THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 768/2012
Reportable

In the matter between:

QUARTERMARK INVESTMENTS (PTY) LTD **Appellant**

and

PINKY MKHWANAZI **First Respondent**
THE REGISTRAR OF DEEDS, JOHANNESBURG **Second Respondent**

Neutral citation: *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* (768/2012) [2013] ZASCA 150 (01/11/2013)

Coram: Maya, Bosielo, Theron, Pillay and Petse JJA

Heard: **20 August 2013**

Delivered: **1 November 2013**

Summary: **Contract – Sale of immovable property – induced by fraud – null and void – no intention on the part of the owner to transfer ownership – ownership does not pass despite registration – rei vindicatio available even if raised mero motu by the court if facts in support thereof appear in the papers – accords with the principle of legality.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Spilg J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Theron JA (Maya, Bosielo, Pillay and Petse JJA concurring):

[1] The first respondent, Ms Pinky Mkhwanazi (Ms Mkhwanazi), instituted application proceedings against the appellant, Quartermark Investments (Pty) Ltd (Quartermark), a property investment company, claiming that it had fraudulently induced her into signing certain sale and lease agreements in respect of her immovable property. In the South Gauteng High Court, Ms Mkhwanazi sought and obtained an order setting aside the transfer of the property to Quartermark; declaring the sale agreements that led to the transfer null and void; directing that the second respondent transfer the property into her name and other ancillary relief.[1] Quartermark appeals against the decision of the high court (Spilg J) with the leave of that court. The second respondent, the Registrar of Deeds, Johannesburg, has not taken part in the proceedings and abides the decision of this court.

[2] In 2004, Ms Mkhwanazi purchased the immovable property known as Erf 1795 Klipfontein (the property) with a loan obtained from Nedbank Limited

[1] The judgment of the high court is reported as *Mkhwanazi v Quarterback Investment (Pty) Ltd & another* 2013 (2) SA 549 (GSJ). The correct citation of the appellant is Quartermark Investments (Pty) Ltd.

(Nedbank), which was secured by registering a mortgage bond over the property. Subsequently, Ms Mkhwanazi fell into substantial arrears in respect of her loan obligations to Nedbank as well as her obligations to another financier in respect of her motor vehicle. Nedbank obtained default judgment against Ms Mkhwanazi some time prior to 13 March 2007, when the property was judicially attached by it.

[3] During 2007, Ms Mkhwanazi approached Mr George Mthebe (Mr Mthebe), an agent of Quartermark, for financial assistance. She explained to Mthebe that she required a loan in the amount of R30 000. To this end she signed documents presented to her for signature by Mr Mthebe. Ms Mkhwanazi said she did not read the documents prior to signing them because Mr Mthebe did not give her an opportunity to do so. On the assurance given to her by Mr Mthebe, she assumed they related to her loan application. Shortly after signing the documents, a portion of the loan amount, R12 000, was paid into her bank account. This amount represented the arrears due in respect of her motor vehicle instalments. Mr Mthebe advised her that the arrears in respect of the mortgage bond would be paid directly to Nedbank and thereafter Quartermark would continue paying the monthly instalments directly to Nedbank.

[4] On the instructions of Mr Mthebe, Ms Mkhwanazi paid monthly instalments of between R2 500 and R3 000 to Quartermark. She understood that in doing so she was repaying the loan she had received from Quartermark. It was also her understanding that a portion of the instalments would be paid by Quartermark to Nedbank in respect of her bond instalments. She made these monthly payments to Quartermark for a period of two years and nine months.

[5] During 2009, Ms Mkhwanazi received a municipal utility bill in respect of the property reflecting Quartermark as the account holder. She contacted Mr

Mthebe who told her not to be concerned as that was done for ‘convenience’ and to create the impression that Quartermark was paying the utility bill. In August 2009, she was visited by a police officer, Inspector Ngobeni and another male person identified as Mr Calisto Mutayi (Mr Mutayi). Mr Mutayi informed her that he used to ‘work with’ Mr Mthebe and that it was possible that the transactions concluded between herself and Quartermark were tainted with fraud.

[6] Ms Mkhwanazi’s subsequent enquiries revealed that the property had been purchased by Quartermark for R157 000. She obtained copies of the documents Mr Mthebe had presented to her for signature. These were a sale of land agreement, an agreement of lease and a power of attorney authorising transfer of the property. In terms of the purported sale agreement, Ms Mkhwanazi sold the property to Quartermark for the sum of R157 000, payable in monthly instalments of R1 570 from 1 May 2007. The instalments were to be paid directly to Nedbank. It was stipulated that Quartermark would pay a deposit of R12 398 and would take occupation and possession of the property on 3 April 2007. In terms of the purported lease agreement, Ms Mkhwanazi leased the property from Quartermark for a monthly rental of R 2 500, escalating by ten per cent annually. The lease was to commence on 3 April 2007 and continue ‘indefinitely on a month to month basis until validly terminated by either party’. In terms of the power of attorney signed by Ms Mkhwanazi on 12 June 2007, she purportedly confirmed having sold the property to Quartermark on 3 April 2007 and authorised transfer thereof to Quartermark.

[7] According to Ms Mkhwanazi, this was the first time she realised the import and implications of the documents she had signed. She had been under the impression that the documents related to her loan application with

Quartermark. According to her, at no stage was she advised by Mr Mthebe that the documents related to the sale and lease of the property.

[8] The appellant's answering affidavit in the high court was deposed to by Mr Brett Provan (Mr Provan), an employee of Quartermark. It was alleged that Ms Mkhwanazi had voluntarily and without undue influence entered into the sale and lease agreements with Quartermark. It was further alleged that Ms Mkhwanazi had at the time been in dire financial trouble, to the extent that the property was about to be sold in execution and the purchase of the property by Quartermark and the leasing of it to her afforded her the opportunity to remain in occupation thereof. Quartermark denied that it provided loans or was a registered credit provider. Quartermark asserted that the monthly payments made by Ms Mkhwanazi constituted rental due to it.

[9] Quartermark also raised the lack of a tender by Ms Mkhwanazi to restore the benefit she had received under the agreements to Quartermark as an impediment to her obtaining relief in the high court. This is stated as follows:

'I further draw the court's attention to the fact that the applicant seeks relief for the reversal of the transfer of the property but she does not even tender repayment of the loan amount that [Quartermark] paid towards the cancellation of the then existing bond over the property.'

[10] In its answering affidavit, Quartermark denied that Mr Mutayi had 'worked for' Mr Mthebe and stated that it had merely instructed him (Mr Mutayi) 'to attend the property and to offer' it to Ms Mkhwanazi for repurchase. It was common cause that Quartermark had offered to sell the property back to Ms Mkhwanazi for R440 000.

[11] Ms Mkhwanazi, in reply, put up an affidavit deposed to by Mr Mutayi in which he states that he had been employed by Quartermark from June 2008 to

the latter part of 2009. He states that he was initially employed 'to evict people in the properties that [Mr Provan] claimed are his' and later to collect money from certain occupants on behalf of Quartermark. He goes on to state that:

'We were always briefed to lie to people about the nature of contracts they have signed and I know as a fact that people would never have signed any of those documents if they knew that they are selling their properties to Brett Provan.'

[12] The two main issues on appeal are whether the respondent has made out a case of fraudulent misrepresentation and whether the high court was correct in directing that the property be transferred to Ms Mkhwanazi despite her failure to tender restoration of the benefit she received under the agreements.

[13] I deal first with the question whether Ms Mkhwanazi has established a case of fraudulent misrepresentation entitling her to cancel the two agreements. It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence.[2] They serve to define not only the issues between the parties, but also to place the essential evidence before the court.[3] They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out.[4] Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit.[5]

[14] A misrepresentation has been described as a false statement of fact, not law or opinion, made by one party to another before or at the time of the contract concerning some matter or circumstance relating to it.[6] A party seeking

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[2]*Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28.
[3]*Swissborough Diamond Mines* (*Pty*) *Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 323F-G; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) para 28.
[4]*Lecuona v Property Emporium CC* [2010] JOL 25266 (GSJ) para 4; *Die Dros* (*Pty*) *Ltd & another v Telefon Beverages CC & others* 2003 (4) SA 207 (C).
[5]*Swissborough Diamond Mines* (*Pty*) *Ltd* at 323J-324A.
[6]Dale Hutchison (ed), Chris-James Pretorius (ed), Jacques du Plessis, Sieg Eiselen, Tomas Floyd, Luanda Hawthorne, Birgit Kuschke, Catherine Maxwell Tjakie Naudé and Elizabeth de Stadler *The Law of Contract in*

to avoid a contract on the ground of misrepresentation must prove that: (a) the representation relied upon was made; (b) it was a representation as to a fact; (c) the representation was false; (d) it was material, in the sense that it would have influenced a reasonable person to enter into the contract; and (e) it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.[7]

[15] In her founding affidavit, Ms Mkhwanazi states that Mr Mthebe visited her at home, discussed her loan application with her and 'promised to come back with documents [for her] to sign [in] order to get the loan'. She states that:

'George came back a couple of days later and told me to sign. He indicated that he was in a hurry and he won't explain the process and documents again as he had done so on his first visit, rather he will later come back to give me a copy. He hurriedly made me sign without affording me an opportunity to read. I trusted him, probably because I was desperate and vulnerable. I just couldn't afford to lose the opportunity to pay off my arrears as I knew that this was probably my last chance to save my house and car from being repossessed.'

The further averments made by Ms Mkhwanazi are summarised in paras 3-7 above. These relate to her understanding as to the mechanism of her loan agreement with Quartermark, and in particular, the terms of repayment of the loan.

[16] Quartermark did not challenge the allegations of fraud made by Ms Mkhwanazi. Mr Mthebe, who represented Quartermark in its negotiations with Ms Mkhwanazi, did not depose to an affidavit, when the circumstances clearly called for a response from him. There is also no explanation from Quartermark as to why he did not do so. There is therefore no evidence to gainsay that of Ms Mkhwanazi regarding the representations made to her by Mr Mthebe and the circumstances that led to her signing the two agreements.

South Africa 2 ed (2012) at 116.

[7] *Novick & another v Comair Holdings Ltd & others* 1979 (2) SA 116 (W).

[17] There can be no doubt that the misrepresentations made by Mr Mthebe were material. I am satisfied that Ms Mkhwanazi was induced by these fraudulent misrepresentations to sign the contract documents. It follows that she was entitled to rescind the contracts.

[18] This brings me to the next inquiry. What relief is Ms Mkhwanazi entitled to following her election to rescind the contracts? She has claimed retransfer of the property into her name. The high court identified her remedy as *restitutio in integrum*[8] - a remedy designed to restore her to the position she was in before she 'entered into the contracts'. The high court held that Ms Mkhwanazi was entitled to retransfer of the property despite no reciprocal tender by her to restore the benefit she received. I agree with the conclusion reached by the high court, but for different reasons. The high court's reasoning was flawed. Briefly stated, in terms of the *restitutio* remedy, a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the innocent party is able and willing to restore what he or she has received under the contract.[9] This rule is founded on equitable considerations and can been departed from in the interests of justice.[10] The high court misapplied the general principles applicable to *restitutio*. In light of the approach of this court, it is not necessary to deal further with the reasoning of the high court.

[19] At the hearing of this appeal, the court raised a 'new issue' with counsel, namely, whether Ms Mkhwanazi's claim ought to have been based on the rei vindication. It does not appear that this issue was dealt with by the parties in the high court. It certainly was not addressed in the judgment of the high court.

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[8]Para 35.

[9]*Van Schalkwyk v Griesel* 1948 (1) SA 460 (A) at 470-471; *Feinstein v Niggli & another* 1981 (2) SA 684 (A) at 700G-H; *North West Provincial Government & another v Tswaing Consulting CC & others* 2007 (4) SA 452 (SCA) para 17.

[10]*Harper v Webster* 1956 (2) SA 495 (FC) at 500A-B; *Feinstein v Niggli* at 700H-701A; S*ithole v Ingwe Collieries & another* (2005) 26 ILJ 2136 (T) para 19; *North West Provincial Government & another v Tswaing Consulting CC & others* 2007 (4) SA 452 (SCA) para 17.

After the hearing of the matter, the parties were invited to make further submissions on whether the claim was vindicatory in nature and whether this 'new issue' could be raised at this stage of the proceedings.

[20] In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in *R v Hepworth*[11] to the effect that a criminal trial is not a game and a judge's position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a 'judge is an administrator of justice' who has to see that justice is done. While these remarks were made in the context of a criminal trial they are equally applicable in civil proceedings and in my view, accord with the principle of legality.[12] The essential function of an appeal court is to determine whether the court below came to a correct conclusion.[13] For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may 'amount to the confirmation by it of a decision clearly wrong',[14] and not performing its essential function. This in turn would infringe upon the principle of legality which was explained by Ngcobo J in *CUSA v Tao Ying Metal Industries*[15] as follows:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law.'

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[11] *R v Hepworth* 1928 AD 265 at 277.
[12] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering* (Pty) Ltd 1976 (2) SA 565 (A) at 70E-F; *Sager v Smith* 2001 (3) SA 1004 (SCA) para 21; *Take and Save Trading CC & others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 3.
[13] *Cole v Government of the Union of S.A.* 1910 AD 263 at 272.
[14] *Ibid* at 273. See also in *Paddock Motors* (*Pty*) *Ltd v Igesund* 1976 (3) SA 16 (A) and *Van Rensburg v Van Rensburg en andere* 1963 (1) SA 505 (A) at 510A.
[15] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 68.

[21] The main argument raised on behalf of Quartermark, in the further submissions, as to why Ms Mkhwanazi could not rely on the rei vindicatio was that she 'at no point contended that she continued to be the owner of the property' and had 'approached the court for declaratory relief, the effect of which would be to restore her ownership of the property'. This argument cannot be sustained. The undisputed facts disclosed by Ms Mkhwanazi lead to the legal conclusion that she did not lose ownership of the property. This is discussed in greater detail below. Ms Mkhwanazi's failure to record this legal position in her affidavits, or the failure of her legal representatives to properly formulate her claim both in the high court and in this court does not preclude this court from considering the correct legal principles. Lewis JA, in the recent judgment of *Nedbank Limited v Mendelow NO & another*,[16] confirmed that the court could raise matters mero motu 'where the facts to which those principles apply are squarely raised in the papers before the court (and that were before the high court)', and that 'a court should not allow the continuation of a wrong because the legal representatives of the parties did not appreciate the correct legal principles'.[17]

[22] The elements of the rei vindicatio are set out in the papers and are not disputed.[18] In her affidavit, Ms Mkhwanazi makes the following averments in this regard:

'8.24 I wish to state that I cringed when I discovered that my property was now owned by [Quartermark]. I was told that [it] "bought" the property from me for about R157 000. …

8.25 I requested Nedbank to investigate how my property was sold without my involvement in the whole process.

…

[16]*Nedbank Limited v Mendelow NO & another* [2013] ZASCA 98 (SCA) (5 September 2013).
[17]Para 17. See also *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 para 7; *Cuninghame & another v First Ready Development 249 (Association Incorporated under Section 21)* 2010 (5) SA 325 (SCA) paras 29 and 30.
[18]Paras 3-7 and 15 above.

9.1 I wish to state that I had no reason whatsoever to sell the property that I occupy; the whole thing was done fraudulently and by underhand tactics.'

[23] It is clear from Ms Mkhwanazi's evidence, which stands uncontradicted, that she had no intention to transfer ownership of the property to Quartermark. She was fraudulently induced to sign the sale agreement as well as the documents authorising transfer of the property to Quartermark.

[24] This court, in *Legator McKenna Inc & another v Shea & others*,[19] confirmed that the abstract theory of transfer applies to movable as well as immovable property. According to that theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction.[20] However, the passing of ownership only takes place when there has been delivery effected by registration of transfer coupled with what Brand JA, writing for the court in *Legator McKenna*, referred to as a 'real agreement'. The learned judge explained that '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'.[21]

[25] As has already been mentioned, a valid underlying agreement to pass ownership, such as in this instance, a contract of sale, is not required. However, where such underlying transaction is tainted by fraud, ownership will not pass despite registration of transfer.[22] The high court correctly found that the contract of sale between Ms Mkhwanazi and Quartermark was tainted by fraud. It follows from this and the fact that Ms Mkhwanazi had no intention to transfer ownership to Quartermark that the purported registration of transfer to

[19] *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) paras 20-22.
[20] Ibid para 20.
[21] Ibid para 22.
[22] *Preller & others v Jordaan* 1956 (1) SA 483 (A) at 496; *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA); *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others* 2012 (3) SA 35 (SCA).

Quartermark has no effect and Ms Mkhwanazi remained the owner of the property.

[26] A party that proceeds by way of the rei vindicatio need not tender restitution of what has been received pursuant to a contract sought to be set aside, because the cause of action is complete without such tender. Restoration of the benefit received may be the subject of a separate claim for unjust enrichment.[23] In *Rhoode v De Kock & another*,[24] Cloete JA contrasted this with a situation where the rei vindicatio was not available. In the latter instance, the party is obliged to sue for restitution *and* tender restitution of the benefit received under the impugned contract.[25]

[27] For these reasons Ms Mkhwanazi is entitled to vindicatory relief – the reregistration of the property in her name and a declaration that the agreements she entered into with Quartermark are null and void.[26] This was the relief granted by the high court. As was stated by the high court, Quartermark, if so advised, may pursue a claim against Ms Mkhwanazi for the return of any benefit she may have received under the agreements.

[28] In the result, the appeal is dismissed with costs.

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L V THERON

JUDGE OF APPEAL

[23] *Rhoode v De Kock & another* 2013 (3) SA 123 (SCA) para 24.
[24] Ibid.
[25] The high court dealt with the matter on the basis of this latter scenario.
[26] See *Meintjes NO v Coetzer* (supra) and *Nedbank Limited v Mendelow NO* (supra) where similar relief was granted.

APPEARANCES

For Appellant:	AW Pullinger Instructed by: Vermaak & Partners Inc, Johannesburg Claude Reid Inc, Bloemfontein
For First Respondent:	N Mkhize Instructed by: Mkhize Attorneys, Pretoria T Hadebe Attorneys, Bloemfontein