

SOUTH AFRICA / JUDGMENT

Agnes and Another v Tobeka and Others (42040/2018) [2022] ZAGPJHC 814 (19 October 2022) [2022] ZAGPJHC 814

COURT

South Gauteng High Court, Johannesburg

BEFORE

Thupaatlase

CASE / FILE NUMBER

42040/2018

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FLYNOTES: SALE OF HOUSE TAINTED WITH ILLEGALITY Constitution – Property and housing – Mortgage held with bank that went through mergers – Instalments not paid – Foreclosure and series of sales – Tainted with illegality – Sales declared void.

REPUBLIC OF SOUTH AFRICA

In the High Court of South Africa

(Gauteng Division, Johannesburg)

CASE NO.42040/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

19 OCTOBER 2022

In the matter between:

Malinga Nomsa Agnes

1st Applicant

Njoko Joseph

2nd Applicant

And

Mahamba Tobeka

1st Respondent

CUF Properties

2nd Respondent

NBS Bank Ltd

3rd Respondent

The Registrar of Deeds, Pretoria

4th Respondent

Nedbank Ltd obo BOE Bank Ltd

5th Respondent

Company Unique Finance (Pty) Ltd

6th Respondent

Meadow Star Investment 87 (Pty) Ltd

7th Respondent

Judgment

Thupaatlase AJ

Introduction

[1] The issues in this case are similar to a situation aptly described by Engelbrecht AJ (as he then was) in the matter of Kgole and Another v FirstRand Bank Limited and Others (2021/28961) [2021] ZAGPJHC (9 November 2021) at para [1] that “this case concerns the efforts of a couple whose property was sold in execution some seven years ago to undo the sale and subsequent registration of that property to a third party”. In this case the period is about twenty years.

[2] The applicants approached the court seeking relief against the respondents as cited in the papers that served before the Court. In the course of the proceedings, it emerged that there was a potential eighth respondent, which is Standard Bank being the current bond holder of the property.

- [3] Unfortunately only the applicants, the second and fifth respondents appeared before court to argue their respective cases. The rest of the respondents did not participate in these proceedings, and Standard Bank was not served with the papers despite being a party with substantial interest in the outcome of this matter. There was also no service on the seventh respondent, allegedly because its whereabouts are unknown to the applicants.
- [4] Central to the appreciation and understanding of the issues involved in this matter is the sequence of material events which are averred in the affidavit of the first applicant and confirmed by the second applicant. The fifth respondent also assisted to fill the holes that are gaping in the sequence of events. The same can be said of the second respondent which is an entity that sold the property to the current registered owner. This happened after the second respondent had purchased the property from sixth respondent who in turn had earlier purchased the property from the seventh respondent.
- [5] The applicants are seeking a relief that the sale transaction and later registration that took place in 2014 in terms of which second respondent (CUF Properties (Pty) Ltd), sold the immovable property described as ERF [...] EVATON WEST EXTENSION [...] TOWNSHIP REGISTRATION DIVISION IQ GAUTENG to the first respondent (Mahamba Tobeka) be declared illegal, invalid and of no legal effect ab initio and that all prior sales of the property be similarly declared null and void.
- [6] The applicants further seek an order that the Registrar of Deeds (fourth respondent) be ordered to deregister the property from the name of the first respondent and reregister it in their names. The nett effect of the relief sought by the applicants is that the court should order that the ownership of the property revert to them. This will in turn entitle them to resist proceedings seeking their eviction from the property currently pending in the Sebokeng magistrates' court. The said eviction proceedings are held abeyance pending the outcome of this matter.
- [7] It is clear from the papers that ownership of the property has passed through various entities and individuals since 1990. The issue for determination is the legal basis of such prior transactions until the property was ultimately sold to the present registered owner. There is no indication that any judicial process was instituted to have the loan agreement cancelled and further whether there was any judgment by default that was obtained against the applicants to cancel the agreement and demand payment of arrears. This is in reference to the first purchase purportedly by the BOE Bank after foreclosure around 2001.
- [8] It is apparent that some of what is stated in the affidavits is at best speculative and based on hearsay. The problem is compounded by the fact that not all previous purchasers of the property including the present registered owner have participated in these proceedings. The analogy that the court is called upon to 'unscramble an egg' which was scrambled some two decades ago is not far-fetched. The matter has a history that is chequered and messy, so to speak. I seek to unpack this history, which will lead to the order of this Court

- [9] Despite paucity of information it is not in dispute that the applicants were the original owners of the property. They had obtained financing through the now defunct NBS bank. This was during 1990 and NBS bank registered a bond over the property to secure the loan.
- [10] In 1998 NBS merged with Boland Bank to form NBS Boland. In the same year NBS Boland merged with BOE Holdings Limited. During 2003 BOE Bank was unbundled, and some of its assets and liabilities were transferred to a new entity called the People's Bank and the remainder of the assets and liabilities were allocated to Nedcor Bank. Peoples' Bank was only in existence until 2005 when its assets and liabilities were transferred to Nedbank in 2005.
- [11] According to the applicants after the NBS BOE bank ceased to operate, they did not know where to pay instalments in order to discharge their bond repayment obligations. It is clear that this must have resulted in the parties falling into arrears and the bank then foreclosed and simultaneously registered the property in its name.
- [12] It is also admitted by the applicants that they did not service the debt from 2003 till 2014. It is alleged by the fifth respondent that this is what led to foreclosure and sale in execution. BOE Bank bought the property at a sale in execution in 2001. There is no indication if a sheriff or messenger of court were involved. The property was subsequently sold by BOE Bank as part of portfolio to the seventh respondent.
- [13] The fifth respondent alleges that from that time onwards, the applicants were paying rental that entitled them to continue staying in the property. I refer to this statement as allegation because it is at best hearsay. It is based on the type of account into which the payments were received. There is no indication that the applicants were aware of the state of affairs. There is further no evidence of a rental agreement between the parties as alleged by the fifth respondent.
- [14] It appears from receipts that are attached to the founding affidavit that there were payments made by the applicants into the accounts of NBS BOE around 2003. According to the applicants these were loan repayments.
- [15] According to the applicants around 2014 they suspected that something was amiss as they were visited by what the founding affidavit refers to as "unscrupulous and illegal estate agents". It is not clear what the purpose of such visitations were, however given the admissions that the loan was not serviced, the said estate agents were probably seeking to sell the property. The founding affidavit is silent on what transpired during those visits.
- [16] I am prepared to assume these visits were by sale agents of the entities cited as respondents seeking to sell the property. It could also have been property speculators who were aware that the property was listed as been for sale by the bank. This conclusion is supported by the fact that property was sold to the first respondent during the same period of 2014. In 2016 first respondent instituted eviction application proceedings in the Sebokeng magistrate's court.

- [17] In response the fifth respondent has filed an affidavit in which a point in limine is raised regarding the non-joinder of Standard Bank as the party in whose favour the mortgage bond is registered. In respect of merits the respondent denies any wrongdoing on its part. The fifth respondent submits that because of passage of time it was unable to retrieve any documents relating to the loan agreement account. There is also no record to ascertain if there was any judicial process instituted by the bank to foreclose the property and to sell it in execution.
- [18] The fifth respondent is only able to state that from the account details provided by the applicants as proof of payment until 2003, it can be concluded that the property had been foreclosed and the bank bought it and later sold it.
- [19] The second respondent indicated that it bought property from the sixth respondent and has provided proof of the sale agreement. And that it had no knowledge of any unlawfulness in the transaction. This was in 2012. The transfer of the property from the sixth respondent to second respondent took place in the same year. The second respondent alleges that it was a bona fide purchaser and seller of the property to the first respondent.
- [20] The argument of the applicants is that they have been deprived of their property unlawfully and without due process. As a result, they argue that the present registered owner of the property and all those who were previously registered owners of the property, had no legal title to the property. They allege fraud, which I must hasten to add is not supported by evidence.

Analysis

- [21] This case is about the rights of an owner of a property that was sold without his or her knowledge and or without due legal process been followed. On the other hand, the case also implicates the rights of the bona fide purchaser's rights. Such rights also require protection. The question is whether the court in appropriate circumstances can order such retransfer of the property to the applicants.
- [22] According to the applicants they had no knowledge of any proceedings that resulted in their property been foreclosed and sold in execution. The fifth respondent has also not provided any evidence that the alleged foreclosure was done in terms of the law.

The Law

- [23] It is clear from the facts that Section 25 (right not be deprived of his or her property arbitrarily) and Section 26 (right to housing and protection from eviction without court order) of the Constitution are directly implicated. The primary residence of the applicants has been transferred into the name of the first respondent. The first respondent approached the magistrates court in Sebokeng for the eviction of the appellant from the property. She is doing this to assert her rights as the registered owner of the property. It is not in dispute that the property was sold and transferred in her name in 2014

[24] The question is how the applicants were deprived of their residential property. In the case of *Jaftha v Schoeman; Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) the court held that immovable property may be sold in execution only after a court order has been obtained and after the court has provided judicial supervision of such a process. This judgment was followed six years later by the case of *Gundwana v Steko Development* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

[25] The importance of these two judgments cannot be over-emphasised. In the case *Menqa and Another v Markom and Other* 2008

(2) SA 120 (SCA) the court stated that writ of execution based on arrear mortgage repayments is invalid if it was granted without judicial oversight by a court. It is noteworthy that the court held that *Jaftha* decision was to be applied retrospectively.

[26] In another decision of *Campbell v Botha and Another* [2008] ZASCA 126; 2009 (1) SA 238 (SCA) the court held that there can be no sale in execution without a judgment and attachment in execution of that judgment. It was held

further that if the judgment is void, then there is no subsequent sale of the property and that would not be a sale in execution but a purported sale in execution.

[27] The above decisions were quoted with approval in the case of *Knox NO v Mofokeng and Another* 2013 (4) 46 (GSJ) and in *ABSA Bank Ltd v Van Eeden and Others* 2011 (4) SA 430 (GSJ). It follows that the sale of property in circumstances where there was no judicial process cannot be supported and cannot pass constitutional

muster. Such deprivation is null and void because it violates the principle of legality.

[28] The facts in this case reveal a very disturbing behavioural pattern of the various banking institutions which morphed after the demise of NBS Bank. It is not clear how the various ownership changes were communicated to the then existing clients of NBS. The fact that the property was at that time sold for R 100.00 and bought by the same financial institution that had foreclosed is the kind of mischief that the *Jaftha* and *Gundwana* cases addressed in their finding and ordered that judicial supervision should be exercised.

[29] It is apparent that the applicants did not enjoy the constitutionally ordained protection. The financial institution conducted what can only be described as extra-judicial execution and sale procedure. This type of conduct is deprecated and frowned upon by our jurisprudence and cannot be countenanced in a democratic order. This is so because it amounts to self-help and an arbitrary deprivation of property.

- [30] As I indicated at the beginning of this judgment there is also the right of a bona fide purchaser that must be considered. The right to acquire and own property is implicit in Section 25 of the Constitution and Section 26 regarding right to housing. The first respondent in whose name the property is currently registered is not before court. However, we know that she approached the Sebokeng magistrates' court seeking eviction of the applicants.
- [31] It is trite law that there is reluctance to rescind a perfect sale. The exception when that can happen was stated in *Sookdeyi and Others v Sahadeo and Others* 1952 (4) SA 568 (A) at page 572 as follows: "These authorities indicate that in certain exceptional circumstances a sale in execution may nevertheless be impugned. The rules in regard to the qualified inviolability of a sale in execution were in so far as magistrates codified in sec.70. It has been construed in harmony rather than in conflict with Common Law."
- [32] The difficulty in this case is exacerbated by the fact that the BOE Bank appears not to have bothered to follow the legal process during what is referred in the papers by the fifth respondent as the 'sale in execution'. In the language of *Campbell supra* there can be no subsequent sale of the property without judicial authority and that would not be a sale in execution but a purported sale in execution.
- [33] In all the of cases that I have referred to it would appear that there was attempt at following due process. In the present case it is clear that BOE Bank acted extra-judicially as way back as 2001 when it purportedly foreclosed the property. There is no indication that any court processes were instituted to deprive the applicants of their property.
- [34] In the case of *Knox supra* the court undertook an analysis of the authoritative case law and common law on this aspect. At para [18] the court stated as follows:

"It follows that the first common law principle to be applied in the present instance is that, as a general rule, property sold at a sale in execution in terms of valid, existing judgment cannot be vindicated from a bona fide purchaser, provided the sale in execution was not a nullity. This implies that even where a valid judgement has been rescinded after sale in execution had taken place, the property cannot be vindicated from a bona fide purchaser who had taken transfer of the property, merely on the ground that the judgment had been rescinded. The second relevant common-law is that the first principle only applies where a valid judgment was in existence at the time of the execution sale and where a valid execution sale complying with the essential applicable rules of court and statutory measures had taken place. Where there was no judgement, or where the judgment was void ab initio, or where the essential statutory formalities pertaining to the sale of an immovable property had not been complied with, the immovable property in question can in principle be vindicated even from a bona fide purchaser who had taken transfer. The reason for the second rule is that where the sale in execution was invalid, the sheriff had no authority to conduct sale and to transfer the property to the purchaser. The result is not only that the underlying sale agreement concluded at the sale in execution is invalid, but also that the real agreement is defective since the sheriff does not have authority to transfer the property to the purchaser. The sheriff only has such authority where a valid sale in execution had taken place."

- [35] The first sale and transfer of the property where BOE Bank foreclosed and later sold the property to the seventh respondent was tainted with illegality. There was no judicial oversight despite that the property was a residential property of the applicants. I conclude that such sale in execution was a nullity.
- [36] The property has already been transferred in the name of the first respondent despite the fact that she has not yet taken possession of the property. The question is whether the property can be vindicated from her as bona fide purchaser. I proceed to answer that question.
- [37] In order to answer the question, it is important to investigate the circumstances that led to such a transfer. This is so because if there is a defect in the real agreement no transfer of ownership will take place. See *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA). The court stated further that “Although the abstract theory does not require a valid underlying contract e.g., sale, ownership will not pass- despite registration of transfer – if there is defect in the real agreement.” See para [22] of the judgment.
- [38] The court in *Legator supra* confirmed that the abstract theory of transfer of ownership also applies in the case of transfer of immovable property. At para [21] of the judgment Brand JA (as he then was) stated the legal position as follows: “Some uncertainty remained, however with regard to the transfer of immovable property. In the High Courts that uncertainty has been eliminated in a number of recent decisions where it was accepted that the abstract theory applies to movables and immovables alike” After quoting various cases which are omitted to avoid prolixity the court went concluded that: “ In view of this body of authority I believe that the time has come for this Court to add its stamp of approval to the viewpoint that abstract theory applies to immovable property”.
- [39] The validity of agreement between BOE Bank and the seventh respondent was vitiated by illegality. This is based on the principle that was enunciated in the case of *Knox* 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.”
- [40] In this case the acquisition of the property by BOE Bank was not in accordance with the law. It is not denied that the bank held a mortgage bond over the property, however there is strict procedure regarding the exercise of those rights when it pertains to deprivation of residential property. The subsequent sale and transfer of the property to subsequent purchasers including the first respondent was therefore tainted with illegality. The bank had no right to pass such rights. I am satisfied that in the premises the property in question can be vindicated despite the respondents been a bona fide purchaser. See *Sookdeyi supra*.

- [41] The fact that the property was registered in the names of various entities and ultimately to the first respondent does not change the fortunes in their favour. In the case of *Meintjies NO v Coetzer and Others* 2010 (5) SA 186 (SCA) at para [13] the court stated that “In any event, mere registration does not afford proof of ownership”.
- [42] The argument by the second respondent that given the length of time it took for the applicant to approach the court to vindicate their rights, it should be taken to mean that the applicants had acquiesced to the status quo or in the alternative that they have waived such rights cannot be sustained.
- [43] The issue regarding inaction and waiver has been dealt with by the *Meintjies* supra decision in the following manner: “Although the fact, that the deceased did not take steps to reclaim the two portions of the farm during the 16-month period from when she learned of the fraud until her death, is to be taken into account in considering whether she had waived such right, a delay in exercising a right is but only one factor to be taken into account and does not necessarily lead to an inference of its abandonment. (See *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A) at 737C). It must also be remembered that the deceased was aged and in poor health, but also that she was caught up in a situation of family strife, with various competing claims upon her and her affections.”
- [44] In this case the applicants were afflicted by ignorance of what was happening around them. There is no proof that they were ever served with any court process to draw their attention to impending sale in execution by BOE Bank. In addition, the bald allegations that the application were aware of the various transfers is not borne out by evidence.
- [45] Our legal architecture decrees the Constitution as our supreme law and that all actions and conduct must be measured against the principles enshrined therein and that conduct that is found to be contrary to the law is void ab initio and therefore unenforceable.

The court in *Nedbank Ltd v Mendelow and Another* NNO 2013 (6) SA 130 (SCA) at para [14] confirmed that “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”. It is my view that by parity of reasoning same should apply where it is found that there was illegality when the property of the applicants was foreclosed in circumstances where the court has found such deprivation to be arbitrary.

[46] In conclusion it is hereby ordered as follows:

1. That the repossession of the property described as ERF [...] EVATON WEST EXTENSION [...] TOWNSHIP REGISTRATION DIVISION IQ GAUTENG by BOE Bank in 2001 and its successor in title fifth respondent (Nedbank Bank) is hereby declared unlawful and invalid ab initio. That the Deed of Transfer T [...] is hereby declared cancelled.

2.The sale and transfer of the property described as ERF [...] EVATON WEST EXTENSION [...] TOWNSHIP REGISTRATION DIVISION IQ GAUTENG by the fifth respondent (Nedbank Limited) to seventh respondent (Meadow Star Investment 87 (Pty) Ltd) is declared null and void and Deed of Transfer T [...] is hereby declared invalid and ab initio and is hereby cancelled.

3. The sale and transfer of the property described as ERF [...] EVATON WEST EXTENSION [...] TOWNSHIP REGISTRATION DIVISION IQ GAUTENG by the seventh respondent (Meadow Star Investment 87 (Pty) Ltd) to sixth respondent (Company Unique Finance (Pty) Ltd) is declared null and void and Deed of Transfer T [...] is hereby declared invalid and ab initio and is hereby cancelled.

4. The sale and transfer of the property described as ERF [...] EVATON WEST EXTENSION [...] TOWNSHIP REGISTRATION DIVISION IQ GAUTENG by the sixth respondent (Company Unique Finance (Pty) Ltd) to the second respondent (CUF Properties) is declared null and void and Deed of Transfer T [...] is hereby declared invalid and ab initio and is hereby cancelled.

5.The sale and transfer of the property described as ERF [...] EVATON WEST EXTENSION [...] TOWNSHIP REGISTRATION DIVISION IQ GAUTENG by the second respondent (CUF Properties) to the first respondent (Mahamba Tobeka) is declared null and void and Deed of Transfer T [...] is hereby declared invalid and ab initio and is hereby cancelled.

6. That the fourth respondent (The Registrar of Deeds: Pretoria) is hereby ordered that within sixty days to cancel all Deeds of Transfer mentioned in paragraphs 1-4 and to further transfer and

register the property described above in the names of the first and second applicants.

7. Each party to pay its own costs.

T Thupaatlase

Acting Judge

Heard on 25 August 2022

Judgment

delivered on 19 October 2022

APPEARANCES

First and Second Applicants: Counsel: ADVOCATE BT NGQWANGELE

Instructed by: Henley Mphamba Attorneys

First Respondent: No Appearance

Second Respondent: Counsel: ADVOCATE WG PRETORIUS

Third Respondent: No Appearance

Fourth Respondent: No Appearance

Fifth Respondent: Counsel: ADVOCATE D VAN NIEKERK

Instructed by: Hammond Pole Majola Inc.

Sixth Respondent: No Appearance

Seventh Respondent: No Appearance

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