and remove from her records the Deed of Transfer No. T 56470/2017 issued by her in respect of [...].
4. The third and fourth respondents are ordered to pay the costs of the application.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA