

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

CASE NO: 16828/2021

2 JUNE 2022 FHD VAN OOSTEN

In the matter between:

EGON ARIAN VAN DER ZEE

APPLICANT

and

RENIER NICHOLAAS JANSEN VAN RENSBURG NO

FIRST RESPONDENT

SEAN DAVID KIRKPATRICK

SECOND RESPONDENT

MASTER OF THE HIGH COURT, JOHANNESBURG

THIRD RESPONDENT

REGISTRAR OF DEEDS, JOHANNESBURG

FOURTH RESPONDENT

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] The genesis to this application is a written loan agreement, the breach of which eventually resulted in a conundrum of events and litigation, which this court is now enjoined to untangle for the purpose of finally adjudicating the matter.

Facts

[2] The point of departure is the loan agreement. On 23 September 2016, at Sandton, a written agreement, styled Loan Agreement, was concluded between the applicant, as creditor, and one John Stuart Squires (Squires), as the debtor, in terms of which it was recorded that Squires acknowledged his indebtedness to the applicant in the sum R450 000.00, being in respect of money lent and advanced as agreed (the loan agreement). The terms of the loan agreement that are relevant for present purposes, are that Squires was required to pay the debt on or before 30 November 2016, failing which interest compounded monthly in advance, would accrue at the rate of 9% per annum from 1 December 2016 (the debt), the applicant would be entitled to exercise his rights, including execution of the property, in terms of a mortgage bond, which Squires agreed the applicant was entitled to register as security for payment of the debt, in the applicant's favour, over the property, described as Holding 26 Steynsvlei Agricultural Holdings (the property), which was registered in the name of Squires.

[3] On 30 September 2016 a mortgage bond, as provided for in the loan agreement, was registered.

[4] Squires failed to pay the debt on or before 30 November 2016, or thereafter. On 7 December 2016 the applicant and Squires purportedly concluded an addendum to the loan agreement in terms of which Squires granted the applicant the option, in the event of upon Squires' breach of the loan agreement, to purchase the property in accordance with the agreement of sale, which was attached thereto (the addendum).

[5] On 7 December 2016 the applicant exercised the option to purchase the property (the deed of sale).

[6] On 20 March 2017 Squires signed his last will and testament in terms of which he inter alia bequeathed the property to the second respondent.

[7] On 29 June 2017 Squires purportedly signed a power of attorney in order to procure transfer of the property into the name of the applicant (the power of attorney). On 26 September 2017 the property was transferred into the applicant's name and the bond was cancelled, in respect of which Deed of Transfer T17/68628, was issued by the Registrar of Deeds, Pretoria.

[8] The second respondent, unbeknown to the applicant, took occupation of the property in February 2107, in terms of a lease agreement concluded with Squires on 1 February 2017, providing for a lease period of 10 years, on notoriously favourable terms. *En passant*, an interesting discovery, which contributes to the mystery of forged signatures appearing on two documents featuring in this matter, to which I shall revert, was brought to the fore in the second respondents answering affidavit: there he states that in November 2017, he fortuitously 'found' a second lease agreement, dated 25 October 2016, containing almost identical terms as the 1 February lease agreement, amongst the documents of the deceased. He then explains that he did not sign the agreement and that the signature of the lessee appearing on the document, was not appended by him, but appears to be a photocopy of the signatures on the 1 February 2017 lease agreement. It does not require a handwriting expert to immediately recognise, on a cursory comparison of the signature pages of both documents, that the explanation of the second respondent is unassailable. Fortunately, this court is not required to delve into the myriad of inferences that spring to mind.

[9] On 27 July 2017 Squires passed away and the first respondent was appointed the executor in the deceased estate on 4 April 2018.

[10] On 21 February 2019 the applicant, having become aware of the second respondent's occupation of the property and the existence of the lease agreement, brought an application for eviction in this court, against the second respondent. The second respondent opposed the application and instituted a counter-application for the stay of the eviction proceedings, pending an action to be instituted by the first respondent for the setting aside of the sale agreement and cancellation of the title deed to the property. The application came up for hearing before Van der Walt AJ. The learned judge held that the power of attorney had lapsed on Squires' death and despite registration of the property into the name of the applicant thereafter, ownership, for purposes of eviction, had not been proved. Both the application and the counter-application were dismissed on 15 January 2020. The correctness of the judgment was challenged in the applicant's heads of argument, but in view of the relief to which the applicant has confined himself to, the eviction application no longer has any relevance.

[11] On 29 May 2019 the first respondent instituted an action against the applicant, in this court, in which he sought the setting aside of the deed of sale and the title deed in the name of the applicant and that the property be transferred into the name of the deceased estate. The applicant noted an exception to the particulars of claim on the ground of not disclosing a cause of action, which the first respondent left in abeyance. On 16 February 2001, the first respondent withdrew the action.

[12] The present proceedings were launched on 6 April 2021. Both the first and second respondents oppose the application and the first respondent instituted a counter-application.

[13] Against this background, I turn now to the relief sought in the application and the counter application.

The relief sought in the application and the counter-application

[14] In the amended notice of motion relief is sought in Part A and Part B. In sum, the relief sought in Part A is for a declarator that the applicant is the sole and exclusive owner and title holder of the property. In the first alternative thereto, the applicant seeks ratification and confirmation of the registration of the property in his name as reflected in the title deed. In the second alternative, the applicant seeks a transfer of the property into the name of the deceased estate and an immediate transfer thereafter of the property into his name. In the third alternative the applicant seeks an order cancelling the existing title deed to the property, that the original mortgage bond be re-registered over the property, that a money judgment be granted against the first respondent for payment of the debt and that the property be declared specially executable (the third alternative relief). In Part B of the notice of motion the applicant seeks relief aimed at procuring an order for eviction from the property against the second respondent.

[15] In the counter-application the first respondent seeks an interdict, restraining the applicant from alienating or otherwise dealing with the property, pending the finalisation of an action to be instituted by the first respondent for setting aside of the deed of sale and re-registration of the property into the name of the deceased estate.

Disputes of fact

[16] The disputes of fact, it is common cause between the parties, concern first, the conclusion of deed of sale and second, the power of attorney having been signed by Squires. The second respondent challenged the signature of Squires on both these documents and obtained the opinion of a handwriting expert, who conducted a forensic examination and comparison between and assessment of Squires' signature on the disputed documents (the addendum to the loan agreement, the annexure thereto and the power of attorney) and his signature on other documents, including the loan agreement and his last will and testament (in respect of which the authenticity of Squires' signature was accepted). The expert concluded that the disputed signatures are unlikely to have been produced by him.

[17] The applicant, for purposes of the present application, does not challenge the findings of the handwriting expert.

[18] In argument before me, Mr *van Tonder*, who appeared on behalf of the applicant, submitted that the applicant now confines the relief sought to the third alternative, based on the facts that are undisputed in accordance with the *Placon-Evans* rule and the first respondent in the counter-application, likewise seeking an order for cancellation of the applicant's title deed and re-registration of the property into the name of the deceased estate.

[19] Counsel for the first and second respondents in response, requested confirmation by the applicant that the relief sought in prayers 2.1, 2.2, 2.3, 2.4 and 2.5 of the first respondent's counter-application will be sought by the applicant. Mr *van Tonder* confirmed accordingly.

Discussion

[20] The fact of the applicant having made a loan to Squires, on the terms and conditions in regard to re-payment, provided for in the loan agreement, Squires' breach thereof in failing to pay the debt and the liability of the deceased estate in respect thereof, remain unchallenged.

[21] The parties to the loan agreement clearly intended the property to serve as security for payment of the debt. In *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) para [12], the Supreme Court of Appeal held:

'In terms of s 3 of the Deeds Registries Act all real rights in respect of immovable property are registrable. To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied:

1. The intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and
2. The nature of the right or condition must be such that the registration of it results in a 'subtraction from dominium' of the land against which it is registered.

(Erlax Properties (Pty) Ltd v Registrar of Deeds 1992 (1) SA 879 (A) at 885B.)'

The right of security over the property created in favour of the applicant, constituted a real right, which was registered over the property by way of a mortgage bond. Upon default of payment, the applicant would have been entitled to foreclose and to obtain an order that the property be declared specially executable.

[22] It is trite that the rights and obligations in terms of an agreement are transferred to the estate of a party to a contract at the time of his or her passing (Cf *Kruger v Kruger NO and Another* (97177/2017) [2017] ZAGPPHC 1280 (13 December 2017) para 14).

[23] Accepting as the parties do, that the subsequent transfer of the property into the name of the applicant was invalid, the status *quo ante* needs to be restored, by way of setting aside the existing Deed of Transfer, and re-registration of the property into the name of the deceased estate, in accordance with the relief sought by both the applicant and the first respondent. The monetary judgment and the re-registration of the bond over the property sought by the applicant, following upon Squires' breach of the loan agreement, are remedies following upon the contractual provisions of the loan agreement, which have not been challenged.

[24] No defence to the relief now sought has been advanced on behalf of the respondents at the hearing before me.

[25] For all the above reasons, I am satisfied that the applicant must succeed in the relief now sought.

Costs

[26] Mr *van Tonder* has asked for punitive costs against the first and second respondents. Clause 14 of the loan agreement provides for costs on the attorney and own client scale. There are no considerations militating against awarding costs on the scale provided for in the loan agreement. Although the second respondent has actively participated in the proceedings, the real party, for all practical purposes, is the first respondent, who must bear the costs of both the application and the counter-application.

Order

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

1. The deed of sale in respect of the property referred to in paragraph 3 of this order, purportedly concluded between the applicant and John Stuart Squires, dated 7 December 2016, is declared void and is set aside.
2. Deed of Transfer T17/68628, issued by the Registrar of Deeds, Pretoria, is declared void and is set aside.
3. The property known as Holding 26, Steynsvlei Agricultural Holdings, Registration Division IQ, North-West Province (the property) shall, with the applicant's attorneys of record acting as the conveyancer, be registered by the Registrar of Deeds, Pretoria, into the name of the deceased estate John Stuart Squires or into the name of the first respondent, as the executor of the deceased estate.
4. The applicant shall sign and execute all documents necessary to effect the said transfer.
5. A mortgage bond, substantially in accordance with mortgage bond B16/41998, shall simultaneously with registration of transfer of the property, be registered against the property by the applicant's attorneys of record.
6. The first respondent shall, on demand by the applicant's attorneys of record, sign and execute all documents necessary to effect the said registration, failing which the sheriff of this court is authorized and directed to sign the said documents on behalf of the first respondent.

7. The first respondent shall, on demand by the applicant's attorneys of record, pay all costs and fees relating to and in connection with the said transfer and registration of the bond.
8. The Registrar of Deeds, Pretoria, is directed to effect transfer of the property and registration of the bond, in terms of this order.
9. Judgment is granted against the first respondent, in favour of the applicant, for payment of the amount of R450 000.00, interest thereon at the rate of 9% per annum, compounded monthly, from 1 December 2016 to date of final payment.
10. The property is declared specially executable.
11. The first respondent's counter-application is dismissed.
12. The first respondent shall pay the applicant's costs of the application and the first respondent's counter-application, on the scale as between attorney and own client.
13. The second respondent is to pay his own costs.
14. Leave is granted to the applicant to approach this court, on the same papers, revised and/or supplementary directions in order for the effective implementation of this order.

**FHD VAN OOSTEN
JUDGE OF THE HIGH COURT**

FOR APPLICANT

ATTORNEY B VAN TONDER

APPLICANT'S ATTORNEYS

THOMSON WILKS INC

COUNSEL FOR RESPONDENT

ADV L GROBLER

***1ST & 2ND RESPONDENTS'
ATTORNEYS***

VAN DER MERWE GREYLING

***DATE OF HEARING
DATE OF JUDGMENT***

***26 MAY 2022
2 JUNE 2022***