IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 7462/2009

In the matter between:

ZAITOEN SALIE	Applicant
and	
TONY BALES N.O.	1st Respondent
ADAM VICTOR PITMAN NO	2nd Respondent
KATHRYN MARY DU PLESSIS N.O.	3rd Respondent
MOGAMAT YUSUF ABRAHAMS	4th Respondent
CHANGING TIDES 17 (PTY) LTD	5th Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	6th Respondent

Coram:	BOZALEK J
Judgment:	BOZALEK J
Heard:	6 – 7 MARCH 2012
Delivered:	29 MARCH 2012

For the Applicant:	***Adv M Ipser***
As instructed by:	***Norton Rose***
	(Ref: M Fredericks)
For the First - Third Defendant:	***Adv M Bartman***
As Instructed by:	***Spencer Pitman Inc***
	(Ref: A Pitman)
For the Fourth Respondent:	***n/a***
For the Fifth Respondent:	***Adv W Roos***
As instructed by:	***Velile Tinto***
	(Ref: L Swart/D Swanepoel)
For the Sixth Respondent:	***n/a***

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 7462/09

In the matter between:

ZAITOEN SALIE	Applicant
versus	
TONY BALES N.O.	1st Respondent
ADAM VICTOR PITMAN N.O.	2nd Respondent
KATHRYN MARY DU PLESSIS N.O.	3rd Respondent
MOGAMAT YUSUF ABRAHAMS	4th Respondent
CHANGING TIDES 17 (PTY) LTD	5th Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	6th Respondent

JUDGEMENT: 29 MARCH 2012

BOZALEK J:

[1] On 27 January 2009 a residential property situated at 97 Wale Street Cape Town was sold in execution. The applicant, who has at all material times resided at the property, now applies for rescission of the order granted by the Registrar of this Court on 25 June 2008 declaring the immovable property in question ("the property") to be specially executable.

[2] First to third respondents are the trustees of the Wizard Investment Trust, the purchaser of the property pursuant to the sale in execution. The fourth respondent is the applicant's former husband and the party against whom the

default judgment, to which was coupled the order for special executability of the property, was granted. The fifth respondent is a large scale bond financier and the judgment creditor in the sale of execution of the property whilst the sixth respondent is the Registrar of Deeds.

[3] The first to third and fifth respondents oppose the rescission of the order of special executability and the further extensive relief sought by the applicant which is the following:

> "2. *setting aside the warrant of execution issued in respect of the immovable property ...;*
> 3. *setting aside the sale in execution of the immovable property to the Wizard Investment Trust ...;*
> 4. *declaring applicant to have been the sole owner of the immovable property since 14 May 2003;*
> 5. *directing sixth respondent to endorse the title deeds of the immovable property to reflect that fact that applicant is the sole owner of the immovable property and has been ... since 14 May 2003;*
> 6. *declaring that the bond registered over the immovable property on 24 December 2002 ... is invalid;*
> 7. *directing the sixth respondent to cancel the aforesaid bond as registered against the title deed to the immovable property;*
> 8,9& 10. *declaring that four bonds registered against the immovable property during 2005 and 2006 are not binding upon the applicant and are cancelled and directing the sixth respondent to cancel same;*
> 11. *directing fourth respondent to take all necessary steps to transfer the immovable property into the name of the applicant;*
> 12. *authorising the deputy sheriff to take the steps referred to in 11 above in the event that the fourth respondent fails to do so;*
> 13. *directing that the costs incurred in respect of the transfer shall be borne by the fourth respondent;*
> 14. *costs of suit.*

[4] The application was also initially opposed by the fourth respondent but he filed no opposing affidavit and ultimately took no part in the hearing.

[5] The background to the matter is the following:

5.1 the fourth respondent purchased the property from the municipality of Cape Town in November 1987. At that stage he was married to his first

wife, Najadah Abrahams, and she was duly noted on the title deeds as co-owner;

5.2 when the fourth respondent and Najadah Abrahams were divorced in 1993 he purchased her half share of the immovable property and an endorsement in terms of s45 bis (1)(a) of the Deeds Registry Act, 47 of 1937 ("the Act") was effected stipulating that the fourth respondent was entitled to deal with the property;

5.3 the applicant was married to the fourth respondent by muslim law on 7 October 1992 and by civil rights, in community of property, on 7 June 1993. It is common cause that the effect of the civil marriage was to vest a half share interest in the property in favour of the applicant;

5.4 the applicant's marriage broke down and during the course of 1999 the fourth respondent began to co-habit with another woman whom he married by muslim law in 1999. According to the applicant, after fourth respondent remarried he became even more secretive about his financial affairs and although she knew that the property was bonded she was ignorant of the terms or amount of the bond.

[6] On 14 May 2003 the applicant and the fourth respondent were divorced under an order of this Court and an order was made *inter alia* to the following effect:

> "... *that the joint estate subsisting between the parties be divided on the basis that Plaintiff (fourth respondent) undertakes and agrees to effect payment of the monthly instalments in respect of the Mortgage Bond registered over the immovable property situated and known as 97 Upper Wale Street, Cape Town, Western Cape Province, registered in the name of Plaintiff until debt secured by a Mortgage Bond shall have been discharged, whereafter Plaintiff shall cause registration of such immovable property, free of any encumbrances, to be effected to and in favour of Defendant (Applicant) at Plaintiff's own propert (sic) cost and expense, it being specially understood and agreed that pending registration of*

transfer to and in favour of Defendant. Plaintiff shall effect payment of the Homeowner's Comprehensive Insurance premium in respect of the house, as also rates and taxes levied against such property.

That, save and expert (sic) as herein provided to the contrary the parties shall respectively retain as their own free and unfettered property all or any of the assets in whatsoever nature or description at present in their possession or under their control respectively."

[7] The fifth respondent registered a bond over the property on 24 December 2002 as security for a loan in an amount of R210 000 which it made to the fourth respondent. It is common cause that the fourth respondent advised the fifth respondent's representative that he was married under muslim law and the bond was granted on that basis without any communication between the fifth respondent and the applicant.

[8] It is also common cause that during 2005 and 2006, notwithstanding the divorce order, the fifth respondent registered four further bonds over the property as security for a series of loans made to the fourth respondent totalling approximately R800 000.

[9] According to the applicant during 2006 various estate agents visited the immovable property and around the same time she was advised that the fourth respondent was no longer paying the bond instalments to the fifth respondent. She learned, for the first time, that he had taken out further loans secured by additional bonds over the property with the fifth respondent during 2005 and 2006. It is common cause that in relation to the 2005 and 2006 bonds the fourth respondent, who was still recorded as the sole owner of the property in the title deeds at the Deeds Registry, advised the fifth respondent that he was married according to muslim law. That statement, insofar as it must be taken as a reference by the

fourth respondent to his third marriage, was correct. Needless to say he made no mention of the applicant's interest in the property.

[10] During 2006 the applicant made enquiries with the fifth respondent regarding the bonds registered over the property, advising them that she had consented to neither the 2002 bond nor the subsequent bonds.

[11] On 25 June 2008 the fifth respondent took default judgment granted by the Registrar of this Court against the fourth respondent in the amount of R984 000 and at the same time an order was made declaring the property specially executable.

[12] Some two and a half months prior to default judgment being taken an advocate acting on behalf of the applicant wrote to the fifth respondent's attorneys advising them that the applicant and fourth respondent had been married in community of property, that she remained co-owner of the property and that she had not consented to mortgage bonds being registered over the property. Some two months after default judgment was granted the applicant engaged attorneys who wrote to the fifth respondent care of their legal representatives advising them that she had been made aware that steps were being taken to sell the property, giving details of her interest in the property and seeking certain information from the fifth respondent.

[13] Notwithstanding these efforts on the part of the applicant the sale in execution went ahead on 27 January 2009. On 17 March 2009 the applicant launched an urgent application to interdict the passing of transfer of the property to the Wizard Investment Trust and an order was made on 17 April 2009 interdicting the passing of transfer pending the outcome of the present application for rescission of judgment and further relief.

[14] **RESCISSION OF JUDGMENT**

The applicant seeks, in the first place, rescission of the order made by the Registrar of this Court declaring the property specially executable. She relies on the provisions of Rule 42(1) which provide for rescission where an order or judgment is erroneously sought or erroneously granted in the absence of any party affected thereby.

[15] The applicant's case is that as the owner of the property, either as the owner of an undivided half share or as full owner thereof, albeit not the registered owner, and a long-time occupant of the property which had been her home for years, she was entitled to be heard before an order of special executability was made.

[16] In *Promedia Drukkers en Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 it was held that the provisions of Rule 42(1)(a) constitute a procedural step designed to correct expeditiously an obviously wrong judgment or order. It was held further that the court has a discretion whether or not to grant an application for rescission under the sub-rule and relief would be granted thereunder if there was an irregularity in the proceedings, if the court lacked legal competence to have made the order or if the court, at the time that the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order. The Court held further that it was not necessary for the applicant to show good cause for the rule to apply.

[17] There can be little doubt that had a court, or in the present case the Registrar, been aware that the beneficial owner of the property in question was the applicant, that the fourth respondent was in breach of the terms of the divorce

order in failing to maintain payments in respect of the original mortgage bond, that the bulk of the mortgage bonds registered over the property had been registered pursuant to loans concluded by the fourth respondent at a time when he was no longer the owner of the property (notwithstanding that the title deeds continued to reflect him as sole owner) and that the property was the home of the applicant and her children, the order for special executability would, in all probability, not have been granted.

[18] It was contended on behalf of the first to third respondents that, in the exercise of its discretion, the Court should refuse to grant rescission because of the applicant's inordinate delay in bringing the application.

[19] The facts are that the application was launched in April 2009 some nine months after default judgment was granted. The applicant states that she was informed of the default judgment shortly after it was issued and then contacted the advocate referred to earlier who made contact with the fifth respondent. He referred her to an attorney, also mentioned earlier, but his attempts to obtain certain information came to naught. At this stage the applicant was unemployed and financially in no position to take any further steps. She then applied to the Legal Aid Board for assistance. This was refused whereupon the applicant approached the Registrar of this Court for *in forma pauperis* assistance and was eventually referred to her present attorneys of record in January 2009. They in turn approached the Bar Council who appointed counsel to assist her. The entire process was time consuming and the applicant only consulted with counsel for the first time on 10 March 2009. None of these facts can be gainsaid by the respondents. The applicant is indeed represented on an *in forma pauperis* basis by her attorneys of record and Adv Ipser.

[20] In *Promedia Drukkers* Van Reenen, J held, in the context of an application for rescission brought under the common law, that it must be brought within a reasonable time and what is reasonable depends on the facts of each individual case. (at 421 F – G). Having regard to the applicant's particular circumstances *viz* her general ignorance in the legal predicament in which she found herself, her financial difficulties which rendered it difficult for her to secure proper legal representation and the time which it took her to exhaust all available channels to seek legal representation before she finally obtained *in forma pauperis* representation, I consider that the application for rescission, although delayed, was brought within a reasonable time and that rescission of the order should not be refused on the basis of such delay.

[21] There is a further basis upon which the applicant is entitled to rescission of the order, namely, in accordance with the judgment of the Constitutional Court in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC). There the Court was required to deal with the constitutionality of the practice of Registrars of the High Court granting default judgment and in particular ordering the special executability of immovable property where such constituted the homes of indigent debtors, after judgment on a money debt. It was held that this practice was unconstitutional for lack of judicial oversight bearing in mind the constitutionally entrenched right to housing. By way of relief in relation to orders which had already been granted to that effect, the Court ruled that aggrieved debtors will have to show – in addition to the normal requirements for rescission – that a court, with full knowledge of all the relevant facts existing at the time of granting of default judgment, would nevertheless have refused leave to execute against the debtor's home; thereafter the question of the effect of invalid execution sales and

subsequent transfers would have to be considered in the light of the applicable principles.

[22] In my view the combined effect of the provisions of Rule 42(1) and the ruling in *Gundwana* applied to the circumstances of the present matter, require that rescission of the disputed order be granted.

[23] **SETTING ASIDE THE WARRANT OF EXECUTION AND THE SALE IN EXECUTION**

The first tranche of the consequential relief sought by the applicant pursuant to the rescission of the order of special executability is the setting aside of the warrant of execution issued in respect of the property as well as the sale in execution of the property to first to third respondents.

[24] The general rule is that execution will be set aside if it is no longer supported by the underlying causa which is the debt and the judgment based thereon. See *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) 252 at 257 B – C. In the present matter the situation is somewhat different. The applicant does not purport to challenge the validity of the default judgment taken against the fourth respondent – his indebtedness to the fourth respondent is not disputed. What is in dispute is the order for special executability, the warrant of execution issued pursuant to that order and the sale in execution which followed.

[25] For the same reasons that I concluded that the Registrar or the Court would not have made the order had they been aware of the applicant's interest in the immovable property and the circumstances which gave rise to the registration of bonds against the property, particularly those registered in 2005 and 2006, I

consider that the underlying causa for the warrant of execution must be taken to have fallen away. It then follows that the attachment of the property pursuant to the writ in execution and the sale in execution of the property falls to be set aside.

[26] **CERTAIN RELIEF ABANDONED**

The applicant initially sought all the relief claimed in the notice of motion. This entailed a challenge to the validity of the mortgage bonds registered over the property both before and after the parties were divorced. The rationale behind the challenge to the pre-divorce mortgage bond was that the applicant, as an owner of a undivided half share of the property by virtue of her marriage in community of property, had not consented to the encumbering of the property through the registration of that bond and, in terms of s15(9)(a) of the Matrimonial Property Act, 88 of 1984, could be not deemed to have consented thereto.

[27] The difficulty which the applicant encountered in challenging the validity of the pre-divorce bond was that the terms of the divorce order itself make it clear that the applicant had, by then at least, become aware of the fact that the property was encumbered by a mortgage bond. The divorce order provided that she would only be entitled to take transfer of the property once the debt underlying the mortgage bond had been discharged by the fourth respondent. It was common cause that the fourth respondent has not discharged the indebtedness under that particular bond, the outstanding balance being somewhere in excess of R200 000. It was put to counsel that the applicant could not logically lay claim to the property unencumbered by any mortgage bond where, through the divorce order and in effect by agreement, she had acquired dominium over the property but subject to any mortgage bond then in existence. Faced with this difficulty, applicant's counsel abandoned the relief sought impugning the validity of the pre-divorce bond and, as a consequence thereof, any claim to immediate transfer of the immovable property

into her name or ancillary relief. Accordingly the applicant ultimately did not proceed with the relief claimed under prayers 6, 7, 11, 12 and 13.

[28] **DECLATORY RELIEF AS TO THE OWNERSHIP OF THE PROPERTY**

Under prayers 4 and 5 the applicant seeks a declaration that she has been the sole owner of the immovable property since 14 May 2003 and directing the sixth respondent to endorse the title deeds accordingly.

[29] It is common cause that the effect of the marriage in community of property between the applicant and fourth respondent was to vest an interest in a half share in the property in favour of the applicant. The terms of the divorce order were that a division of the joint estate was ordered and in particular it was stipulated that the applicant would become the sole owner of the property albeit subject to transfer only being effected to her once the property was free of the existing encumbrance viz the mortgage bond registered over the property by the fourth respondent in 2002.

[30] It is applicant's case that she became owner of the entire immovable property as at the date of divorce notwithstanding that this position was not reflected in the title deeds of the property. In *Knysna Hotel cc v Coetsee N.O.* 1998 (2) SA 743 (SCA) it was held that according to our system of land or title registration (which is sometimes called a *"negative"* system in contrast to a *"positive"* system where registration is irrefutable proof of ownership), it could not simply be said that the person in whose name the property was registered was necessarily the owner of the property.

[31] In *Commercial Liquidators (Pty) Ltd and Another v Wiggill and Others* 2007 (2) SA 520 (TPD), the Court was required to deal with a situation similar in many

respects to the present matter. The dispute involved immovable property which fell into the joint estate of parties married in community of property, one portion of which was, on dissolution of the marriage, to be transferred unencumbered to the wife and the other to the husband. Notwithstanding the terms of the divorce order the former husband, without authority, borrowed further funds on the strength of an existing mortgage and failed to effect sub-division and transfer of the portion into his ex-wife's name. The High Court held that on dissolution of the marriage dominium in the immovable property in question had vested in the ex-wife immediately and that sub-division of the erf and registration in her name were merely formalities. On appeal this viewpoint was upheld by the full bench which held that registration of transfer of the properties in question was not a prerequisite for the vesting of dominium in each of the spouses. It was further held, in respect of the monies borrowed by the ex-husband under cover of the bond, that after the divorce he had had no authority to encumber the portion due to his ex-wife and consequently the bond holder had no claim against the former wife and was not secured in respect of that property. Finally, it was held that the ex-wife was the owner of the unencumbered portion and was entitled to cancellation of the bond over that particular portion and to transfer of the property into her name.

[32] The full bench considered the judgment of this Court in *Ex Parte Menzies et Uxor* where King, J, as he then was, discussed, after extensive research into the authorities, both the proprietary consequences of a marriage in community of property and the dissolution of such a marriage. The following passage from Wiggill's case is instructive:

> *"If the parties instead of a personal computer and a lounge suite own two fixed properties, A and B, and the parties agree that the husband gets A and the wife gets B, and the Court then makes the agreement an order of Court, the effect of the order is that the joint estate is immediately divided in terms of the order. I cannot think of any conceivable reason why dominium in A does not vest in the*

husband immediately and dominium in B in the wife. It is in any event in accordance with the common law as expounded in Rosenberg v Dry's Executors and Others (supra). Registration of transfer of the property to the different spouses is not a requisite for dominium to vest in them. Our system of deeds registration is a negative one where the deeds registry does not necessarily reflect the true state of affairs." (at pg 527 para 6)

See also *Eksteen v Pienaar* 1969 (1) SA 17 (O) at 20 C.

[33] On behalf of the fifth respondent Mr Roos submitted that the divorce order relating to the parties is evidence of nothing more than the applicant having a personal right or claim against the fourth respondent in respect of acquiring ownership of the property or, more specifically, for payment by him of the bond obligations whereupon she could then claim registration of transfer of the property into her name.

[34] I cannot agree with this submission. The ratio in *Wiggill*, in turn based on *Ex Parte Menzies*, makes it clear in my view that the applicant acquired dominium over the property consequent upon the order of divorce. Dominium has been described as *"that attribute of a thing whereby a person, though not actually in possession of it, may acquire the same by legal process"* (*Marcus v Stamper and Zoutendyk* 1910 (AD) 58). Although the applicant, by virtue of the initial bond over the property, did not enjoy full ownership *"dominium plenum"* but incomplete ownership "*dominium minus plenum*", this was nevertheless dominium over the property and not merely a personal right against the fourth respondent. In the circumstances I consider that the applicant is entitled to a declaration that she has, since 14 May 2003, been the sole owner of the immovable property and directing the sixth respondent to make an appropriate endorsement onto the title deeds of the property.

[35] **REMAINDER OF THE RELIEF SOUGHT**

The remainder of the substantive relief sought by the applicant *viz* prayers 8 to 10, revolves around the four bonds registered against the property pursuant to loans made to the fourth respondent after the divorce in 2005 and 2006. The applicant seeks a declaration that these bonds are not binding upon the applicant, that they are cancelled and directing the sixth respondent to cancel the bonds registered against the title deeds of the property.

[36] A declaration that the bonds are not binding on the applicant as sought under prayer 8 is, strictly speaking, misplaced relief since bonds are registered against immovable property alone. Should the applicant be granted the relief sought in prayers 9 and 10, namely, the cancellation of the bonds registered against the immovable property together with an order directing the sixth respondent to cancel the bonds, she will in effect gain the relief which she seeks.

[37] The applicant's case in this regard is straightforward, namely, that upon her divorce on 14 May 2003 she acquired dominium over the property. In those circumstances the fourth respondent thereafter had no authority to encumber the property. Accordingly, the fifth respondent has no secured claim in respect of the property pursuant to the new bonds registered over it and the applicant is entitled to their cancellation.

[38] Counsel for the parties devoted little attention to interpreting the clause in the divorce order regulating the disposition of the property. However, its correct interpretation appears to be that the applicant became the owner of the property subject to the fourth respondent only being obliged to pass transfer once he had settled the debt underlying the sole mortgage bond then registered over the property and being responsible for the payment of the monthly instalments in

respect of the underlying loan. The clause is silent as to whether the fourth respondent could further encumber the property but in my view it must be interpreted as precluding any such right on the part of the fourth respondent both on the basis of the *contra proferentem* rule and since to interpret it otherwise so would render the applicant's rights in and to the property nugatory.

[39] Adopting this interpretation, and no different meaning was contended for by any party, it is clear that post-divorce, the fourth respondent had no dominium over the property and was principally obliged to service the bond and settle the outstanding indebtedness thereon. Although the title deeds reflected the fourth respondent as the owner of the property this was incorrect and misleading and he had no authority to further encumber the property.

[40] In arguing for the validity of the post-divorce bonds it was contended on behalf of the fifth respondent that, based on the title deeds and fifth respondent's acceptance at face value of the fourth respondent's statement that he was the owner of the property and that he was married only by muslim rights, the further loans advanced and secured by the additional four mortgage bonds were incurred in good faith and without any negligence on its part. It was further argued that the fifth respondent did not know until at least 2008 that the applicant laid claim to ownership in the property and she was negligent in not effecting an appropriate endorsement to the title deeds, thereby notifying the public at large in that she had an interest in the property.

[41] In this regard it must be noted that in terms of s45 bis of the Act where an immovable property formed an asset in the joint estate of spouses who have been divorced and one of them has lawfully acquired the share of his or her former spouse in the property, the Registrar of Deeds may on written application by the spouse concerned endorse on the title deed of the property that such spouse is

entitled to deal with such property. Thereupon such spouse shall be entitled to deal with such property as if he or she has taken formal transfer into his or her name of the share of former spouse in the property.

[42] I am unaware of any statutory provisions which hold that an unregistered owner who does not take this prudent step is bound by any bonds registered against the property by an innocent third party who, deceived by someone falsely claiming to be the owner of the property, loans money against the security of the property. Nor was I referred to any case where immovable property was held to be encumbered by bonds passed over such property as a result of unauthorised loans made against the security of the property without the owner's consent, knowledge or connivance.

[43] It is so that an anomalous and undesirable situation can arise in such circumstances, namely, that loans are advanced on the strength of security in the form of a mortgage bond over immovable property only for it to transpire that, notwithstanding the title deeds reflecting the debtor as the sole owner of the property, in reality he is not and the security is worthless. However, in my view it does not follow that the innocent true owner of the property is in effect held bound by the security over the property where this was effected pursuant to a false representation on the part of the debtor. To the extent that there may be have been negligence on the part of the applicant as the true owner in not registering her title then the bond holder can raise the defence of estoppel or can pursue an action for damages; non constat that the mere allegation of negligence on the part of the true owner renders the unauthorised bonds binding on the property.

[44] It was contended on behalf of the first to third respondents that the applicant was estopped from relying on her ownership of the property and her ignorance of

the fact that the fourth respondent was purporting to encumber the property as security for loans from the fifth respondent. The doctrine of estoppel limits the availability of the owner's vindicatory rights where he has by culpable misrepresentation induced an outsider to believe that a third party is the owner of the property or has the right to dispose of it. The essentials for estoppel are: a representation by words or conduct of a certain factual position, that the party acted upon the correctness of the facts as represented to his detriment and that the representation was negligently made. An essential element of estoppel is that there must have been a *"representation of some kind consisting of words or conduct, including acts, omissions or silence"*. In the present matter the respondents' reliance would be on the applicant's omission to register her interest in the property on the title deeds. See *Union Government v Viannini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at page 49 – 50.

[45] But the reliance on such representation must have been the proximate cause of the claimant's detriment. The person raising the estoppel cannot prove reliance on the representation if the possessor's representation and not the owner's was the proximate cause of his/her detriment. See *Universal Stores (Pty) Ltd v OK Bazaars (1929) (Ltd)* 1973 (4) SA 747 (A) at 761.

[46] Although an estoppel may be created by negligence it would appear that the doctrine is limited in its application. See in this regard *Union Government v National Bank of South Africa Ltd* 1921 AD 121 where Innes CJ stated as follows:

> *"Legal negligence consists in a failure to exercise that degree of care which, under the circumstances it was the duty of the person concerned to use towards another. It involves therefore the existence of a duty to take care owed to the complainant. Such a duty may arise in various ways. It may be specially imposed, as by statute; but, speaking generally, it either springs from a privity of relationship (contractual or other) between the parties concerned or is created by the circumstances of the case."*

[47] Referring to the circumstances of the case before him the learned Chief Justice proceeded:

> *"If there was any duty to take care owed by the post master to future holders of postal notes, it must be looked for, not in relationship, for there was none, but in the circumstances of the case. Every man has a right that others shall not injure him in his personal property by their actions or conduct, but that involves a duty to exercise proper care. The test as to the existence of the duty is, by our law, the judgment of a reasonable man. Could the infliction of injury to others have been reasonably foreseen. If so, the person whose conduct is in question must be regarded as having owed a duty to such others – whoever they might be – to take due and reasonable care to avoid such injury. There are innumerable cases in which South African Courts have dealt with these questions by an application of the extended principles of the Aquilian Law. But, speaking generally there will be found in them this element: that the injury to personal property relied upon was the direct result of the act done or the force set in motion. The obstruction placed in the road, the vehicle unskilfully driven, the fire carelessly kindled, in these and numerous other cases the injury was due to the direct operation of the act or agency complained of. Here the alleged injury did not result from the direct operation of the conduct complained of."*

[48] Similar considerations are at play in the present matter. That the fourth respondent loaned large sums of money on the strength of the security offered by the property is primarily attributable to a misrepresentation by the fourth respondent. He represented that he was the true and exclusive owner of the property and entitled to encumber it with further mortgage bonds when in truth he knew that this was not the case and at the very least he required the applicant's consent to any such step. It is so that the fifth respondent was presumably encouraged or strengthened in its view by reason of the title deeds to the property indicating that the fourth respondent was its sole owner. However, in my view, the primary representation was not the applicant's failure to have her interest endorsed on the title deeds but the fourth respondent's fraudulent misrepresentation that he was the sole owner of the property and entitled to encumber same.

[49] Having regard to the fact that the doctrine of estoppel is equitable I consider that in the circumstances of this matter, even assuming that the applicant was negligent in failing to assert her rights by having her interest endorsed on the title deeds, it would be unfair in the circumstances of this matter to hold that as a result the property must held to be burdened by the further mortgages incurred by the fourth respondent after the divorce. In reaching this conclusion I also take into account that the beneficiary of those loans was the fourth respondent alone and that the fifth respondent retains a full claim against the fourth respondent for such monies.

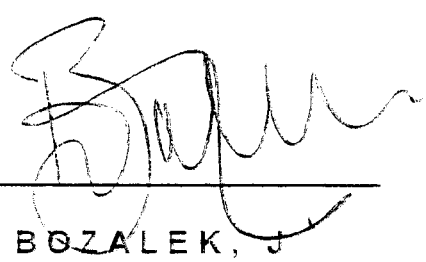
[50] In the circumstances I hold that the defence of estoppel put up by the respondents cannot succeed and that the applicant is entitled to the relief sought in prayers 9 and 10 (prayer 8 being superfluous), namely, a declaration that the post-divorce bonds are cancelled and directing the sixth respondent to cancel the bonds as registered against the title deeds to the property.

COSTS

[51] The applicant seeks the costs of this application as well as the costs of the anterior urgent application which interdicted the transfer of the property following the sale in execution. Those costs were reserved for the determination of the trial court in this application. The applicant sought all costs on an attorney/client basis but I can see no warrant for a punitive costs order not least because the various respondents who actively opposed this application were fully entitled to do so.

[52] In the result the following order is made:

1. Rescinding the order granted by the Registrar of the Western Cape High Court on 25 June 2008 under case number 12689/07, whereby it was ordered that the immovable property known as Erf 129302 Cape Town at Cape Town in the City of Cape Town, Cape Division, in the Province of the Western Cape, in extent 70 square metres, held by deed of transfer no T23994/1988 (hereinafter referred to as the 'the immovable property') is declared to be specially executable;
2. Setting aside the warrant of execution issued in respect of the immovable property under case number 12689/07;
3. Setting aside the sale in execution of the immovable property to the Wizard Investment Trust on 27 January 2009;
4. Declaring applicant to have been the sole owner of the immovable property since 14 May 2003;
5. Directing sixth respondent to endorse the title deeds of the immovable property to reflect the fact that applicant is the sole owner of the immovable property and has been the sole owner thereof since 14 May 2003;
6. Directing the sixth respondent (the Registrar of Deeds) to cancel the bonds numbered B48673/2005; B110763/2005; B23862/2006 and B87088/2006 as registered against the title deeds to the immovable property;
7. Directing the first to fifth respondents to pay the applicant's costs in the application, which costs shall include the costs incurred in respect of the interlocutory application brought under case number 5419/09, jointly and severally, the one paying the others to be absolved.



BOZALEK, J
JUDGE OF THE HIGH COURT