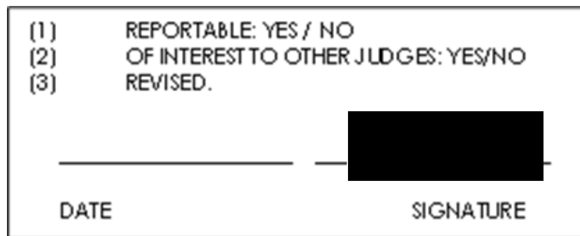
Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISON, PRETORIA

CASE NO.: 20095/2017


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

DATE SIGNATURE

In the matter between:

ELIAS KUTUMELA VIVIAN	1st Applicant
MATLALA LINDA VIVIAN	2nd Applicant
EDWARD MADIBANE	3rd Applicant
JOHANNA MADIBANE	4th Applicant

and

ABSA BANK LTD	1st Respondent
SHERIFF TSHWANE NORTH	2nd Respondent

JUDGMENT

GWALA AJ

[1] This matter served before me for a simultaneous hearing of two applications brought by the first and second applicants (henceforth, the applicants) cited as such in both applications. Both applications are under the same case number. In one application, the applicants seek an order that they be joined as parties in the main action. In another application, they seek an order rescinding a default judgment granted in favour of the first respondent so that they can enter the fray to vindicate their right to property which they have somehow lost through what they allege were fraudulent means. Both applications are opposed by the Respondent.

[2] It is convenient that I deal briefly with the joinder application. In the notice of motion, the applicant seek an order as follows:

"1. [o]rdering that the first, second and third applicant(s) be joined as the third respondent, fourth respondent and fifth respondent in the application proceeding instituted under Case No: 20095/2017;

2. [t]hat the applicant be directed to serve copies of the order (joinder order) and the pleadings delivered in the application proceeding on the first to fifth respondent within 10 (ten) days of judgment;

3. [t]hat ABSA BANK Limited to pay costs of this application;

4. [g]ranting applicant(s) any further or alternative relief."

[3] In the body of the founding affidavit, the applicants say the application is brought in terms of Rule 10 of the Uniform Rules. The respondent takes issue with this. It contends in this regard that the application must be dismissed because it was brought in terms of an incorrect rule. It contends that the application ought to have been brought in terms of Rule 12 of the Uniform Court Rules.

[4] I see things differently. Even if this was correct, I would overlook it. It is clear to me that the applicants seek an opportunity to be joined as necessary parties in the action in order to exercise their right to access to court and vindicate their right to property as it will appear below. They have a direct and substantial interest in the main action. They state that they are the rightful owners of the house which is the subject matter in the main action. If indeed it is finally established that they are the owners of the property which is the subject of litigation, then not only do they have in interest in the matter, they have an interest even in the outcome of the litigation. This takes care of the *locus standi* point raised by the first respondent.

[5] I am of the view that to facilitate the right to access to court as envisaged in section 34 of the Constitution and to prevent a permanent grave injustice, it will better serve justice to overlook technicalities and grant the applicants leave to intervene. If they are not permitted to join in the litigation simply because they have, in their affidavit, referred to Rule 10 instead of Rule 12, the court's doors will be shut permanently in their face. I would rather facilitate the protection of a right than being

mechanical and rigid about the Rules. The Rules are for the court and not the other way around.

[6] In any event, in their notice of motion, the applicants merely want to be joined. This is sought on the basis that they have a direct and substantial interest in the subject matter of the litigation. At common law courts have inherent power to order joinder of parties. In *Shorts Retreat, Pietermaritzburg v Daisy Dear Investments,*[1] the Supreme Court of Appeal ordered a joinder of a party even in the absence of an application. It said:

> "[12] At common law our courts have an inherent power to order joinder of parties where it is necessary to do so. Ordinarily such an order is issued pursuant to an application by one of the parties, in a court of first instance, which would have been served upon the party whose joinder is sought. A court could however, even on appeal, *mero motu* raise the question of joinder to safeguard the interests of third parties and decline to hear a matter until such joinder has been effected. In this case, there was no formal application and all that was required of the municipality was the report referred to earlier."

[7] I turn now to deal with the application for the rescission of the default judgment. It is now an opportune moment to deal with the issue of the alleged ownership of the property that is the subject matter in the main action. The property has been declared executable in terms of Rule 46A of the Uniform Rules pursuant to the default judgment granted in favour of the Bank and against the third and fourth applicants. The latter are not participating in these applications before me. The third and fourth applicants were cited as defendants in the main action. And the applicants were not cited in those proceedings.

[8] The interest the applicants have in the matter is apparent. So is their *bona fide* defence. They say that they are the owners of the property known as Erf No. ██, Soshanguve. They were residing in that property. They purchased it with the assistance of a home loan obtained from ABSA BANK, the first respondent

[1] *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2010 (4) BCLR 354 (SCA); [2009] 4 All SA 410 (SCA) para 12

(ABSA)/bank. They settled their home loan with the ABSA as early as 2008, long before the summons that are the subject matter was issued. Notwithstanding that the applicants settled their home loan in 2008, ABSA provided them with confirmation that it had since been settled only in February 2020. Even though they are rightfully owners of the property, so they contend, they were not cited as the necessary parties in the main action.

[9] The applicants state that they never sold their property, nor did they receive any money as proceeds of sale in respect of their property. They never had any intention to sell it at any stage. It appears that from a judgment that was delivered by the Magistrate Court in an application for their eviction that the applicants had always persisted with their version that they never sold or nor consented to sell their property. According to them the sale of their property was fraudulent.

[10] It has long been held in a plethora of authorities that where a transfer of property is obtained by fraud, or other means which vitiates consent such as duress or undue influence, then ownership does not pass.[2]

[11] In *Nedbank LTD v Mendelow and Another NNO*[3] the Supreme Court of Appeal said thus:

> "[13] This court has recently reaffirmed the principle that where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect. In *Legator McKenna Inc and Another v Shea and Others* Brand JA confirmed, first, that the abstract theory of transfer of ownership applies to immovable property, and, second, that if there is any defect in what he termed the 'real agreement' — that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively — then ownership will not pass despite registration. Thus while a valid underlying agreement to pass ownership, such as a sale or donation, is not required, there must nonetheless be a genuine

[2] *Preller and others v Jordaan* 1956 (1) SA 483 A at 496.
[3] *Nedbank v Mendelow* 2013(6) SA 130 SCA at para 13 and 14.

intention to transfer ownership. This principle was unanimously approved in *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* and has been followed consistently since then.

[14] However, if the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass: *Preller and Others v Jordaan*. That principle was applied recently by this court in *Meintjes NO v Coetzer and Others* and *Gainsford and Others NNO v Tiffski Property Investments (Pty) Ltd and Others*."[4]

[12] It seems to me that the applicants have a complete *bona fide* defence that entitles them to be heard by the court. At least they have a counter claim based on rei vindication. Accordingly, I am of the view that the application for the rescission default judgment should succeed. The applicants have explained their *bona fide* defence and the reason for their absence, namely, they were not cited as parties in the main action. As such they were not aware that there was such litigation.

[13] Two other things to mention. First, counsel for the respondent argued that I should accept the version of the respondent which is to the effect that the applicants sold their property in 2008 to one Robbinson. I am of the view that this is a dispute that should be resolve in the trial should the matter proceed that far. The orders made herein are only interim. The final determination of the disputes will be done by the trial court.

[14] The second aspect that needs mentioning is that the applicants seek to join in completed proceeding. The fact that proceedings are completed is not necessarily a bar to intervention if it is for a legitimate purpose. In *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others*[5] the Court said:

"The fact that a judgment or final order has already been issued is not a bar to leave to intervene being granted (*United Watch C and Diamond Co* case

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[4] See *also Meintjies NO V Coetzer and Another* 2010 (5) SA 186 para 9. See also *Gavstand and Other NNo Vs Tiffski Property Investment (Pty) Ltd and Others* 2012 (3) SA 35 SCA paras 38 and 39 See also *Quartermark Investments (Pty) Ltd vs Mkhwanazi & Another* 2014 (3) SA 96 SCA paras 21-25

[5] *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In Re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (TK) at 679 B-D

supra) if the intervention is sought for some legitimate process which can be instituted subsequent to the issue of the judgment or final order (*Baard v Estate Baard* 1928 CPD 505, in which the applicant was granted leave to intervene for purposes of noting an appeal against the judgment)."

[15] Counsel for ABSA prayed for costs against the applicants on an attorney and client scale. I am of the view that the applicant cannot be blamed for not participating in the matter before there was default judgment because they did not know that there was such an action that could potentially affect their rights. The only way they can be permitted to participate in the litigation was through these applications. I am of the view that a just order would be that costs be costs in the cause and I shall order as such.

[16] In the result, I make an order in the following terms:

[16.1] the first and second applicant are joined as third and fourth defendants in the main action and in all subsequent proceedings under case number 20095/2017 *mutatis mutandis*;

[16.2] the first respondent is directed to serve the summons upon the first and second applicants;

[16.3] the default judgment granted under case number 20095/2017 is rescinded and the first and second applicant are granted leave to defend the action;

[16.4] the costs of the application to join and the of application for rescission of the default judgment shall be costs in the cause.

GWALA AJ
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 06 May 2024
Date of delivery: 02 July 2024
Appearances:
For the Applicant: No Appearance
Instructed By:

For the Respondent: Adv JH Groenewald
Instructed By: