REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

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DATE SIGNATURE

CASE NO. 03566/19

In the matter between:

MAGAGE WILLIAM MELELWE Applicant

and

SABELO ENOCH SONGCA First Respondent

LEBOGANG OLINDA SONGCA Second Respondent

BANYANA CAROLINE MOKELA N.O. Third Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG Fourth Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG Fifth Respondent

SB GUARANTEE COMPANY (PTY) LTD Sixth Respondent

Coram: Salmon AJ

Heard on: 20 October 2023, (MS Teams)

Delivered on: January 2024

JUDGMENT

SALMON AJ:

INTRODUCTION

[1] This is an application in terms of which Mr Magage William Melelwe seeks the setting aside of an agreement of sale in respect of immovable property, and consequent relief. The orders sought are in the following terms: -

"1. Setting aside the agreement of sale entered into between the First and Second Respondents as purchasers and the Third Respondent as seller.

2. An order that the Fourth Respondent cancel the Deed of Transfer number T44784/2017 in terms of which the property was transported from the Estate of the Late Oupa John Mabulala into the names of the First and Second Respondents.

3. An order that the Third Respondent sign all documents and do all things necessary to transfer the property into my name, failing which the Sheriff, Krugersdorp is authorized to sign on behalf of the Third Respondent.

4. Ordering the Fifth Respondent to holding the finalization of the estate of the Late Oupa John Mabulala, Unique Reference 9922014EST001558/File No. 001558/2014 in obeyance pending finalization of this application."

[2] The Applicant resides at 17133 Drakensberg Street, Kagiso, Krugersdorp. In 1998, shortly after he turned forty years of age, Mr Melelwe (together with his now late wife – they were married in community of property)[1] entered into a written agreement with the then-registered owner of that same property, Mr Oupa John Mabulala, in terms of which they purchased the property.[2] At that stage, it was vacant land. I refer to this agreement, where appropriate, as the 'first Deed of Sale'.

[3] The First and Second Respondents subsequently[3] entered into an agreement also to purchase the Drakensberg Street property, then from the Executrix of the estate of Mr Mabulala, who is his daughter and the Third Respondent. The First and Second Respondents served a Notice of Intention to Oppose the application but did not file affidavits or anything else. There was no appearance on their behalf at the hearing.

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1 In what follows, for convenience, I refer to simply to Mr Melelwe. Nothing turns on the fact that his wife passed away in 2002.

2 For convenience I will refer to this as the "Drakensberg Street property".

3 That is, in 2017.

[4] The Third Respondent is the only child of the late Oupa John Mabulala. At the time when he passed away, in 2006, Ms Mokela was thirty one years of age. She, too, served a Notice of Opposition to the application but has not delivered affidavits or anything else. There was no appearance on her behalf at the hearing.

[5] From what is to be gleaned from the 'record' on Caselines, neither the Fourth nor Fifth Respondents have delivered any documents, and therefore do not oppose the relief sought in this application.

[6] The Sixth Respondent was granted leave to intervene in these proceedings. It is the guarantor, to Standard Bank, of the obligations upon Mr & Mrs Songca (the First and Second Respondents) to make payments under a home loan granted by the Bank to enable them to purchase the Drakensberg Street property. It is also the mortgagee in respect of a bond registered over the property. It opposes the relief sought and has filed an opposing affidavit. My reference to 'the Respondent' in what follows means the Sixth Respondent.

[7] In the hearing before me, only the Applicant and the Sixth Respondent took part, represented by Mr SB Vukeya and Ms S Van der Walt, respectively.

THE BACKGROUND FACTS

[8] The Respondent raises no dispute in regard to the Deed of Sale. It is dated (16 June 1998) and signed by all parties to the agreement. For all intents and purposes, it constitutes a deed of alienation as contemplated by the Alienation of Land Act 68 of 1981.

[9] The first Deed of Sale provides for a purchase price of R7000,00 and it is common cause that this was duly paid by Mr Melelwe. It also provides that Mr Melelwe (as purchaser) would be responsible for payment of rates and other municipal levies payable in respect of the property;[4] he would pay the costs of registration of transfer including transfer duty and deposits as required against his liability for rates, taxes and other charges;[5] that transfer was to be effected within a reasonable time after compliance with those obligations, and that the parties would sign all documents in order to register the transfer upon request from the nominated conveyancers.[6]

[10] Over the subsequent several years, Mr Melelwe made (sometimes regular, sometimes irregular) payments against the Rates and Taxes account held by the Krugersdorp Municipality in respect of the Drakensberg Street property. However, it seems, the outstanding rates and taxes were never liquidated entirely. As at February 2015, when his last payment took place, the outstanding amounted to R2574.85. In short, Mr Melelwe never placed himself in a position to take transfer of the property.

[11] It is not clear when, but over time Mr Melelwe developed the Drakensberg Street property by the addition of a residence. It is this house that he now lives in. There is a provision in the first Deed of Sale that the purchasers may not, before registration of the property in their name, effect any improvements on or to the property or effect any changes to existing improvements on or to the property without the seller's prior written consent.[7] It does not appear from the affidavits before me whether the improvements effected by Mr Melelwe were

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4 Clause 2.2 of the Deed of Sale.

5 Clause 5 of the Deed of Sale.

6 Clause 7 of the Deed of Sale.

7 Clause 6.1 of the Deed of Sale.

indeed with the written consent of Mr Mabulala, but nothing turns on this for purposes of the present adjudication.

[12] Mr Mabulala passed away in December 2006. This was before any transfer documents could be finalized and signed between him and Mr Melelwe. According to his Founding Affidavit, Mr Melelwe approached Mr Mabulala's family for assistance but *"they were not will to assist me and refused to give me the name and contact details of the Executor of OUPA JOHN MABULALA'S estate. I did not know what to do, but I took comfort in the fact that I had a written agreement of sale signed by OUPA JOHN MABULALA and that I had paid the purchase price."* These allegations are not the subject of any dispute.

[13] As it turned out, Mr Mabulala died intestate. His only child, the Third Respondent, was appointed as Executrix; Letters of Executorship were issued by the Fifth Respondent on 22 January 2014. Not in this capacity, but as Mr Mabulala's daughter, two days before her appointment Ms Mokela had lodged an Inventory[8] with the Master of the High Court listing the Drakensberg Street property as an asset belonging to her late father, together with (only) household goods valued at R10 000,00. The Drakensberg Street property - then with Mr Melelwe's residence an improvement, funded by him - was given a nil value by Ms Mokela in the Inventory.

[14] The next Mr Melelwe knew was to receive a letter from attorneys demanding that he vacate the property, on the basis that the property was registered in the name of the First and Second Respondents. He subsequently was served with an application for his eviction issued out of the Kagiso Magistrates' Court

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[8] In terms of section 9 of the Administration of Estates Act 1965 – hereinafter, the "Estates Act".

under Case No. 1436/2018. That application is currently pending the outcome of the present proceedings.

[15] The papers in the application for eviction are not before me although they have been uploaded to the Caselines file for this matter. Nevertheless, Mr Melelwe alleges in his Founding Affidavit that, according to the application for eviction, the First and Second Respondent had purchased the property from the Estate of the late Oupa John Mabulala.[9] A 'Search Works' Deeds Office report annexed to Mr Melelwe's affidavit shows that the purchase date was 5 September 2017,[10] with registration in the name of Mr Songca being effected at the Deeds Office on 27 November 2017.

[16] It appears from the Respondent's Affidavit that Standard Bank granted Mr & Mrs Songca a loan to purchase the property on or about 22 September 2017, in terms of which it advanced them R445 985,00. On the same date, the Respondent guaranteed to Standard Bank the due and punctual payment of all sums due by Mr & Mrs Songca pursuant to the Home Loan Agreement, and as security, a mortgage bond was registered over the property in favour of the Respondent.

[17] I hereinafter refer to the agreement between Ms Mokela N.O. and the Songcas as the 'second Deed of Sale'.

THE PARTIES' POSITIONS

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[9] This is not disputed. The agreement in terms of which the Songcas purchased the property is not before the Court, but the aforementioned undisputed fact notwithstanding, it seems to have been accepted by the parties (as indeed it must be) that the seller was Ms Mokela in her capacity as Executrix.

[10] The Home Loan Agreement with Standard Bank reflects the date as 1 September 2017. Nothing turns on this.

[18] In addition to the contention that the second Deed of Sale ought to be set aside, as the property was already sold to the Applicant, Mr Vukeya's submissions went further:

- The sale of the property to Mr Songca is invalid for failure to comply with the provisions of the Estates Act; and
- The Third Respondent will be unduly enriched if the sale is condoned.

[19] The enrichment aspect was not earnestly advanced by Mr Vukeya. The invalidity based on the failure to comply with the Estates Act was, though. Mr Vukeya relied on section 29 of the Estates Act in submitting that the Third Respondent failed to cause a notice to be published[11] calling upon all persons having claims to lodge such claims with the executor; and also failed, before effecting the transfer, to lodge with the registration officer a certificate by Fourth Respondent that no objection to the transfer exists. He also submitted that the Third Respondent, as Executrix, further failed to lodge, advertise and lay for inspection the liquidation and distribution account as required by section 36 of the Estates Act - and that this would have given the Applicant an opportunity to lodge an objection to the account.

[20] The problem with Mr Vukeya's submissions concerning the Estates Act is that they contemplate factual issues (and contentions arising therefrom) not addressed in the papers at all. True, the Applicant's attorneys obtained a copy of the Master's file purportedly in relation to the estate of the late Mr Mabulala; and the documents it contained were annexed to the Founding Affidavit. Those annexures do not include such notices, advertisements or accounts. However, it would be manifestly unfair to the Respondents to accord the

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[11] In the Government Gazette and in at least one newspaper circulating in the area in which the deceased ordinarily resided at the time of his death.

submissions cogency[12] when the Respondents had not been alerted to the points.[13] For example, Ms Mokela may well have wished to say something about the allegations, but as they were not raised in the Founding Affidavit, how was she to know? Does the absence of a document from the Master's file alone indicate its absolute non-existence? Or, that what a document is intended to memorialize never took place because the document is not in the file? I do not think the contention can go this far.

[21] Mr Melelwe's allegation in his affidavit that it appears from the documents that the estate has not been finalised, however, is not disputed.

[22] Mr Vukeya also requested the Court to draw an adverse inference against Ms Mokela, flowing from her recordal of the value of the immovable property as nil in the statutory Inventory she submitted to the Master. In other words: that her conduct was malicious and intended to mislead the Master. Mr Vukeya's submission was based, notably, on the premise that the Third Respondent was aware at the time that the property belonged to the Applicant. I decline to draw the inference.

[23] Whilst one may raise eyebrows at the nil value for a property on which stands an inhabited residence (sold a few years later for over four hundred thousand rands), drawing an inference of fraudulent conduct requires something more. As a general proposition, drawing adverse inferences depends on the facts and circumstances of the case[14] and, apart from anything else, the *factual*

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[12] Cf. President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) paras [61] - [65]; Dexion Europe Ltd v Universal Storage Systems (Pty) Ltd 2003 (1) SA 31 (SCA) paragraph [15].

[13] These are not legal points arising from the undisputed facts.

[14] Pexmart Cc And Others v H Mocke Construction (Pty) Ltd And Another 2019 (3) SA 117 (SCA) at paragraph [69]

premise for the Applicant's contention as advanced by his Counsel[15] is not something raised in the Founding Affidavit. Again, where Ms Mokela is not given the chance to answer the allegation, she could not be said to have avoided doing so and thereby invoking the possibility of an adverse inference. Put differently, had Mr Melelwe alleged, with some factual platform, that she *in fact* was aware, her failure to address the averment may indeed have raised the probability of an adverse inference.

[24] The Applicant's contention that the property was already sold to Mr Melelwe, however, is on a different footing. I revert to it shortly. It ties in with one of the submissions made on behalf of the Respondent and which I now review.

[25] The Respondent filed an affidavit in which it is averred that:

- The Sixth Respondent is the holder of a mortgage bond over the property to secure the obligations of the First and Second Respondents in terms of the home loan agreement with the Standard Bank (which it has guaranteed);

- It was not aware of the agreement of sale between the Applicant and the Late Oupa John Mabulala;

- Absent a finding of invalidity in relation to Title Deed T44784/2017 or the underlying agreement[16] which gave rise to the registration thereof, an order for cancellation would be without just cause.

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[15] Namely, that she *was* aware at the time that the property *belonged* to the Applicant.

[16] As shall be seen, herein lies the rub.

- It was also not aware of any fact that could legally invalidate the underlying sale agreement which resulted in the transfer and registration of the property in the name of the First and Second Respondents; and

- It was not aware of any defect that could invalidate the Loan Agreement and Mortgage Bond.

[26] In light of the Mortgage Bond, in particular, Ms Van der Walt submitted that the Respondent (therefore) has a stronger right over the property than the Applicant and even third parties. She also submitted that there appears no intention on the part of the Applicant to take transfer of the property into his name. Further, that, anyway, any claim he had against the estate of the deceased Mr Mabulala has prescribed, though when pressed Ms Van der Walt did not pursue this prescription point.[17]

DISCUSSION

[27] It is so, that (as submitted by Ms Van der Walt) a mere deed of alienation does not effect the passing of ownership of immovable property from one to another. This is achieved only by registration of the transfer at the Deeds Office, and the title deed then serves as proof of ownership. However, as anticipated in the Respondent's affidavit (and see, particularly the passage in the third bulleted sub-paragraph [25] above), registration of transfer in and of itself is not unassailable - and nor is it the final answer.

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[17] This may have been wise given that it is not disputed that Mr Melelwe only became aware of the potential problem when served with the attorney's letter to vacate the premises, shortly after which he launched the present proceedings, whilst the prescription point was not raised in the Respondent's answering affidavit. It is trite that a point such as prescription must be pleaded, at least because there might be an answer.

[28] The abstract system of transfer of ownership has been part of our law since it was introduced in 1941[18] and was affirmed to be the applicable system by Brand JA in Legator McKenna.[19] It is not necessary to review the principles in its regard; this has happened in many decisions several of which are reviewed in the Moore case,[20] LAWSA, and in the comprehensive survey undertaken by LJ van der Merwe AJ in the Knox N.O. case[21] - for a few examples. The essence of this system is that, once registration of transfer occurs, ownership has passed - notwithstanding that the underlying contract may be invalid - due to want of compliance with some formality, for instance.

[29] However, this is not the end of the story; as LJ van der Merwe points out[22] "*the abstract theory does not and cannot serve as a guarantee of ownership."* Indeed, as Brand JA made clear in Legator McKenna,[23] it is all about the "real agreement": "*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."* As LJ van der Merwe AJ added[24] "*This implies that the transferor must be legally competent to transfer the property, the transferee must be legally competent to acquire the property, and that the golden rule of the law of property, that no one can transfer more rights than he himself has, also applies to the real agreement."*

[30] It is the "real agreement" in the context of the second Deed of Sale which cannot pass muster. At common law, essentially,[25] ownership in property (movable or immovable) passes when the following integers are satisfied:

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18 Commissioner of Customs & Excise v Randles, Brothers and Hudson Ltd 1941 AD 369

19 Legator McKenna, Inc and Another v Shea 2010 (1) SA 35 SCA

20 Absa Ltd v Moore and Another 2016 (3) SA 97 (SCA) at paragraph [36] *et seq*.

21 Knox N.O. v Mofokeng and Others 2013 (4) SA 46 GSJ, and the various annotated cases.

22 Knox N.O. at paragraph [22].

23 Legator McKenna, paragraph [22].

24 Knox N.O. at paragraph [19].

a. The ‘thing’ must be capable of being held in private ownership;

b. The transferor must be capable of transferring ownership - the maxim *nemo plus iuris ad alium transferee potest, quam ipse haberet*[26] features here;

c. The transferee must be capable of acquiring ownership;

d. There must be the requisite intention, directly as to the passing of ownership, of both transferor and transferee;

e. Transfer of ownership postulates delivery (in the case of movable) and registration in the case of immovables);

f. Payment must be effected, unless credit is agreed.

[31] It seems to me that the Executrix (the Third Respondent) was not in a position to enter into an agreement to transfer ownership of the Drakensberg Street property, any more than would Mr Mabulala have been, were he to be still alive. Could it be said that Ms Makola N.O. had a true *animus contrahendi* when, as a matter of fact, an unimpugned deed of alienation had already bound the Drakensberg Street property to someone else? It is not necessary to investigate this avenue, for it seems to me equally apposite (and determinative) that at least one import of the first Deed of Sale was to encumber Mr Mabulala with an obligation to do what was required in order for Mr Melelwe to bring about transfer of the property’s ownership (to himself) when once he was in a position to do so.[27] Absent release of that obligation – for example, by cancellation of the first Deed of Sale, Mr Mabulala was not free to dispose of the Drakensberg Street property to third parties, and nor – accordingly - was the Executrix of his estate.

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[25] See, generally, LAWSA, Land Administration, Volume 25(1) 3rd Ed paragraph [40], Things, Volume 27 paragraph [209]. The online edition is referenced.

[26] “No one can transfer more rights to another than he himself has.” Hiemstra’s Trilingual Dictionary Juta, 1992.

[27] This is a residual obligation upon a seller. See, in general, LAWSA, Sale, Volume 36 3rd Edition at paragraphs 267 *et seq*.

[32] Therefore, the real agreement underlying the second Deed of Sale was incompetent to achieve its objective. Ms Makola N.O. could not have agreed to sell to the Songcas the property.

[33] But, Ms Van der Walt submitted, Mr Melelwe had shown no intention of having transfer effected. I am doubtful of the legal conclusion of the submission, if any, for there is neither imperative nor obligation found in the first Deed of Sale in terms of which Mr Melelwe had to take transfer within a certain time framework. Ms Van der Walt did not cite authority for the proposition that it must be inferred that Mr Melelwe is thus to be deprived of any right he may have, and I have not come across any.

[34] That apart, this was not raised in the affidavit lodged by the Respondent. Again, it may be unfair to give it cogency in the absence of a pointed challenge which Mr Melelwe could answer.

[35] But, even so, what of it? Mr Melelwe was aware of his position in that he could not take transfer until the outstanding rates and taxes had been liquidated, and he had been making sporadic payments to that end. He was enjoying undisturbed possession; he paid for the land, paid for the buildings on it, was recorded in the Municipal records as being responsible for the rates and taxes, and for a long period of time had not needed at any stage to show or prove his title.

[36] I therefore conclude that Mr Melelwe is entitled to have the second Deed of Sale set aside, together with the consequent relief of cancellation of the Deed of Transfer into the names of the First and Second Respondents.

[37] However, the relief sought in prayer 3 is problematic. Mr Melelwe is not axiomatically entitled to transfer; he is, though, when once he owes no rates

and taxes in respect of the Drakensberg Street property. The details in this regard were not ventilated before me. I therefore propose to grant Mr Melelwe leave to approach the Court again for such relief, on the same papers but supplemented where applicable, if necessary. The relief in prayer 4 will be granted.

[38] There is no reason why costs should not follow the result.

[39] I therefore make the following order:

a. The agreement of sale between the First and Second Respondents, as purchasers, and the Third Respondent, as seller, in respect of ERF 17133 Kagiso Extension 12, is set aside;

b. The Registrar of Deeds, Johannesburg, is directed to cancel the Deed of Transfer number T44784/2017 in terms of which the said property was transferred from the Estate of the late Oupa John Mabulala in to the names of the First and Second Respondents and to rectify the Deeds Register so as to reflect the said Estate as registered owner of the property;

c. Magage William Melelwe is granted leave, upon settlement and/or payment by him or on his behalf, of the Municipal rates and taxes which accrued in respect of the said property as if the agreement of sale between the First and Second Respondents, as purchasers, and the Third Respondent, as seller, had not taken place, to approach the Court upon the same papers, supplemented where applicable, for an order directing the Third Respondent to sign all documents and do all things necessary to effect transfer of the said property into his name, failing which the Sheriff, Krugersdorp is authorised to do so;

d. The Master of the High Court, Johannesburg, is directed to pend the finalisation of the Estate of the Late Oupa John Mabulala, Unique Reference 9922014 EST001558/File Number: 001558/2014 until the transfer contemplated in (c) above is completed or until the Court orders otherwise.

e. The Sixth Respondent is ordered to pay the Applicant's costs on the scale of party and party, to include the costs of Counsel.

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SALMON AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing:	20 October 2023
Date Judgment Delivered:	January 2024
For the Applicant:	Adv. SB Vukeya
Instructed by:	Nemakanga Attorneys
First to Fifth Respondents:	not represented.
For Sixth Respondent:	Adv. S Van Der Walt
Instructed by:	VBD Inc.