

**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO:349/21

LP ZATU

Applicant

V

NC MADIKANE

1st Respondent

ABSA BANK LIMITED

2nd Respondent

REGISTRAR OF DEEDS, CAPE TOWN

3rd Respondent

NATIONAL PRIDE PROPERTIES

4th Respondent

THABO QOKO N.O.

5th Respondent

JUDGMENT DELIVERED ON THIS 9th DAY OF FEBRUARY 2022

FORTUIN, J:

A. INTRODUCTION

[1] This is an application by Ms L[...] P Zatu (“Zatu”) to set aside the transfer of immovable property, described as Erf 2[...], Khayelitsha, situate in the City of Cape Town (“the property”) effected pursuant to a written sale agreement (“the agreement”) by:

1.1 cancelling the title deed number T15[...];

1.2 cancelling the mortgage bond with registration number B77[...]; and

1.3 registering a title deed in respect of the property in the name of the applicant.

[2] The relief sought is opposed by the first respondent, Nosipho Caroline Madikane (“Madikane”) on the basis that she concluded an agreement during June 2017 with Zatu to purchase the property for an amount of R280 000.00.

[3] It is the first respondent’s case that the intention of the parties, i.e. to transfer the property on payment of R280 000.00, was achieved when the property was registered in her name on 18 April 2018.

[4] It is further the first respondent’s case that, should the court find in favour of the applicant, she will proceed with her counter application seeking an order that Zatu repays the purchase price plus interest.

B. COMMON CAUSE BACKGROUND FACTS

[5] Zatu is the surviving spouse of the late N[...] R[...] P[...] (“the deceased”) to whom she was married in community of property on 7 November 1992. Zatu was appointed as executor of the deceased estate on 20 March 2017.

[6] On 10 October 2016, after receiving a call from Thabo Qoko (“Qoko”), the fifth respondent, an estate agent employed by National Pride Properties (the fourth respondent), Zatu met with him and gave him a mandate to market the property and find a buyer and that he will be paid commission of R20 000.00. In July 2017, Qoko found Madikane as a buyer in line with the terms of the mandate he concluded with Zatu. The

Offer to Purchase was signed by Madikane together with someone who signed as “Zatu”.

[7] On 8 August 2017, Zatu attended at the offices of Velile Tinto Cape Inc (“VTC”) where she met with one Jody-Lee Harrington (“Jody”). It is common cause that Jody explained the terms of the transaction to Zatu during this consultation. She accordingly signed the required documents to pass transfer.

[8] During August 2017, Zatu corresponded with VTC regarding documents required to cancel the existing bond registered over the property. In compliance, Zatu forwarded a copy of her marriage certificate to VTC on 18 August 2017. Application in terms of s45(1) of the Deeds Registry’s Act 47 of 1937 was in fact made whereby Zatu, as executer of the estate of the deceased was granted permission with deal with the property as she pleased.

[9] Hereafter, Zatu changed her mind and decided to cancel the transaction. She conveyed this decision to Madikane telephonically, but she did not accept the cancellation.

[10] During January 2018, VTC requested Zatu to make payment of the municipal rates and taxes. Even though Zatu did not reply hereto, Qoko replied on her behalf indicating that Zatu was not in a financial position to settle the rates and taxes.

[11] On 4 March 2018, WWT Electrical attended to the property and an electrical certificate was obtained.

[12] On 11 April 2018, Qoko informed the attorneys for Madikane, Van der Berg Attorneys, that Zatu would be giving vacant occupation of the property on 14 April 2018.

[13] It is common cause that registration of the property occurred on 18 April 2018. Since this date, the full payment of the purchase price was made to the conveyancing

attorneys, and Madikane continues to pay the monthly bond instalments to the bank. Zatu and her children, however, remains in possession of the property. During July 2020, Madikane, as the registered owner of the property, instituted eviction proceedings against the occupants of the property (Zatu and her children).

C. APPLICANT'S VERSION

[14] Zatu's version is that, while in the Eastern Cape, she received a phone call from Qoko informing her that he obtained her contact details from the occupants of her property in Khayelitsha. They agreed to meet on 10 October 2016. During this meeting she asked Qoko to sell the property for the agreed price of R280 000.00, and that his commission of R20 000.00 was to be paid from the proceeds of the transaction. During October 2016, Qoko advised her that, because the property was registered only in the name of her late husband, she was obliged to first report his estate to the Master.

[15] It is her case that Qoko failed to attend a meeting with her to conclude the agreement for the sale of the property. Instead, he called her to advise that she needed to attend at the offices of VTC to conclude the transaction.

[16] At this meeting with Jody on 8 August 2017, a number of documents were presented to her. An offer to purchase was however not amongst these documents. After some delay in effecting transfer, due to problems relating to the cancellation of the bond, she advised VTC that she was no longer interested in transferring the property. She did not receive a response from VTC regarding her instruction to cancel the sale of her property. She did however receive eviction papers from Madikane during July 2020. This was also the first time that she discovered that the transfer did, in fact, proceed, against her wishes.

[17] Because she never received any communication from VTC after she cancelled the sale, she instructed her attorneys to investigate the transfer. According to her, her attorneys established that:

17.1 fraud was committed because the seller's signature on the Offer to Purchase was forged; and

17.2 fraud was committed in that the signature on the application for bridging finance was forged, as she never signed these documents.

[18] In her opinion, the sale agreement did not comply with the provisions of section 2(1) of the Act. In addition, no witnesses attested to the Offer to Purchase. It is therefore her case that Madikane's Offer to Purchase was not properly accepted by her. Moreover, that the transfer was tainted by fraud.

[19] It is further Zatu's case that, in light of the above circumstances, it is evident that she never intended to transfer the property.

D. FIRST RESPONDENT'S VERSION

[20] It is Madikane's version that she became aware that Zatu intended to sell her house when the property was advertised in a local newspaper on more than one occasion during 2016 and 2017. It was during mid-2017, when she once again saw the advert that she decided to make an Offer to Purchase the property.

[21] She signed an Offer to Purchase on 11 July 2017 for R280 000.00. She left the signed offer with Qoko, and he later advised that her offer had been accepted. She was subsequently advised that VTC was appointed as conveyancing attorneys. Both Madikane and Zatu was required to sign the transfer documents. Zatu signed on 8 August 2017.

[22] It is her version that she did receive a telephone call from Zatu, informing her that Zatu wanted to cancel the sale. However, she did not accept the unilateral cancellation of this agreement. The court is asked to consider the following events, which occurred

after August 2017 in support of Madikane's contention that Zatu did not convey her intention to cancel her transaction to "all concerned".

22.1 On 5 September 2017, Zatu was telephonically informed by Erasmus of Van Berge Attorneys of the progress of the transfer process.

22.2 On 1 November 2017, VTC enquired from Zatu whether she had any additional information regarding the bond registered over the property. She was informed that they were still not in possession of the correct details in order to prepare the required documentation to cancel the existing bond.

22.3 On 18 January 2018, VTC sent an e-mail to Zatu, requesting her to pay the municipal rates and taxes. Instead of indicating to them that she has cancelled the transaction, Qoko advised Van Berge Attorneys, on behalf of Zatu, that she was not in a financial position to settle the rates and taxes.

22.4 On 4 March 2018, WWT Electrical attended to the property to inspect and repair the electrical faults with the aim of issuing the requisite compliance certificate. The electricians obtained permission to enter the property from Zatu's children, who was occupying the property at the time.

22.5 On 11 April 2018, Qoko informed Van Berge Attorneys that Zatu would be giving vacant occupation of the property on 14 April 2018.

[23] It is further Madikane's case that that Zatu did not communicate her intention to cancel. Moreover, her alleged intention to cancel was never delivered in writing, nor was it accepted by Madikane.

E. RELEVANT LEGAL PRINCIPLES

[24] The **Alienation of Land Act 68 of 1981** prescribes the formalities to be complied with. Sec 2(1) in particular determines that:

“2 (1) No alienation of land after the commencement of this section shall, subject to the provisions of s28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

[25] Section 28(2) of the Act provides as follows:

“(2) Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.”

[26] These sections were at the centre of numerous decisions in our courts. It is trite that there are two requirements to be met before ownership can pass. Firstly, delivery, which in the case of immoveable property is effected by registration of the transfer in the Deeds Office, and, secondly, a real agreement between the parties. In this regard see **Du Plessis v Propitius and Another**¹.

[27] The question to be asked here is which of the documents make up the real agreement? Is the Deed of Sale merely the underlying agreement reflecting the meeting of the minds of the parties and is not the real agreement, or are the transfer documents, excluding the Deed of Sale, the real agreement.

[28] In the very old decision of **Wilken v Kohler**², it was held that where an agreement is of no force and effect for want of compliance with a peremptory statutory provision, but the parties nevertheless carried out the terms of the agreement, the

¹ 2010 (1) SA 49 (SCA).

² 1913 AD 135 at 144.

agreement cannot be undone on the mere ground that it was invalid or unenforceable in law. This position was confirmed in the later decision in **Legator McKenna Inc v Shea**³.

[29] This position was also codified in Section 28(2) of the Alienation of Land Act of 1981⁴.

F. DISCUSSION

[30] I was asked by the applicant to apply the principles laid down in **Burger v Edenglo**⁵ and by doing so accept that we are dealing with a transaction that is “*entirely tainted and void ab initio*”. In my view, this matter is distinguishable from the said matter, as the **Burgers** in the 2018 matter never intended to sell their property permanently. The court found that the real agreement was accordingly defective.

[31] In contrast, Zatu intended to transfer the ownership of the property permanently. This is evident from her instructions to Qoko to sell, the numerous advertisements to sell the property and her signing of all the necessary documents in order to register the transfer.

[32] In **Fraser v Viljoen**⁶ the registration of transfer of ownership of the property had not yet occurred. In my view, therefore, that matter is also not comparable with the facts in *casu* where witness signatures were not present on the Deed of Sale. It is common cause that we are currently dealing with a matter where registration of transfer did already occur. The same applies to the matter of **Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd**⁷. As in the **Fraser** matter, registration of transfer had not taken place. In *casu*, there is no counter-offer as in the Rockbreakers matter. Accordingly, in my view, the validity of the real-agreement was never at issue here.

³ 2010 (1) SA 35 (SCA).

⁴ See para [25] above.

⁵ (6544/18) [2018] ZAWCHC 141 (14 October 2018).

⁶ 2008 (4) SA 106 (SCA).

⁷ (498/08) [2009] ZASCA 102; 2010 (2) SA 400 (SCA); [2010] 1 All SA 291 (SCA) (18 September 2009).

[33] The applicant attempted to file an amended notice of motion without a notice in terms of Rule 28 delivered to Madikane. This application is not properly before the court, and I will therefore not consider the relief sought therein. I am, accordingly, only considering the main application.

[34] In my view, Zatu intended to sell the property to a willing seller for R280 000.00. Madikane, on her end intended to acquire that same property for the same amount. The transfer of ownership of the property was registered, and Madikane paid the purchase price to the conveyancing attorneys she obtained by applying for a bond. She is required to settle the monthly bond instalments notwithstanding that she has still not been placed in occupation of the property.

[35] It is clear that the lawful purpose of the transaction was achieved, as there was compliance with the requirements to transfer ownership, at which stage the validity of the deed of sale became irrelevant. In any event, this deed of sale is not part of the real agreement between the parties. The contents, however, reflects exactly what the intention of the parties were as is evident from the content of the transfer documents.

[36] The applicant seeks final relief on motion. This brings the principles laid down in **Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**⁸ into play. It is trite that where there is a dispute of fact in motion proceedings, a final order may be granted if those facts averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The evidence of the respondent will prevail, unless the respondent's version "*is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.*"⁹ See **National Director of Public Prosecutions v Zuma**¹⁰.

⁸ 1984 (3) SA 623 (A).

⁹ **Plascon-Evans**, *supra*.

¹⁰ 2009 (2) SA 277 (SCA) at para 26

[37] The disputed issues in *casu* are not material. The fact that Madikane did not accept the telephonic cancellation of the agreement is common cause. The fact that the transfer documents were signed by both parties, and that these documents reflect the common intention or the meeting of the minds of both parties, is common cause. The fact that the property was in fact registered in the name of Madikane is common cause. The fact that Qoko allegedly signed the deed of sale fraudulently is a fact that does, however, not affect the validity of the sale.

[38] In my view, there is no dispute of fact on the papers in respect of the material issues and even if there was, Madikane's version is not "*palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers*".

[39] The presence of fraud in the sale transaction ousts the provisions of s28(2) which was designed to rectify transactions which does not comply with the provisions of s2(1). It is trite that a fraudulent contract cannot be rectified and, as a result, the transaction would be void *ab initio*. This is not the case in *casu*.

[40] My findings that the alleged fraud by Qoko did not affect the validity of the real agreements between the parties, is in no way an indication that this court condones fraud. The enthusiasm with which he had the Deed of Sale finalized, even by alleged fraudulent means, is regrettable. This court finds this behaviour unacceptable and Zatu is advised to take the necessary steps by lodging a complaint with the Estate Agent's Board. A copy of this judgment will also be forwarded to this Board.

[41] In **Absa Bank Ltd v Moore**¹¹, the following was said in relation to the effect of fraud, and in particular the maxim: "*fraud unravel all*".

¹¹ 2017 (1) SA 255 (CC) para 39.

“ ... The maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim.”

[42] As stated above, the alleged fraud committed by Qoko does not affect the sale, but only affects the agreement between the victim (Zatu) and the perpetrator (Qoko).

[43] I am in agreement with Madikane’s submission that section 2(1) of the Act does not require witnesses to sign an agreement. The absence of witness signatures did also therefore not affect the validity of the agreement.

[44] I disagree with the applicant that this deed of sale should be set aside on the basis that it is against public policy. I am in agreement with Ndita J’s sentiments in **Burger and Another v Edenglo Holdings (Pty) Ltd and Others**¹² on the fact that “... courts are empowered to declare contracts, or contractual terms, entered into freely and voluntarily, unenforceable if they are found to be against public policy. ...” In *casu*, the intention of the parties is clear. There is no allegation that any of the parties did not get what they wanted from the transaction, e.g. the purchase price in the deed of sale is the same as in the transfer documents, and the parties are the same in the transfer documents as they are reflected in the deed of sale. I cannot find any sign of the agreement being *contra bones mores*.

[45] It is common cause that Madikane was never in possession of the property. It is for this reason that she instituted eviction proceedings against the occupants of the property. Any claim by the applicant based on the *re vindicatio* is therefore without any merit.

[46] Zatu’s reasons for cancelling the sale was, firstly, because the cancellation of the existing bond became difficult. In her replying affidavit, however, this reason changed to the fact that her children needed the property as a place to stay while they were

¹² *Supra*.

studying and working in Cape Town. Ignoring, for now, the fact that her version changed between her founding affidavit and her replying affidavit, not one of these grounds is sufficient for a valid cancellation of the agreement. The law, as it stands currently, is that when the ownership of transfer is registered, the transaction cannot be reversed unless certain limited circumstances are present. In *casu*, I cannot find any of these circumstances present. In this regard, refer to s28(2) of the Act, which states that such an agreement is “valid *ad initio*”.

G. CONCLUSION

[47] Whatever the reason why Zatu does no longer want to sell her house to Madikane, the fact of the matter is that our law provides her with the opportunity to retract from the agreement if it was never her intention to enter into that specific agreement and, in particular, before the registration of transfer was completed. None of these factors is present here.

[48] The only fraud alleged in her papers is the signature of her agent, Qoko. In my view, this does not vitiate the real agreement. No fraud by Madikane is alleged. In terms of s28(2) of the Act, the real agreement accordingly remains valid and of legal effect.

H. ORDER

[49] **In the circumstances, the application is dismissed with costs.**

FORTUIN, J

Date of hearing: 6 October 2021

Date of judgment: 9 February 2022

Counsel for applicant: Adv M Titus

Instructed by: Nonoza Potelwa Inc, Cape Town

Counsel for 1st respondent:

A H Beviss-Challinor

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