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

Case no: 6943/2008

ABDULLAH ARMIEN	First Plaintiff
EBRAHIMA ARMIEN	Second Plaintiff
SAAID ARMIEN	Third Plaintiff
GABEBA PIETERSEN	Fourth Plaintiff
RIDHWAAN ARMIEN	Fifth Plaintiff
FALDIEN ARMIEN	Sixth Plaintiff
NAJWA ARMIEN	Seventh Plaintiff
SHAMIMA ARMIEN	Eighth Plaintiff
SEBASTIAN PETERSEN	Ninth Plaintiff
MASAT SMITH N.O.	Tenth Plaintiff
v	
ABUBAKAR ARMIEN	First Defendant
MASTER OF THE HIGH COURT OF SOUTH AFRICA (CAPE OF GOOD HOPE PROVINCIAL DIVISION)	Second Defendant
ABSA BANK LIMITED	Third Defendant
REGISTRAR OF DEEDS	Fourth Defendant

Court: Acting Judge J I Cloete

Heard: 22, 23, 24, 28, 29, 30 November 2011 and 5 December 2011

Delivered: 25 January 2012

JUDGMENT

CLOETE AJ:

Introduction

[1] The 1st to 6th plaintiffs (all siblings, hereinafter referred to as *'the plaintiffs'*) sue in their capacities as the intestate heirs of the estate of their late mother Mariam

Armien (*'the deceased'*). The 7th to 10th plaintiffs are cited as interested parties in their capacities as the intestate heirs of the subsequently deceased Mogamat Armien (*'Mogamat'*). The latter was the son of the deceased and the plaintiffs' sibling.

[2] The plaintiffs allege that the 1st defendant, also their sibling and an intestate heir of the deceased's estate, fraudulently caused an immovable property, being Erf 33989, Cape Town at Bonteheuwel, also known as 15 Bracken Street, Bonteheuwel (*'the property'*), previously registered in the name of the deceased, to be transferred into his name as sole owner thereof. They claim that the 1st defendant caused certain marks purporting to be their respective signatures, alternatively by photocopying their signatures, to be placed upon a document in which they ostensibly repudiated their claims to the estate of the deceased and consented to the property being transferred into the name of the 1st defendant to enable him to acquire sole ownership thereof. The 2nd, 3rd and 4th defendants are cited as interested parties. They do not oppose the relief sought by the plaintiffs.

[3] The plaintiffs essentially claim orders directing the 1st defendant to transfer to them (and to the 7th to 10th plaintiffs) unencumbered, undivided shares in the property in accordance with their respective entitlements under the laws of intestate succession. Accordingly the 1st to 6th plaintiffs each claim transfer of an undivided 1/8th share and in respect of the 7th to 10th defendants, transfer to each of an undivided 1/32th share. The plaintiffs also seek costs against the 1st defendant on the scale as between attorney and own client.

[4] The 1st defendant denies the plaintiffs' allegations and opposes all of the relief sought. He has also raised a special plea of prescription which, for the sake of practicality, was dealt with as one of the evidential issues during the trial.

Background

[5] The deceased and her children resided at the property (which was registered in her name) for a number of years. It was considered by all of them to be their family home. As time passed, some of the children left the property and set up home elsewhere with their spouses and children. Others returned from time to time, residing for various periods at the property. When the deceased passed away on 31 May 1998, those residing with her at the property were Mogamat, the 1st defendant, the 6th plaintiff and his wife and the 7th plaintiff, Mogamat's daughter, who had been raised by the deceased as her own. The deceased died unmarried and intestate. The property was unencumbered at the time of her death. Mogamat subsequently passed away, also unmarried and intestate, on 16 December 2004. He was survived by four children, being the 7th to 9th plaintiffs, as well as a minor child Zaida Smith represented by the 10th plaintiff.

[6] The 1st defendant was appointed as executor of the deceased's estate in terms of letters of authority issued by the 2nd defendant on 21 May 2001. Precisely what document or documents were signed by the siblings, and lodged with the 2nd defendant for this purpose, is not entirely clear, but all are agreed that the 1st defendant was properly appointed as executor. The reasons for his appointment are in dispute and I will turn to these when evaluating the evidence.

[7] What forms the crux of the dispute is the document allegedly executed by the 1st to 6th plaintiffs and the late Mogamat during January 2002. For sake of convenience I will refer to this document as the *'Undertaking'*. It is in terms of the latter that both the plaintiffs and Mogamat purportedly repudiated their claims in respect of the deceased's estate and consented to the property being transferred into the name of the 1st defendant. The Undertaking is considered in some detail below.

[8] It was as a result of the Undertaking that the property was transferred to the 1st defendant on 11 November 2002 and registered as such by the 4th defendant. The 1st defendant subsequently and on 14 December 2005 caused a mortgage bond to be registered over the property in favour of the 3rd defendant in the amount of R200 000. His evidence was that he has only drawn approximately R100 000 out of the mortgage bond account and that at present there is a balance owed to the 3rd defendant of some R85 000.

[9] The plaintiffs contend that they only became aware that the property had been transferred into the name of the 1st defendant, and that a mortgage bond had been passed over the property, during September 2007, as a consequence of which they instituted these proceedings during April 2008. The plaintiffs have also laid a charge of fraud against the 1st defendant, and the matter is currently under investigation.

[10] Apart from his denial of any wrongdoing, the 1st defendant has claimed that the plaintiffs' cause of action has prescribed in that the transfer of the property took place in 2002, that at the time of the transfer of the property the plaintiffs were all aware thereof and consented thereto, and that inasmuch as more than three years had

elapsed prior to the institution of these proceedings, the plaintiffs' claim has prescribed in terms of s 10(1) as read with s 11(d) of the Prescription Act No 68 of 1969 (*'the Prescription Act'*).

The applicable legal principles

[11] Before turning to evaluate the evidence, it is necessary to consider whether the plaintiffs' claim is *'a debt'* for purposes of extinctive prescription within the meaning of the Prescription Act, whether the plaintiffs' claim is vindicatory in nature (i.e. the *rei vindicatio*), and the incidence of the burden of proof in the determination of this matter.

[12] In *Staegemann v Langenhoven* 2011 (5) SA 648 (WCC) the court was faced with a similar issue, albeit relating to the return of a motor vehicle and thus movable property. In that case the applicant sought to recover his motor vehicle which had been misappropriated and ultimately sold to the first respondent, who was an innocent purchaser. The first respondent resisted the claim, contending that the applicant's *rei vindicatio* was a debt within the meaning of s 10 of the Prescription Act and, because three years had since elapsed, the debt had prescribed in terms of s 11(d) thereof. At 650J-655B Blignault J analysed the relevant authorities. I propose to summarise the findings made by him as follows:

12.1 The answer lies in the fundamental distinction between a real right and a personal right (at 651E);

12.2 The object of a real right is a thing. Ownership, being a real right, avails the owner of the *rei vindicatio*, i.e. the right to recover the thing in question from anyone in possession thereof (at 652A-F; see also the authorities cited therein);

12.3 On the other hand, the object of a personal right is some sort of performance by another, often coupled with a duty to counter-perform (at 652A and F-H). Put differently, an obligation is equivalent to a personal right, and not a real right;

12.4 The Prescription Act recognises this distinction. Real rights are subject to acquisitive prescription (see Chapters 1 and 2 thereof) and personal rights to extinctive prescription (in Chapter 3 thereof which incorporates ss 10 and 11 referred to above) (at 652I-J and 653F);

12.5 Since the *rei vindicatio* is a claim to ownership in a thing, it is a real right which is subject to acquisitive prescription; it cannot be considered a debt subject to extinctive prescription.

[13] In my view, and by parity of reasoning, the same principles must apply in respect of a claim based on ownership of immovable property or, as is the case in the present matter, undivided shares in an immovable property. The plaintiff's claim is clearly founded on the *rei vindicatio* – they became owners of undivided shares in the property under the laws of intestate succession upon the death of the deceased. Accordingly, the plaintiffs' claim against the 1st defendant is subject only to the provisions of Chapter 1 of the Prescription Act. Section 1 (contained in Chapter 1) provides as follows:

*'**1. Acquisition of Ownership by Prescription.** – Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.'*

[The remaining provisions of Chapter 1 and Chapter 4 of the Prescription Act do not apply in the present matter.]

[14] Accordingly, the 1st defendant cannot rely on the provisions of s 10(1) as read with s 11(d) of the Prescription Act, and the defence raised in his special plea must fail.

[15] I now turn to the incidence of the burden of proof.

[16] The plaintiffs rely on the fraud of the 1st defendant. They must accordingly show on a balance of probabilities that: (a) there was a misrepresentation on the part of the 1st defendant, which has also been expressed as *'a perversion of the truth'* (see Lawsa, 2nd Ed, Vol 6 at para 308); (b) that the misrepresentation was unlawful, which, if fraudulent, it would *ex hypothesi* clearly be; (c) that the 1st defendant's misrepresentation caused the plaintiffs prejudice (in the present matter, financial prejudice); and (d) an intention to defraud on the part of the 1st defendant (which, for obvious reasons, overlaps with (a) and (b) above).

[17] The 1st defendant essentially relies on the defence of abandonment. He claims that when he received the Undertaking from the 1st plaintiff, it was already signed, apparently by his other siblings. He has no personal knowledge of whether the Undertaking was signed by the 1st to 6th plaintiffs and the late Mogamat since it was not signed in his presence. He denies any fraud on his part. He also claims that the execution of the Undertaking by his siblings was consistent with a discussion which he alleges took place on the evening of the deceased's funeral, at which, he claims, all of the siblings were present and at which it was decided that he, in accordance with the wishes of the deceased, would inherit the property. He denies that he acted unlawfully in having the property transferred into his name, alleging that in fact the 1st plaintiff

assisted him in arranging the transfer.

[18] Essentially the same principles appear to apply to abandonment as to waiver (in cases dealing with ownership of a thing, abandonment is the appropriate legal concept, whereas in cases dealing with an obligation, it is waiver): see the *Staegemann* case at 655C.

[19] In *Laws v Rutherford* 1924 AD 261 at 263 Innes CJ dealt with the issue of onus when raising the defence of waiver as follows:

'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances.'

[20] In *Meintjes NO v Coetzer and Others* 2010 (5) SA 186 (SCA) the 1st and 2nd defendants had fraudulently obtained transfer of certain portions of a farm owned by their late mother. In a vindicatory action brought by the executor of her estate, the 1st and 2nd defendants had pleaded in the alternative that if it was found that they had fraudulently transferred the portions in question, then in that event the deceased had known of the transfers but failed to take any action to reclaim them. She had accordingly expressly waived or abandoned her right to claim return thereof. Shongwe JA (delivering judgment on behalf of the majority) said at 189F-190D that:

[8] The plaintiff's claim is founded on rei vindicatio. *The first and second defendants sought to counter by resorting to the flimsy defence of waiver which was doomed to fail from the moment it was made. The plaintiff contends, correctly in my view, that the deceased never lost her right of ownership, notwithstanding the fact that portions 2 and 3 of the farm had already been transferred and registered in the names of the first and second defendants by illegal means. In* Legator McKenna Inc and Another v Shea and Others 2010 (1) SA 35 (SCA) *([2008] ZASCA*

144), in para 22, Brand JA said the following:

'[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or "saaklike ooreenkoms". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A) at *922E - F;* Dreyer and Another NNO v AXZS Industries (Pty) Ltd *supra in para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg* Preller and Others v Jordaan 1956 (1) SA 483 (A) *at 496; Klerck NO v Van Zyl and Maritz NNO supra at 274A - B; Silberberg and Schoeman op cit at 79 - 80).'*

(See also Du Plessis v Prophitius and Another 2010 (1) SA 49 (SCA) *([2009] ZASCA 79), wherein Ponnan JA referred to* Legator *with approval.)*

[9] As we know, real rights may be acquired by various modes that are not reflected in the deeds office, for example, by prescription, expropriation, etc. In such circumstances the owner can trump a bona fide possessor who had acquired the property from the person registered as owner in the deeds registry. Under the negative system of registration, which was adopted in South Africa from Roman-Dutch law, the registrar of deeds plays a rather passive role. Although he examines every deed carefully before registering it, mistakes do happen. For example, where the signature of the transferor is forged, as is the case in the matter before us, the court will order rectification of the deeds registry in favour of the original owner. This will be so, even against the bona fide acquirer. In the present case, a fortiori, the first and second defendants are not bona fide acquirers, as they admittedly forged the deceased's signature. (See also Preller and Others v Jordaan 1956 (1) SA 483 (A) *at 496.)'*

[21] The *locus classicus* on the burden of proof is *Pillay v Krishna and Another* 1946 AD 946 at 951-952 where Davis AJA said:

'The first principle in regard to the burden of proof is thus stated in the Corpus Juris *... If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it ... Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded* quoad *that defence, as being the claimant: for*

his defence to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet *states in the next section as follows: "He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute" '.*

[22] Having regard to the principles set out above, I agree with the submission of plaintiffs' counsel that, whilst the onus rests on the plaintiffs to prove their entitlement to the relief which they seek on a balance of probabilities, the burden of proof rests initially upon them to establish their case on a *prima facie* basis whereafter the burden of proof shifts to the 1st defendant to prove his defence of abandonment.

Evaluation of the evidence

[23] The 1st to 5th plaintiffs as well as the 1st plaintiff's wife Sharifa Latief testified on their behalf. The 6th plaintiff did not testify. On the fifth day of the trial his counsel placed on record that the reason therefor was that since the trial had run over considerably from the estimated two to three days, the 6th plaintiff was unable to take any further leave from his employment.

[24] 1st Defendant testified as did his wife Ilhaam Abrahams and a friend, Ismail Bean, on his behalf.

[25] A number of matters were canvassed during the course of evidence but for purposes of determination of this matter, the evidence regarding three central issues appears to be the most relevant. These are firstly, the deceased's wishes; secondly, the circumstances giving rise to the appointment of the 1st defendant as executor of the deceased's estate; and thirdly, the *'execution'* of the Undertaking.

The deceased's wishes

[26] At the time of her death the deceased's only assets were the property and its contents, the latter being of minimal material value. The 1st plaintiff testified that he was present at a discussion which took place with the deceased approximately three months prior to her death. Also present were the late Mogamat and the 1st defendant (the 7th plaintiff was at the property but not present at the discussion). The deceased specifically expressed the wish that the property was not to be sold after her death, that it was to remain in the family, and that it was always to be regarded as a family home.

[27] It was for this purpose that the deceased wished the 1st plaintiff, as the oldest sibling, to *'have it'*. He declined since he lived elsewhere and did not wish to take on the responsibility. He also felt that all of the siblings should acquire a stake in the property. He distinctly recalled that at that point in the discussion the 1st defendant had walked out of the room, moving down the passage, when he offered, shouting back into the room, to act as custodian of the property in order to give effect to the deceased's wishes. She agreed. Although Mogamat was older than the 1st defendant (who is the youngest of the siblings), it was felt that he lacked responsibility and that it would thus not be wise for him to act as custodian. This did not sit well with Mogamat who resented the decision until his death in 2004.

[28] The 1st plaintiff vehemently denied the 1st defendant's version that it was the deceased's wish – apparently expressed on more than one occasion to the siblings – that he (i.e. the 1st defendant) should alone inherit the property. The 1st defendant contended that this was because all of the other siblings had their own properties at

the time and that he had been principally responsible for his mother's care. However during cross-examination he conceded that this was not the case, admitting that not all of the siblings owned their own properties and that he had only been partially responsible for assisting in his mother's care, whereas other family members had assisted her both physically and financially.

[29] The 1st plaintiff also testified that it was at the same discussion that the deceased expressed the wish that her granddaughter, the 7th plaintiff, should inherit her bedroom furniture. It is common cause that the family carried out the deceased's wishes regarding this furniture.

[30] The 2nd plaintiff described the deceased's wishes concerning the property as she expressed them to him as follows: *'That the house must never be sold and any family member in need of a house or shelter can come and live in the house'*. He testified that in accordance with these wishes *'All of us – all of the brothers and sister – would be the owners of the house'* after the deceased's death. He rejected the 1st defendant's version as a lie. (It should be mentioned at this juncture that it became apparent during the course of testimony that none of the plaintiffs had, as lay persons, ever properly applied their minds to the legal formalities required in regard to the property after the deceased's death).

[31] The 3rd plaintiff testified that he specifically recalled the words used by the deceased when expressing her wishes about the property to him; she described it as being a *'herberg'* or sanctuary for *'the entire family'*. He similarly vehemently denied the 1st defendant's version.

[32] The 4th plaintiff confirmed the deceased's wishes regarding both the property and bedroom furniture in her testimony; she said that *'We were all heirs and all of us could have a share in the house. If any of us needed a place to stay we could go there'.* She testified that the 1st defendant's version of the deceased's wishes had never been expressed to her by the deceased.

[33] The 5th plaintiff was adamant that it was always the deceased's wish that the property would remain a family home after her death. She had told him this personally. He had no knowledge of her wishes regarding her bedroom furniture, which it seems she expressed shortly before her death at a time when he was not in Cape Town.

[34] It was in accordance with the deceased's wishes regarding the property that some time after her death the 5th plaintiff returned to reside there permanently. He never sought, nor was he asked by the 1st defendant, to seek permission to reside there and for the entire period he has resided at the property he has never been requested to pay rental or any other consideration for his occupation. In his words *'My mother's wish was that the house belongs to all of us; no-one can say that it is his house only; no-one objected to me staying there'.* He described his entitlement to reside there as being based on that of a *'share owner'.* He was clear that the deceased had never preferred one of her children above the others and rejected the 1st defendant's version outright.

[35] I was impressed by the manner in which the plaintiffs gave evidence on this issue. They were consistent and were able to recall very specific aspects relating to the deceased's wishes as expressed to them, lending credence to their version.

[36] The same unfortunately cannot be said of the 1st defendant. During his testimony he claimed that he had told the deceased that he would look after her until her death. She had apparently replied that if he did so *'I will give you the house'*. The 1st defendant also claimed that the deceased had informed the other siblings of this on various occasions at family gatherings. That these wishes had been conveyed at family gatherings had not been put to any of the plaintiffs who testified. The 1st defendant even claimed that the deceased was so adamant in her wish that he alone should inherit the property that she had accompanied both him and the 1st plaintiff to consult with an attorney, Mr Badroodien, in order to obtain advice on how to transfer the property to the 1st defendant upon the deceased's death. However, this had not been put to any of the plaintiffs in cross-examination. It also contradicts the 1st defendant's earlier testimony that he had attended on the office of the 2nd defendant some time after the deceased's death – in early 2001 – together with the 1st plaintiff specifically for the alleged purpose of ascertaining the steps required in order to transfer the property into his name. He had stated that *'I thought we needed to go to the Master to get it done'*. This had similarly not been put to the 1st plaintiff in cross-examination.

[37] In his cross-examination the 1st defendant then claimed that this alleged visit to Mr Badroodien had taken place some two years prior to the deceased's death. He stated that at the time the deceased was *'immobile'* and had remained in the vehicle whilst he and the 1st plaintiff consulted Mr Badroodien. The 1st defendant alleged that the deceased told the 1st plaintiff that the property was to be transferred into his (i.e. the 1st defendant's) name. This had also not been put to the 1st plaintiff when he testified. The 1st defendant said that Mr Badroodien explained the process required

and that the deceased *'needed to get proof that the house is mine'*. He was unable to satisfactorily explain why the *'proof'* was not subsequently furnished to Mr Badroodien or why the latter was in fact never consulted again thereafter. The explanation furnished by the 1st defendant was that *'The process took some time'*. He then changed his evidence and claimed that Mr Badroodien had informed the 1st plaintiff that only the latter would be required to consult with him again and that he (i.e. Mr Badroodien) would then *'do the rest'*. He thereafter changed his evidence yet again, claiming that the deceased had given the 1st plaintiff *'the mandate'* that the property was to be transferred into the 1st defendant's name whilst she was still alive. Again, none of this had been put to the 1st plaintiff.

[38] When cross-examined on the deceased's alleged wishes, the 1st defendant changed his version and said that it was because *'all of the others had married and had their own dwellings and I was the last in the house so she would make sure that I would get the house'* adding, as an apparent afterthought, that *'I was also looking after her and if someone needed a place then I can assist them'*. Earlier in his testimony he had however confirmed that he was not the last and only sibling residing at the property at the time. He also went on to concede that in assisting in the care of his mother, he had not expected anything from her in return.

[39] The impression which I gained from the 1st defendant's testimony on this aspect was that he simply made it up as he went along. He was evasive, clearly untruthful in certain respects, and tailored his evidence as cross-examination revealed the difficulties in his version.

[40] Having regard to the respective versions of the witnesses, their credibility and the consistencies and inconsistencies in their evidence, I am satisfied that the balance of probabilities favours the version of the plaintiffs, namely that it was never the intention of the deceased that the 1st defendant alone should inherit the property.

The circumstances giving rise to the appointment of the 1st defendant as executor

[41] The 1st defendant testified that it was at a family meeting held directly after the deceased's funeral that a decision was taken, allegedly at the instance of the 1st plaintiff, that the property should be transferred into his (i.e. the 1st defendant's) name in order to give effect to the wishes of the deceased. It was for this reason that he was subsequently appointed as executor of the deceased's estate. He did not proffer an explanation as to why it was necessary that such a decision be taken when, on his own version, the siblings knew of this before the deceased's death.

[42] The plaintiffs who testified (save for the 5th plaintiff) confirmed that a family meeting was indeed held. Although they differed in certain respects on the full extent of what was discussed at the meeting, all were adamant that there had been no discussion whatsoever relating to the property. The 3rd plaintiff testified that a discussion of this nature *'would have been impossible. My mother's body wasn't even cold in the grave....It is impossible to me as a Muslim to talk about worldly things on the night of a funeral. If there had been such a discussion, or if it was raised by one of my siblings, I would have stopped it.'* The 5th plaintiff was not present at the meeting since he was working up country at the time.

[43] The evidence of all of the plaintiffs (save again for the 5th plaintiff) was that, over the months that passed after the deceased's death, one or other of them were approached by the 1st defendant for assistance in settling certain municipal accounts relating to the property which had fallen into arrears. After the third occasion (when payment had to be made to a firm of attorneys to whom the rates arrears had been handed over for collection) the siblings (again excluding the 5th plaintiff) decided that the situation could not continue and that one of them should be placed in charge of the running and maintenance of the property. The obvious choice was the 1st defendant. He had previously offered to do so; Mogamat, it was felt, lacked the necessary responsibility; and the other siblings did not wish to take on this additional burden for various reasons.

[44] A document was then drafted. Who exactly drafted it, in what format it was prepared, and who was responsible for obtaining the signatures of the various siblings is not entirely clear. However to my mind not much turns on this since it is common cause that the 1st defendant was duly appointed as executor by the 2nd defendant in May 2001. Although certain of the plaintiffs disputed that the photocopy of the document procured by their attorney from the 2nd defendant was the document which they recalled having signed; the 5th plaintiff was adamant that he had never signed any document at all; and their evidence was that Mogamat refused to agree to the 1st defendant being appointed executor, the fact of the matter is that the 2nd defendant was handed a Nomination as Executor apparently signed by all of the siblings and bearing their identity numbers, in terms of which the 1st defendant was nominated as executor of the deceased's estate. The whereabouts of the original of this document are not known. The significance thereof is however that firstly, it appears to be the only

document which on the face of it was signed by all of the siblings prior to the execution of the Undertaking to which I refer below and secondly, on his own version, not only was the document in the 1st defendant's possession prior to it being handed in at the office of the 2nd defendant, but he made a copy of it for his own safekeeping.

[45] The evidence of the plaintiffs (save again for the 5th defendant) was that by the appointment of the 1st defendant as executor he would bear the responsibility of ensuring that the property was maintained and its running costs were met; he was free to rent out the property, or portions thereof, to tenants; and all rentals received would be utilised by him towards the costs attendant upon the property. Should any difficulty arise, the 1st defendant was free to approach the plaintiffs and a family decision would be made as to how to deal with it. Consistent with this decision was that none of the plaintiffs ever requested, or received, any rental from tenants at the property (of which there appear to have been a number over the years). The plaintiffs also confirmed that since the appointment of the 1st defendant as executor he had not again approached any of them for assistance. The plaintiffs were absolutely adamant that they had never had any intention of divesting themselves of their ownership of the property.

[46] The 1st defendant denied all of this and again his evidence was most unsatisfactory in various material respects. Initially he claimed that he had never had occasion to approach his siblings for assistance regarding unpaid municipal accounts. They had always been paid either by himself or by the 7th plaintiff. He then changed his evidence and said that the rates account had indeed fallen into arrears but that he only realised this to be the case during 2002 when he was in the process of taking transfer of the property into his name, and was required to settle the account in order

to obtain a rates clearance certificate. He then however conceded that it was possible that the account had fallen into arrears prior to 2002 and that he was aware of at least one occasion when the account had fallen into arrears after he had taken transfer of the property. A current monthly municipal account was handed in as an exhibit by the plaintiffs during the course of the 3rd plaintiff's testimony. It reflected that as at 14 November 2011 the municipal account was in arrears by the amount of R3 540.78. This equates to approximately 12 months of arrears.

[47] The 5th plaintiff testified that, apart from himself, there are currently six other occupants of the property. Of these, three are non-family members and one is conducting a small business from the property. The 5th plaintiff also testified that one of the family members is the former wife of the late Mogamat and that she had confirmed to him that she is paying rental. The occupant of an outside room at the property, a Mr Diedricks, pays rental of R1000 per month. This had been confirmed to the 3rd plaintiff by Mr Diedricks' daughter. Also according to the 3rd plaintiff, the 1st defendant attended at the property at the end of every month and it was the 3rd plaintiff's understanding that the 1st defendant did so for the purpose of collecting rentals. All of the other plaintiffs who testified likewise confirmed that it was their understanding that the occupants of the property (save for the 3rd and 6th plaintiffs) were indeed effecting payment of rental to the 1st defendant, and that others who had occupied the property in the past had also done so.

[48] The 1st defendant denied that he had ever charged rental to any of the occupants of the property. He attempted to explain this by claiming that certain of the occupants were *'keeping the house clean'*, another was ensuring that the property was

not vandalised, and that he did not feel it right to charge rental to another for occupation of a dwelling which was not completed. However, under cross-examination he conceded that he was entitled to charge rental, stating that *'Wherever you stay, you need to pay rent. I have never seen anything like that* [staying somewhere without having to pay rental], *except perhaps if you stay in a shack on vacant land'.* Although it was open to the 1st defendant to have the occupants of the property testify on his behalf he did not avail himself of this opportunity. When pressed for an explanation as to why he had not exercised his rights, on his version, as owner of the property, he became evasive, claiming that *'I am still carrying out my mother's wish – giving them a place to stay'.* However, he later conceded that he had in fact approached an attorney to attempt to evict the 3rd plaintiff from the property allegedly on the grounds of the poor behaviour of his children.

[49] In short the impression which I gained was that the 1st defendant again simply tailored his evidence as he testified. At no stage did he explain why he believed that his appointment as executor conferred upon him some sort of right of ownership of the property, and on the fundamental aspects relating to his appointment as executor, the explanations proffered by him were generally either not credible or in certain instances bordered on the nonsensical.

[50] Having considered the respective versions of the plaintiffs and the 1st defendant, I again find that the 1st defendant's version must be rejected in favour of the plaintiffs' version. I thus find that in appointing the 1st defendant as executor of the deceased's estate, the plaintiffs had no intention of divesting themselves of any of their rights of ownership in the property, nor did their conduct subsequent thereto evidence

any such intention.

The *'execution'* of the Undertaking

[51] As I have said, the Undertaking is a document allegedly executed by the 1st to 6th plaintiffs and the late Mogamat in favour of the 1st defendant during January 2002. It is a typed document bearing the heading *'Undertaking in Respect of the Estate of the Late Mrs Mariam Armien'*. The body of the undertaking reads as follows:

'We, the dependants and issue of the late Mrs Mariam Armien, registered estate number: 5252/99 hereby repudiates (sic) *our claim in respect of the late Mariam Armien and by placing our signatures next to our respective names and consenting thereto that the Immovable Property of the late Mariam Armien be transferred in the name of our brother ABUBAKAR ARMIEN to acquire sole ownership in terms of the aforementioned property.*
THUS DONE AND SIGNED AT ***CAPE TOWN*** *THIS THE DAY OF JANUARY 2002'.*

[52] Directly under the date, on the left hand side, are the signatures of two alleged witnesses. During the course of evidence the 1st plaintiff's wife Sharifa Latief testified that the signature of the first witness appeared to be hers, although she denied ever having signed the Undertaking as a witness. Ms Latief confirmed that she had witnessed a previous document appointing the 1st defendant as executor, but no other document. The 1st defendant's wife Ilhaam Abrahams who testified on behalf of the 1st defendant identified the signature of the second witness as being hers, although she was candid that she had not witnessed anyone actually signing the Undertaking. She said that she was merely presented with it, apparently by the 1st plaintiff (who denied this) in the presence of his wife (who also denied this) and the 1st defendant, and informed that she was required to sign in order to witness that *'the property is to go into the name of'* the 1st defendant.

[53] Roughly adjacent to the signatures of the two "witnesses" on the right hand side is the stamp of an Advocate Michael Petersen who is described as a practicing advocate and *ex officio* Commissioner of Oaths. His address also appears as well as a signature above the words *'Commissioner of Oaths'*.

[54] Under the signature of the two "witnesses" appears the word *'DEPENDANTS'*. The 1st to 6th plaintiffs, together with the late Mogamat, are listed thereunder as "dependants" and next to each name appears an identity number in handwriting together with what purports to be their signatures. The whereabouts of the original of this document are not known.

[55] The 1st defendant's explanation for the existence of this document is the following. He was informed (he did not say by whom) that *'I needed another document to put the property into my name'*. It was for this purpose that he attended on Adv Petersen and furnished him with a copy of what the 1st defendant referred to as the *'Executor'* document. Adv Petersen then drafted the Undertaking. When the 1st defendant collected it from his office only the typed portions appeared on the document. The 1st defendant then took the Undertaking to the 1st plaintiff who at some stage thereafter brought it back to the 1st defendant bearing the identity numbers and signatures of the "dependants" as also the signature of the 1st plaintiff's wife as the first witness. The 1st defendant could not recall when exactly he had collected the document from Adv Petersen, but stated that it was during the course of January 2002 *'as stated on the document'*. The document was apparently returned to him by the 1st plaintiff a month or two thereafter. According to the 1st defendant, the 1st plaintiff then accompanied him to the attorney Mr Badroodien to enable the latter to proceed with

the transfer.

[56] During cross-examination the 1st defendant was referred to a letter written by Adv Petersen dated 15 January 2002 and addressed to the 2nd defendant, the content of which reads as follows:

'Dear Sir/Madam

RE THE ESTATE OF THE LATE MARIAM ARMIEN

ESTATE NUMBER: 5252/99

I refer to the aforementioned and hereby annexed (sic) *a copy of the Undertaking of the dependants of the late Mrs Mariam Armien hereto for your attention.*

Any queries should be directed to the writer.'

[57] The 1st defendant was unable to explain why, if the Undertaking had indeed been returned to him by the 1st plaintiff a month or two after he collected it from Adv Petersen's office in January 2002, Adv Petersen had written a letter to the 2nd defendant enclosing the Undertaking on 15 January 2002. The 1st defendant was also unable to explain why the letter from Adv Petersen was addressed to the 2nd defendant when, on his own version, the 1st plaintiff had accompanied him (i.e. the 1st defendant) in delivering the original Undertaking, not to the 2nd defendant, but to Mr Badroodien. Apparently realising the corner in which he found himself, the 1st defendant attempted to explain away this material discrepancy in his evidence by suddenly claiming that Adv Petersen had in fact given him the letter of 15 January 2002 at the same time he collected the unsigned and uncompleted Undertaking from his office.

[58] All of the plaintiffs who testified were categoric that they had never seen the Undertaking prior to a copy thereof having been obtained by their attorney from the 2nd

defendant in contemplation of this litigation. They certainly had never signed it. The 1st plaintiff pointed out that his name had been misspelt. He denied that he had ever procured the signatures of his siblings on the document. He said that the signature next to his name was not his. The only occasion on which he had met Adv Petersen was when, on the recommendation of the 1st defendant, he approached Adv Petersen to assist him (i.e. the 1st plaintiff) and his wife to draft a will. He had briefly attended on Adv Petersen's office for this purpose without an appointment and he was requested by Adv Petersen to return at a later date, because the latter was busy. He did not meet Adv Petersen again.

[59] The unchallenged evidence of the other plaintiffs who testified was that they had never met Adv Petersen; they had not signed the Undertaking; that either their names on the Undertaking had been misspelt or the signatures appearing thereon were not theirs; and that they certainly never had any intention, at any stage, of transferring ownership of their respective shares in the property to the 1st defendant. Some of the plaintiffs who testified believed that the 1st defendant had somehow either copied or managed to transpose their signatures from the document which they had signed nominating him as executor. The 3rd plaintiff testified that certain of his personal documents (including his passport and others bearing his identity number and signature) had been stolen from the property and that these documents might have been used for this purpose. This evidence was not challenged.

[60] The 1st defendant conceded in cross-examination that he had never personally witnessed any of his siblings signing the Undertaking. He thus could not state as a fact that they had signed it. Adv Petersen was not called by the 1st defendant. Accordingly

his involvement in the creation of the Undertaking and how his signature apparently came to be on the document – when, on the 1st defendant's own version it was not signed in the presence of Adv Petersen – remains a mystery.

[61] In support of his version that the 1st plaintiff had accompanied him to Mr Badroodien to process the transfer of the property, the 1st defendant called Ismail Bean to testify on his behalf. The 1st defendant alleged that Mr Bean had accompanied both him and the 1st plaintiff to the office of Mr Badroodien. This had been denied by the 1st plaintiff, who testified that the only occasion on which he had consulted Mr Badroodien together with the 1st defendant was to obtain advice on the possibility of registering a family trust. Mr Bean had not accompanied them.

[62] Mr Bean's evidence was singularly unhelpful to the 1st defendant's case. The latter testified that when they attended on the office of Mr Badroodien he signed the transfer documents in his presence, at the same time effecting payment of Mr Badroodien's fee to attend to the transfer. This took place in the presence of the 1st plaintiff and Mr Bean. However, during Mr Bean's cross-examination it emerged that at the alleged meeting with Mr Badroodien no documents were signed nor was any payment made. He had stood to one side of the consulting room while the 1st plaintiff and 1st defendant stood a distance away with Mr Badroodien, only having a discussion. Mr Bean said that he *'could not hear everything they said'*.

[63] Although open to him the 1st defendant declined to call Mr Badroodien whose evidence, in my view, was crucial to the 1st defendant's case. It is also apparent from the title deed under which the property was transferred to the 1st defendant that the

conveyancer involved was one Shireen Ahmed of Shireen Ahmed-Kagee Attorneys. She was similarly not called to testify by the 1st defendant on his behalf.

[64] The plaintiffs testified that they became aware that the property had been transferred into the name of the 1st defendant only during the course of 2007. This came about as a result of the 5th plaintiff having established that the 1st defendant's mother-in-law had sent a prospective purchaser to the property. After certain of the plaintiffs had confronted the 1st defendant and were unable to resolve the dispute directly with him, the plaintiffs consulted with their attorney who procured copies of both the Nomination as Executor and the Undertaking from the 2nd defendant. Certain of the plaintiffs testified that even subsequent to the institution of proceedings they had attempted without success to reach a resolution of their dispute with the 1st defendant.

[65] Again, weighing up the versions of the respective witnesses on this issue, it is my view that the version of the plaintiffs is inherently credible and that the version of the 1st defendant must be rejected as untruthful. On a balance of probabilities the plaintiffs have shown that by some fraudulent means the 1st defendant procured what purported to be the signatures of the plaintiffs and the late Mogamat on the Undertaking. He then used this document in order to secure transfer of the property into his name without the knowledge or consent of the plaintiffs. The plaintiffs thus had no intention to transfer ownership of their undivided shares in the property to the 1st defendant. They have not abandoned their rights of ownership and they are entitled to the relief sought by them on the merits.

COSTS

[66] As I have said the plaintiffs claim costs against the 1st defendant on the punitive scale of attorney and own client. It is trite that special considerations must be present arising either from the circumstances of the case or from the conduct of the losing party before a punitive costs order may be made. In *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597 at 607 the Court, dealing with awards of attorney and client costs, stated as follows:

'The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the Court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

[67] Circumstances where such an order is appropriate include where a litigant has acted vexatiously, recklessly or maliciously, or where his conduct has been unworthy, reprehensible or blameworthy: see Joubert *'LAWSA'* 2nd edition vol 3(2) para 323.

[68] A court is also entitled to order an unsuccessful litigant to pay the successful party its attorney and own client costs, but the consideration of an award of this nature should be approached on the basis that firstly, it is proper in exceptional circumstances only; secondly, it should be borne in mind that the purpose of such an order should be to recompense the successful litigant as far as can be done; and thirdly, it should be ascertained what the attorney can recover from his or her client; see the same edition of LAWSA at para 316.

[69] Whilst I am satisfied that the conduct of the 1st defendant justifies an award of costs on a punitive scale, I do not have sufficient information as to what the plaintiffs' attorney can reasonably recover from his clients. During the course of argument plaintiffs' counsel referred to the 1st defendant's evidence on his apparent wealth. However, that does not assist me in establishing the actual financial means of any of the plaintiffs. Certainly some of them own property and are employed. On the other hand, some are retired and have dependants. But in my view it would be incorrect in light of the absence of any direct evidence in this regard to assume that the plaintiffs will be unable to meet a portion of their attorney and own client costs. In the circumstances I am satisfied that an award of attorney and client costs is appropriate.

CONCLUSION

[70] In the result I make the following order:

1. ***The 1st defendant is directed to do all things necessary, including the signing of all documents, to effect the transfer of an undivided 1/8th share of the immovable property situated at 15 Bracken Street, Bonteheuwel, being Erf 33989 Cape Town at Bonteheuwel (*'the property'*) into the names of each of the 1st to 6th plaintiffs within a period of 90 (ninety) calendar days from date of this order.***

2. ***The 1st defendant is directed to do all things necessary, including the signing of all documents, to effect the transfer of an undivided 1/32th share of the immovable property situated at 15 Bracken Street, Bonteheuwel, being Erf 33989 Cape Town at Bonteheuwel (*'the

property') *into the names of each of the 7th, 8th, 9th and 10th plaintiffs within a period of 90 (ninety) calendar days from date of this order.*

3. *In the event that the 1st defendant fails to comply with the provisions of 1 and 2 above, the Sheriff of the High Court, Cape Town is hereby authorised and directed to take all steps necessary in order to give effect thereto, subject thereto that all costs relating to both the Sheriff's attendances and the transfers shall in the first instance be borne jointly and severally by the 1st to 6th plaintiffs, subject to their right of recourse against the 1st defendant.*

4. *Simultaneously with registration of the transfers referred to in 1 and 2 above the 1st defendant shall take all steps necessary to cancel the mortgage bond held by the 3rd defendant over the property, including payment of any balance owing thereunder.*

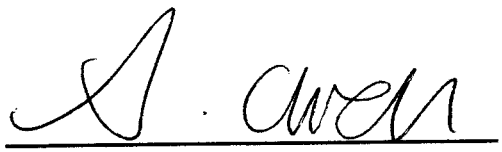
5. *The 4th defendant is hereby directed (subject to the requirements set out in the Alienation of Land Act 68 of 1981) to give effect to the provisions of 1 and 2 above.*

6. *The transfers referred to at 1 and 2 above shall be attended to by a conveyancer appointed by the 1st to 6th plaintiffs.*

7. *Leave is hereby granted to the 1st to 6th plaintiffs to approach this Court, without notice to the 1st defendant, for any amendments to this*

order as may be required by the 4th defendant in order to give effect to the terms hereof.

8. ***The 1st defendant shall effect payment of the 1st to 6th plaintiffs' costs on the scale as between attorney and client.***



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