

SOUTH AFRICA / JUDGMENT

Anderson and Another v Standard Bank of SA Limited and Others (986/2019)

[2024] ZAECQBHC 11 (13 February 2024)

[2024] ZAECQBHC 11

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Bands

CASE / FILE NUMBER

986/2019

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FLYNOTES:

PROPERTY – Restitution – Sale induced by fraud
– Owners sought loan and signed documents – Unwittingly selling home and later having to vacate – Seeking vindictory relief –
Whilst applicants may have been negligent in signing documentation, alternatively, naive, they were clearly misled as to nature of transactions – Caveat subscriptor of no application in face of fraud – Vindictory action cannot be equated to “debt” for prescription – Deed of sale declared null and void – Declared that applicants are owners of the immovable property and entitled to restitution.
SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy
IN
THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)
Case
No. 986/2019
In
the matter between:-

BENITA
ANDERSON
First
Applicant
CLAUDE
GRAHAM ANDERSON
Second
Applicant
and
THE
STANDARD BANK OF SA LIMITED
First
Respondent
SOUTHERN
SPIRIT PROPERTY 131 (PTY) LIMITED
Second
Respondent
DON
FRASER
Third
Respondent
JOHAN
NEL
Fourth
Respondent
TRACEY
BERYD NEL
Fifth
Respondent
REGISTRAR
OF DEEDS KINGWILLIAM'S TOWN
Sixth
Respondent

JUDGMENT

BANDS J:

[1] At the centre of this dispute is a fraudulent reverse-mortgage scheme devised and implemented by the now deregistered company, Asset Management Specialists (Pty) Ltd (“AMS”), to which approximately 150 financially distressed individuals fell victim, resulting in the loss of their homes; the very thing that they sought to protect against when approaching AMS for financial assistance. Unsurprisingly, this is not the first time that the AMS scheme has come under fire, having previously received judicial attention in numerous matters, most notably by the then Eastern Cape Division of the High Court, Grahamstown, [1] in *Tshatshu and Another v Standard Bank of SA Limited and Others*, to which I return.[2]

- [2] The applicants, who contend to have been deceived by AMS, seek vindictory relief,[3] which is evidenced by their request for restitution in respect of erf 2[...], Westering, Gqeberha, more commonly referred to as 1[...] L[...] C[...], Westering, Gqeberha (“the immovable property”).
- [3] The application is opposed by the fourth and fifth respondents (“the respondents”) who are the current registered owners of the property. Primarily, the respondents argue that the applicants, at all material

times, had the requisite intention to dispose of the immovable property and accordingly they were not defrauded. Alternatively, they contend that in the event of a finding that the applicants were the victims of fraud; their claim for return of the immovable property has prescribed. Whilst the respondents initially adopted the attitude that the application was not vindictory in nature,[4] this contention was, correctly so, not persisted with when the matter came before me for argument. It was accepted by both counsel appearing in the matter that the factual findings relating to the mechanism and nature of the scheme, as per the judgment of Revelas J in Tshatshu, in the absence of an appeal of that decision and any evidence to the contrary, stand.

The AMS scheme

- [4] In short, AMS approached the general public by way of advertising, offering distressed property owners what they believed to be a solution to their cash flow problems. This solution took the form of what AMS referred to as their “product”, which provided would-be clients (“the client”) seeking to raise finance, but unable to do so due to having been blacklisted with the credit bureau, an answer to their quandary by obtaining a loan on their behalf at a preferential interest rate, through an AMS shelf company. A mortgage bond would be registered over the immovable property to serve as security for the loan. To participate in the scheme and qualify for the AMS’ product, the client had to be the owner of immovable property with sufficient equity.
- [5] The mechanism through which the scheme operated is described in detail in Tshatshu. For the purposes of this judgment, it suffices to set out as follows. The client’s immovable property would be sold and transferred to an AMS shelf company (in this instance, the second respondent), specifically incorporated for this purpose. The client was at all times led to believe that the immovable property would simply be transferred to the shelf company, in which it would “rest” (in other words, in which it would be held) on behalf of the client.
- [6] AMS raised the finance by utilising creditworthy individuals, with proven income and clean credit records, as guarantors to provide security in the form of suretyships in favour of the relevant banking institution (“the creditor”) on behalf of the shelf companies. The guarantor, in return for participating in the scheme, would receive a fee equal to 5% of the amount raised by the mortgage bond. This was but one of many costs for which the client would become liable, under the scheme.

- [7] An example of the additional costs, all of which are included in the total loan amount (together with the guarantor's fee), appears from the final reconciliation account addressed to the second applicant by AMS, which includes: (i) payment of the amount owing to the banking institution in order to discharge the existing home loan; (ii) payment to the client of the monies as and for the "loan"; (iii) all transaction costs associated with the transfer and registration of the immovable property from the client to the shelf company; (iv) commission to AMS equal to 7.5% of the total finance raised; and (v) other ancillary costs and fees. In the present matter, the cumulative cost of the transaction was R785,000.00.
- [8] The client would be required to enter into a written agreement of lease with the shelf company in respect of the immovable property. In terms thereof, the client would be liable for the payment of monthly rental at a rate equal to the bond repayments for which the shelf company was liable to the bank, which amount, given the above fees, was invariably much higher than the client's initial bond repayment prior to becoming embroiled in the scheme.
- [9] Revelas J, in Tshatshu, highlighting the fraudulent and pernicious character of the scheme, utilised the following example:
- "An individual who had been servicing a bond of for instance R857,061.00, would, once he or she has signed up with AMS, end up servicing a bond of R3 million in lease payments to a shelf company."*
- [10] How this could be, is immediately apparent ex facie the final reconciliation statement addressed to the applicants in casu. The applicants, prior to contracting with AMS were liable for R131,548.01 under their existing home loan agreement. Following their engagement with AMS, and in order to finance a loan in the amount of R100,000.00,[5] the applicants had not only alienated their property, valued at R785,000.00, for an effective price of R231,548.01 (R131,548.01 to settle their existing home loan and R100,000.00 being the funds "advanced" to the applicants in terms of the loan with AMS) but became liable for the payment of monthly rental to reside in the property equal to the repayments due in terms of a significantly higher home loan, in the amount of R785,000.00.
- [11] Even more disturbing is that the client, effectively having financed the above and who is now, in law, no more than the lessee of the immovable property sold to the shelf company, enters into an option agreement with the shelf company. In terms of this latter agreement, the client is granted an option to repurchase the immovable property from the shelf company, against payment of the same price that the applicant sold the immovable property for, to the shelf company.

The facts of the present dispute

- [12] The applicants purchased the immovable property during 1992 for an amount of R138,000.00 and the property was registered in both of their names. A mortgage bond securing their home loan was registered over the immovable property in favour of ABSA bank. Some thirteen years later, during May 2005, the second applicant noticed an advert in the local newspaper, the Herald, offering loans to the public. The applicants sought to effect certain

renovations to their home but were unable to approach other mainstream financial institutions for finance as they were experiencing financial difficulties.

[13] This being so, they responded to the advert and were invited to meet with AMS agents, Wilma and Ben Breytenbach (“the Breytenbach’s”) at the offices of AMS in Humewood. Significantly, the Breytenbach’s were the same AMS agents who featured in Tshatshu. I pause to mention that the respondents, notwithstanding this fact, coupled with the further factual findings to which Reveals J arrived regarding the fraudulent nature of the scheme, advanced no reason why the modus operandi of AMS, through their agents, would be any different in respect of their dealings with the applicants.

[14] On meeting with the Breytenbach’s, the applicants were advised that:

(i) they would qualify for a loan of R100,000.00; the immovable property would be placed in a company for safe-keeping until such

time that the applicants’ loan had been repaid; and (iii) the repayment structure would be confirmed during a further meeting.

[15] During the subsequent meeting, the applicants signed the documentation presented to them, which they understood to serve as confirmation of the loan (for which the immovable property would serve as security) and for the purposes of placing the immovable property “into a company for safe-keeping”, but which instead constituted: (i) a deed of sale entered into between the applicants and the second respondent in respect of the immovable property; (ii) an option to purchase the immovable property; (iii) a notice of cancellation; and (iv) a power of attorney to pass transfer. The applicants, much like the applicants in Tshatshu, were emphatic that they never realised that by signing the aforesaid documentation, they were selling their house to the second respondent. This was never their intention. As set out above, by entering into the agreements, the applicants alienated

their property to the second respondent for R785,000.00. From this, the applicants “benefitted” from R231,548.01 as set out in paragraph [10] above. I use the term benefitted loosely, as the amounts received were not unencumbered for the reasons set out above.

[16] The R100,000.00 received in respect of the “loan” was utilised by the applicants to renovate the immovable property and to pay off household debt.

[17] Whilst the applicants were initially liable for payment of an amount of R4,750.00 per month, under the agreement, this soon escalated to R7,100.00 per month. All attempts to contact AMS to obtain

reasons

for the increase proved to be unsuccessful.

[18] During or about late 2006; alternatively, early 2007, the applicants received a phone call from one Phillip Taljaard (“Taljaard”), who identified himself as AMS’ attorney. Taljaard advised the applicants that AMS was the subject of investigation and that they should stop making payments to AMS. The applicants acted in accordance with the advice received. They attempted to contact the Breytenbach’s in an endeavour to obtain further information, however their telephones had been disconnected.

All attempts to contact the AMS Head Office proved fruitless. The first applicant eventually traced Wilna Breytenbach via the Facebook social media platform, who advised her that “AMS had deleted all data from the computers and had terminated the phone lines”.

[19] During 2010, the applicants approached attorney, Eugene Raymond (“Raymond”), to investigate the matter and to establish the position regarding the immovable property. Whilst Raymond made initial inquiries regarding the loan, he passed away shortly thereafter.

[20] The applicants, acting on the assumption that they would be contacted by an official from AMS or an attorney acting on its behalf, took no further steps for a period of four years until they were contacted by attorney Claude Knoesen (“Knoesen”).[6] According to the applicants, Knoesen advised them that they owed a gentleman by the name of Don Fraser, the third respondent in these proceedings, money and that they had been living in his home free of charge for a period of seven years. The applicants state that they were shocked and dismayed by what was conveyed to them. They did not know who Don Fraser was.

[21] Ultimately, the applicants contend that Knoesen advised them that they had no choice but to move out of the immovable property as it no longer belonged to them. The applicants, under threat of legal consequences should they refuse to vacate the immovable property and believing to be lacking any form of a remedy, reluctantly vacated the immovable property.

[22] Later during 2016, the applicants, having read about Tshatshu in the local newspaper, approached the Legal Resources Centre for legal assistance, which thereafter culminated in the present application. It was only at this juncture that the machinations of the scheme became known to them.

[23] As foreshadowed above, the respondents argue that the applicants, at all material times, had the requisite intention to dispose of the immovable property. Whilst the respondents concede that they have no direct knowledge of: (i) the facts set forth by the applicants, including their engagement with AMS and the Breytenbach’s; and (ii) the fraudulent nature of the scheme (which they do not deny), they argue that it is inconceivable that a person such as the first applicant, who was employed as a personal assistant to a life insurance broker at Mortgage SA at the time of contracting with AMS, would sign all of the documentation and still be under the impression that they were only applying for a loan and that the immovable property was not being sold to the second respondent. On this basis, it was contended that a real agreement between the applicants and the second respondent was concluded in order to transfer ownership of the immovable property to the second

respondent, who obtained good title to the property. This is the very same argument that was raised in Tshatshu.

- [24] As succinctly set out by Revelas J at paragraph [39] of Tshatshu, with reference to various other decisions pertaining to reverse mortgage schemes:

“The courts, when dealing with these type of matters have generally adopted the approach that individuals who had been fraudulently

induced to sell their homes, were entitled to vindicatory relief – the registration of their properties into their names and declaratory orders rendering the documents underpinning the impugned transactions null and void. The applicants argued that the facts of their case were on all fours with the facts in the ABSA v Moore and Quartermark cases. The applicants submitted that these two decisions of the Supreme Court of Appeal enjoin me to grant the relief as set out in their notice of motion.”

- [25] Lewis JA writing for the Supreme Court of Appeal in Absa Bank Limited v Moore,[7] which dealt with a comparable scheme, commonly referred to as the Brusson Scheme, summed up the unusual features thereof, which

features Revelas J found to be equally applicable to the AMS scheme. The summary at paragraph [24] of the judgment reads as follows:

“The unusual features include: the investor does not really intend buying the property and never takes occupation; the client does not really intend selling the property and does not lose occupation; the investor pays nothing, but applies for a bond over the property as he has a good credit rating; the price payable in terms of the instalment sale agreement accrues not to the investor but to Brusson; all payments are made to Brusson; in the event of default by the clients, Brusson is entitled to take transfer of the property.”

- [26] The question which needs to be determined is whether the applicants performed the alleged legal act knowingly, with the aim of bringing about the legal consequences it entails. In other words, did the applicants intended to transfer the immovable property to the second respondent, or were they instead induced to sign the documentation by way of a fraudulent misrepresentation, believing that they would retain ownership of the immovable property.

- [27] I cannot agree with the respondents that the applicants knowingly entered into the agreements with the necessary intention of selling the property to the second respondent. I am of the view that the respondents’ allegations, regarding the applicants’ alleged knowledge (which at best is speculation), in the face of the applicants’ positive assertions, amounts to no more than a bare denial and are insufficient to raise a genuine dispute of fact.

- [28] As articulated by Binns-Ward J in Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd and Another:[8] “the import of the Plascon-Evans rule is so well established that it hardly bears stating: it is to the effect that where there is a dispute of fact on the papers final relief may be granted in an application only if it is justified by the averments in the affidavits of the

applicant which are either admitted or not disputed by the respondent, together with the facts alleged by the respondent. It is, however, the qualifications and exceptions to that simple principle that are sometimes overlooked..." [Own emphasis].

[29] As pointed out by the learned judge of appeal in *Plascon-Evans Paints v Van Riebeeck Paints*: [9]

"In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona

fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949

(3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto* NO 1972

(3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's

factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines

whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board* and

Another 1983

(4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries* case, supra at 924A)."

[30] It is inconceivable that any homeowner would sell their immovable property worth R785,000.00 for an amount of R231,548.01, the breakdown of which I have dealt with, and then utilise the monies left over, following the settlement of the existing home loan, to renovate a property which they no longer owned but instead occupied as a tenant, all the while paying rental equal to the monthly home loan instalment, which was far in excess of what they were originally

paying (as owner).

[31] It further defies logic that the applicants would: (i) in selling their immovable property, cover the transfer fees (which are usually for the account of the purchaser); (ii) forego the majority of the financial benefit associated with the sale (which accrued to AMS); and (iii) agree to the repurchase of the property from the purchaser for the full amount of R785,000.00, particularly if regard is had to the computation of such amount.

- [32] The respondent's reliance on the final reconciliation to support their case, does not assist the respondents.[10] That fees were raised in respect of the transfer and registration of the immovable property, is not inconsistent with the version of the applicants that they, at all material times, were led to believe that the immovable property would be "placed" in the second respondent for safekeeping and that the immovable property would serve as security for the loan.
- [33] Whilst the applicants may have been negligent in signing the documentation; alternatively, naïve, they were clearly misled as to the nature of the transactions, believing them to serve some other purpose entirely, as was the case in *Moore and Tshatshu*; the principles enunciated in such decisions, being equally applicable to the present case. I am accordingly satisfied that as the applicants had no genuine intention to transfer ownership of the immovable property, the purported transfer under the agreements is ineffectual to convey valid title to the second respondent, in the absence of which, the second respondent was unable, in law, to transfer ownership in the immovable property to the respondents.
- [34] Applying *Legator McKenna Inc v Shea*[11] and *Nedbank Ltd v Mendelow NNO*[12] at para 12:
- "It is trite that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds register. Registration is 'intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office'. And it is a source of information about those rights. But registration does not guarantee title, and if it is effected as a result of a forged power of attorney or of fraud, then the right apparently created is no right at all."*
- [35] The respondents' reliance on caveat subscriptor is of no application in the face of fraud and accordingly, such argument must fail.[13]
- [36] As stated above, the respondents further argue that in the event of a finding that the applicants were the victims of fraud; their claim for return of the immovable property has prescribed.
- [37] The respondents' reliance on *Rens v Standard Bank of South Africa Limited and Others*[14] to support their argument is misplaced, the law having been settled by the Supreme Court of Appeal in *Absa Bank Ltd v Keet*, to which I am bound.[15] In this respect, the court stated as follows at paragraph [25]:
- "...the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act which prescribes after three years is, in my opinion, contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription, on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his*

right of action against the debtor,

which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a ‘debt’ has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor’s property after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act.”

- [38] In light of the aforesaid and given the vindicatory nature of the relief sought by the applicants, the respondents’ argument in respect of prescription must fail.
- [39] A further legal point raised by the respondents is that of estoppel. In essence, the respondents contend that “[t]he applicants knew for many years that the property was registered in someone else’s name. They failed to take any steps to rectify the position and in doing so allowed the sale of the property to us to occur.” Without belabouring the point, not only is this an incorrect synopsis of the facts before me, but a party seeking to rely on estoppel must satisfy the requirements set out by the Supreme Court of Appeal in *Aris Enterprises (Finance) v Protea Assurance*[16] and thereafter in *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd*,[17] which the respondents, on the facts of the present matter, have failed to do.
- [40] A further argument raised on behalf of the respondents was that the applicants have benefitted from an unmerited windfall in that prior to their engagement with AMS, they owed the bank an amount of R131,548.01. Following their engagement, not only did the applicants receive an amount of R100,000.00 in cash as and for the loan, but the bond over the immovable property was extinguished. The respondents contend that it will be an unconscionable outcome should the applicants be allowed to “walk back into a property (on which they previously owed a substantial sum) bond free”. This argument of course does not take into account the substantial sums of money paid by the applicants to the second respondent as and for “rental” to reside in the immovable property. Leaving this aside, and even if the applicants will be better off than prior to the fraud, should I come to the applicants’ assistance (which is in any event not clear on the facts of this matter), the applicants, much like the respondents are innocent parties. Significantly, the first respondent bank has chosen not to oppose the application. The Constitutional Court in *Absa Bank Limited v Moore and Another*,[18] faced with a similar argument, albeit having been raised on behalf of the bank, stated as follow at paragraphs [56] and [57]:

“[56] Beneath these contentions lies the Bank’s complaint that the Moores received an unmerited windfall at its expense. It is true that the Moores are better off now than before the fraud, and that the Bank, having lost its secured loan to the Moores, now has only an unsecured claim against Mr Kabini, who is probably good for nothing. But the Moores justly defend that this was not their fault. Their bond debt to the Bank was discharged because the Bank decided to take Mr Kabini, whom it thought now owned the property, as its debtor in their stead. It was the Bank that decided to grant a loan to Mr Kabini. We don’t know what background checks it did, or could have done, on him. We know nothing

about the conveyancing attorney whom it employed, and who accepted all the documents at face value. The discharge of the Moores' debt was not subject to a condition that Mr Kabini would prove a worthy debtor. And, on the facts before us, there is no basis to develop our law so as to impose one.

[57] In the way things have turned out, on what we have before us, the outcome is not unjust. The Bank, which enjoyed the institutional resources and power to protect itself against the fraudulent scheme, but didn't do so, has to suffer the loss its loan to Mr Kabini caused to it."

[41] In the event that the respondents are held to the terms of their loan agreement in respect of the immovable property, for which the bank would ultimately have lost its security, the respondents are free to institute a claim for damages against whichever party they deem to be responsible for their loss; alternatively, to pursue any other legal

remedy seeking whatever relief they deem appropriate, in the circumstances of the matter. This falls outside the ambit of

this judgment.

[42] The argument on behalf of the respondents that as they are innocent purchasers, the applicants have no right of recourse against them for the return of the property, is without merit. So too is their misplaced reliance on the decision of *Preller & Others v Jordaan*.^[19] *Preller* is not authority for such proposition. What the court found was that where a party, despite the fraudulent conduct, intended to transfer the title in the property, even though willingness to do so may have been the result of undue influence, it constitutes a valid act, which is not void but only voidable. In such instance, ownership passes between the relevant parties and the property may not be reclaimed by way of the *rei vindicatio*. Where however, as in present matter, a party signs a deed of sale, thinking it to be something else, and accordingly has no intention to bring about the legal consequences of a sale, such act has no legal consequences.

Conclusion

[43] For all of the above reasons, it follows that the applicants are entitled to the relief sought, including the costs of the application, which ought to follow the event.

[44] The following order is issued:

1. The following documents are declared null and void and of no force and effect and are accordingly set aside:

- 1.1 Deed of Sale entered into between the Applicants and the Second Respondent, dated the 23 July 2007;

- 1.2 Option to Purchase entered into between the Applicants and the Second Respondent dated the 16 October 2007;

1.3 Notice of Cancellation entered into between the Applicants and the Second Respondent dated 16 October 2007;

1.4 Power of Attorney to Pass Transfer dated 6 September 2005.

2. It is declared that the applicants are the owners of ERF 2[...], Westering, Gqeberha, also known as 1[...] L[...] C[...], Westering, Gqeberha (“the immovable property”).
3. The applicants are entitled to restitution in respect of the immovable property.
4. The second and third respondents are ordered to pay the costs of the transfer of the immovable property into the name of the applicants.
5. The fourth and fifth respondents are ordered to pay the costs of the application.

I BANDS

JUDGE OF THE HIGH COURT

Date heard: 10 August 2023 Date of judgment: 13 February 2024 For the applicants: Mr Naidu
Instructed by: Legal Aid South Africa 1 Uitenhage Road North End For the 4th and 5th
respondents: Adv Mullins SC Instructed by: Howard Collen Attorneys 11A Shirley Street Newton
Park Gqeberha

[1] Now known as the Eastern Cape Division, Makhanda.

[2] (1787/2014) [2016] ZAECGHC 43 (6 May 2016).

[3] The full relief sought, as set out in the notice of motion is as follows: “1. That the following agreements purportedly concluded between the Applicants and the Second and Third Respondents are declared to be invalid and unlawful and of no force and effect: 1.1 Deed of Sale entered into between the Applicants and the Second Respondent, dated the 23rd July 2007; 1.2 Option to Purchase entered into between the Applicants and the Second Respondent dated the 16th October 2007; 1.3 Notice of Cancellation entered into between the Applicants and the Second Respondent dated 16th October 2007; 1.4 Power of Attorney to Pass Transfer dated 06th September 2005. 2. That the agreements listed in paragraph 1 above are set aside. 3. It is declared that the Applicants are entitled to restitution of ERF 2[...], Westering, Port Elizabeth, also known as 1[...] L[...] C[...], Westering, Port Elizabeth. 4. That the Second and Third Respondents be ordered to pay the costs of the transfer of the property into the name of the Applicants. 5. Granting the Applicants leave to supplement their Founding Affidavit, should the need arise. 6. That any of the Respondents who oppose this application pays the costs of the Application. 7. Further and/or alternative relief.”

[3] The full relief sought, as set out in the notice of motion is as follows:

“1. That the following agreements purportedly concluded between the Applicants and the Second and Third Respondents are declared to be invalid and unlawful and of no force and effect:

1.1 Deed of Sale entered into between the Applicants and the Second Respondent, dated the 23rd July 2007;

1.2 Option to Purchase entered into between the Applicants and the Second Respondent dated the 16th October 2007;

1.3 Notice of Cancellation entered into between the Applicants and the Second Respondent dated 16th October 2007;

1.4 Power of Attorney to Pass Transfer dated 06th September 2005.

2. That the agreements listed in paragraph 1 above are set aside.

3. It is declared that the Applicants are entitled to restitution of ERF 2[...], Westering, Port Elizabeth, also known as 1[...] L[...] C[...], Westering, Port Elizabeth.

4. That the Second and Third Respondents be ordered to pay the costs of the transfer of the property into the name of the Applicants.

5. Granting the Applicants leave to supplement their Founding Affidavit, should the need arise.

6. That any of the Respondents who oppose this application pays the costs of the Application.

7. Further and/or alternative relief.”

[4] Which argument has a bearing on the defence based on prescription.

[5] Whist the applicants cite a total loan amount of R100,000.00, the loan amount payable to the applicants as recorded in the statement

is in the cumulative amount of R130,194.52, payable in two separate instalments of R43,000.00 and R87,194.52 respectively.

[6] I am aware of the dispute on the papers pertaining to whom Knoesen was purportedly representing at the time. In this respect, the applicants contend, from their understanding, that Knoesen had been acting on the instruction of Mr Fraser’s attorney who was based in East London, whilst the respondents contend that he was acting on the instruction of the applicants. No confirmatory affidavit was filed on behalf of Knoesen dealing with this aspect. For the purposes of this judgment, I deem it unnecessary to resolve this dispute, which in no way has a bearing on the final outcome of the matter. Interestingly however, even on the respondents’ version, Knoesen, at the time of his involvement, which was shortly prior to the applicants having vacated the immovable property, stated, in respect of such property, that the applicants “sort of believe it’s their house.”

[6] I am aware of the dispute on the papers pertaining to whom Knoesen was purportedly representing at the time. In this respect, the applicants contend, from their understanding, that Knoesen had been acting on the instruction of Mr Fraser’s attorney who was based in East London, whilst the respondents contend that he was acting on the instruction of the applicants. No confirmatory affidavit was filed on behalf of Knoesen dealing with this

aspect. For the purposes of this judgment, I deem it unnecessary to resolve this dispute, which in no way has a bearing on the final outcome of the matter.

Interestingly however, even on the respondents' version, Knoesen, at the time of his involvement, which was shortly prior to the applicants having vacated the immovable property, stated, in respect of such property, that the applicants "sort of believe it's their house."

[7] 2016 (3) SA 97 (SCA).

[8] (23255/2010) [2012] ZAWCHC 43 (15 May 2012).

[9] 1984 (3) 623 (AD) at 634I – 635A-C.

[10] Nor does the consent to install the pre-paid electricity meter upon which the respondents rely, which in any event was after the fact.

[11] 2010

(1) SA 35 (SCA).

[12] 2013

(6) SA 130 (SCA).

[13] Absa Bank Limited v Moore 2016

(3) SA 97 (SCA) at paragraph [17].

[14] (371/14) [2015] ZAECPEHC 14.

[15] 2015

(4) 474 (SCA) at paragraph [25].

[16] 1981

(3) SA 274 (AD).

[17] (381/10)

[2011] ZASCA 20 (17 March 2011).

[18] 2017 (1) SA 255 (CC).

[19] 1956

(1) SA 483 (AD).

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