

SOUTH AFRICA / JUDGMENT

E.M.D and Another v Fourie and Others - Reasons (2493/2019) [2023] ZAECQBHC 46 (17 August 2023)

[2023] ZAECQBHC 46

COURT

Eastern Cape High Court, Gqeberha

BEFORE

J W Eksteen

CASE / FILE NUMBER

2493/2019

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GQEBERHA

OF INTEREST

Case No.: 2493/2019

Date Heard: 3 August 2023

Made available: 17 August 2023

In the matter between: E[...] M[...] D[...] First Applicant D[...] D[...] Second Applicant And JOANNE FOURIE First Respondent RENIER POSTUMOUS Second Respondent ETHEL STEVENS Third Respondent CHARLES BEKKER Fourth Respondent KAPLAN BLUMBERG ATTORNEYS Fifth Respondent THE REGISTRAR OF DEEDS KING WILLIAMS TOWN Sixth Respondent

REASONS

EKSTEEN J:

- [1] In this matter the applicants sought to vindicate an immovable property registered in the name of the first respondent, Ms Joanne Fourie. On 3 August 2023 after hearing the applicants in person and counsel for the first, second and fourth respondents, I made the following order:

“1 The following agreements purportedly concluded between the Applicants and the First Respondent are declared to be invalid and unlawful and of no force and effect:

- 1.1 Deed of Sale entered into dated 16 February 2018;
- 1.2 Power of Attorney to pass transfer dated 16 April 2018.
2. The agreements listed in paragraph 1 above are set aside.
3. The Applicants are entitled to restitution of ERF 9[...], B[...], Port Elizabeth, also known as [...] A[...] Street, Salt Lake, Port Elizabeth.
4. The First Respondent is to sign any and all documentation necessary to effect transfer of the property back to the Applicants.
5. The Fifth Respondent is to attend to the conveyancing procedures related to transferring the property back into the names of the Applicants.
6. The Second, Third and Fourth Respondents pay the costs arising in respect of the transfer of the property into the name of the Applicants, the one paying the others to be absolved.
7. The First Respondent pay the costs of the application.”

I indicated at the time that the reasons for my order would follow. These are my

reasons.

Background

- [2] The first applicant, Ms E[...] D[...], and the second applicant, Mr D[...] D[...] had been married to one another on 26 December 1987. During the subsistence of their marriage they acquired the immovable property situated on erf 9[...], B[...], Port Elizabeth, also known as [...] A[...] Street (the property). The property was bonded in favour of Standard Bank of SA Limited and was registered jointly in the names of Ms D[...] and Mr D[...], as co-owners. On 30 August 2011 they were divorced, but, notwithstanding the divorce, they retained the property as joint owners. Initially, Mr D[...] remained in occupation of the property until his remarriage in 2013, when he and his new wife moved out of the property. Ms D[...] and the children born of their union returned to reside in the property.
- [3] During approximately 2012, while Mr D[...] was still resident in the property, he began to experience employment difficulties and was unable to meet his obligations to Ms D[...] in respect of the bond payments to Standard Bank. Ms D[...] tried to make payment of the bond which placed strain on her finances. Thus, in 2016, Ms D[...], too, moved out of the property to rent premises nearby. The property was then let, and although the papers do not deal with the rental income, as a matter of law, it accrued in equal shares to Ms D[...] and Mr D[...] respectively.

- [4] Over time the applicants fell further in arrears on their bond payments with the result that Standard Bank took judgment against them on 19 September 2017 in the amount of R50 000,00 together with interest thereon. Pursuant to the judgment Standard Bank proceeded to advertise a sale in execution in respect of the property which was scheduled for 16 February 2018.
- [5] Shortly before the sale in execution was to proceed the third respondent, Ms Ethel Stevens, who was employed by Standard Bank and who has since passed away, approached Ms D[...] and advised that she knew a person, the second respondent, Mr Postumous, who could assist in preventing the bank from selling their home. Thus, Ms D [...], who had in the interim been remarried to one John Jacobs, was introduced to Mr Postumous. What occurred thereafter is the subject of considerable factual dispute. Ms D[...] contended that she had been advised by Mr Postumous that Ms Fourie would advance a loan to her in order to pay off the bond obligation and that she would hold the property as security for the loan until it was repaid. For this purpose she was taken to the offices of the fifth respondent where various documents were drawn up and signed and she believed that they related to the said loan. Ms Fourie was not present during these negotiations, which were conducted by Mr Postumous and Mr Bekker, the fourth respondent, on her behalf.
- [6] In fact, the documents that were signed constituted a deed of sale in respect of the property which was sold to Ms Fourie for R70 000,00 and the seller was reflected as Ms D[...] and Mr D [...]. However, it is common cause that in fact John Jacobs, Ms D[...]’s husband, signed as Mr D [...]. He forged Mr D[...]’s signature. Ms D[...] alleged that Mr Postumous, Mr Bekker, an estate agent, and Ms Cradock, an attorney in the employ of the fifth respondent, knew of his true identity and that they had advised him to sign, as if he were Mr D [...], because of the urgency of the matter. Accordingly, the applicants alleged that Ms Fourie had fraudulently obtained registration of the property with the concurrence of Mr Postumous, Ms Stevens and Mr Bekker.
- [7] As I have said, there is a considerable factual dispute relating to the events which occurred at the offices of the fifth respondent. Ms Fourie said that she had been approached by Mr Bekker, who had advised her of the predicament of the applicants and the threatening sale in execution and suggested that there was an opportunity to purchase the property at a reasonable price, subject to the applicants’ right to repurchase the property later, at an increased price, so as to ensure a profit to her. Thus, the respondents said that Mr Postumous had advised Ms D[...] orally that she could repurchase the property for R120 000,00 when she was able to. The first, second and fourth respondents contended that the applicants were at all times aware thereof that the property was to be sold.
- [8] It is common ground that Ms D[...] repaid an amount of R50 000,00 to Mr Postumous on 17 March 2018 and a further R10 000,00 on 19 January

2019. These amounts were accepted and retained by Mr Postumous and there is no tender to return these funds. Ms D[...] contended that the money was paid in reduction of the loan. However, the respondents argued that Ms D[...] had intended to repurchase the property and that the said amounts have been received as part payment of the purchase price. They said that a contract of sale could not be completed in respect of the repurchase because Ms D[...] had not been able to raise the R120 000,00 referred to earlier.
- [9] Approximately two months after signature of the deed of sale Ms D[...] and Mr Jacobs again attended at the offices of the fifth respondent and signed a power of attorney to pass transfer of the property to Ms Fourie, and again Mr Jacobs forged the signature of Mr D[...]. The property was duly registered in the name of Ms Fourie pursuant to this power of attorney and the bond commitment to Standard Bank was relieved.
- [10] As adumbrated earlier, the property had been let and the deed of sale records that the purchase was subject to the rights of the existing tenants. Notwithstanding this recordal, after the transfer of

ownership had been registered in the deeds office and in May 2019, Ms Fourie proceeded with an application to evict the applicants and all persons occupying through them from the premises. That prompted the present litigation.

- [11] The dispute of fact, and the allegations of fraud, cannot be resolved on the papers. However, I consider that the application may be resolved without resort to these disputes. It is common cause

on the papers, as adumbrated earlier, that Ms Fourie, as purchaser, never negotiated either with Ms D[...] or Mr D[...]. All the negotiations were conducted by Mr Postumous, Ms Stevens and Mr Bekker. The applicants were estranged from one another and Mr D[...], as co-owner with Ms D[...], was never consulted in respect of the sale and was not party to the transaction. He did not sign the deed of sale nor did he sign the power of attorney to pass transfer and he was, at all times, entirely unaware of the process. As I have said Mr Jacobs forged his signature.

The Deed of Sale

- [12] Section 2(1) of the Alienation of Land Act[1] (the Act) provides:

“No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

- [13] As adumbrated earlier, Mr D[...] was a co-owner of the property and he did not sign the deed of sale nor did he authorise Mr Jacobs in writing to do so on his behalf. The deed of sale was therefore of no force or effect at the time. Because the invalidity is prescribed by statute an estoppel cannot be invoked to make it legal.[2] Mr White, on behalf of the respondents, did not argue the contrary.

[14] Since Wilken[3] it has been trite that “[a] transaction which has no force or effect is necessarily void ab initio, and can in no circumstances confer any right of action.”[4]

Section 28(2) of the Act

[15] However, the invalidity of the contract, as stipulated in s 2(1), is subject to the provisions of s 28 of the Act. Section 28(2) provides:

“Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.”

[16] Section 28(2) gives statutory effect to the judgment in Wilken where the Appellate Division held:

“It by no means follows that because a court cannot enforce a contract which the law says has no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms.”[5]

Accordingly, what s 28 requires is full performance by all parties to the contract. Partial performance, or full performance by one of the parties, would not suffice to cloth the transaction with validity.[6]

[17] It is not disputed that Ms Fourie had performed in full in terms of the contract and the bond registered over the property was cancelled and extinguished by payment of the purchase price to Standard Bank.

The more difficult question relates to whether the property has been transferred to Ms Fourie.

[18] As adumbrated earlier, s 28 contemplates full performance by all parties to the contract. Mere registration at the deeds office would not suffice, rather, the transfer of ownership is required. The law in South Africa has accepted that the abstract system applies to the transfer of ownership in movable and immovables alike.[7] In Legator McKenna the Supreme Court of Appeal explained:

“[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. 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 ... Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass

- *despite registration of transfer - if there is a defect in the real agreement.”*[8]

[19] As I have explained, in this instance, Mr D[...], as a joint owner, was at all material times unaware of the transaction until the application for the eviction was filed. He did not participate in the conclusion of the contract of sale, did not authorise the transfer of his property and did not intend to transfer his right of ownership to Ms Fourie. As a general rule a party cannot be deprived of his property without his consent and, accordingly, the absence of the participation of Mr D[...] as joint

owner, constitutes a defect in the real agreement and cannot be cured by the provisions of s 28(2). Thus, the registration in the deeds office, of its own, did not pass transfer of ownership in the property of Mr D[...].

[20] So, one may rightly ask: what of Ms D[...]’s intention as manifested in the deed of sale and power of attorney? A co-owner may, in law, dispose of their undivided share in property without recourse to other co-owners. I accept, for purposes of this judgment, as I am bound to do[9], that Ms D[...] was at all times aware of the fact that she was signing an agreement of sale and a power of attorney to pass transfer. However, Ms Fourie did not intend the purchase price to be in respect of a 50% undivided share in the property. She intended to take transfer of the unencumbered ownership of the entire property. Ms D[...], on the other hand, did not own the property and as a matter of law could not deliver more than what she had, namely, her undivided share. On the undisputable facts presented in this matter the seller (Mr and Mrs D[...]), and in particular Mr D[...], has not performed fully in terms of the contract as envisaged in s 28 of the Act. Again, Mr White, for the respondents, did not contend otherwise.

Estoppel

[21] Recognising this difficulty, the respondents contended that Mr D[...] is estopped from denying his intention to pass transfer of ownership and so to deny the validity of the real agreement. The averments underlying the estoppel advanced proceeded as set out hereafter. Mr D[...], so the respondents contended, had entirely abandoned the immovable property and had not made any payments towards the bond obligation since

2012. Thus, they argued that he had reconciled himself with the fact that Ms D[...] would be responsible for the repayment of the mortgage loan agreement with Standard Bank and, if she was unable to do so, that the immovable property would be sold by way of auction. The auction was indeed scheduled for 16 February 2018, the day upon which the deed of sale was signed. The respondents alleged further that in abandoning his rights in respect of the immovable property, by allowing Ms D[...] to make each and every decision relating to the immovable property without any input from himself subsequent to 2012, the second applicant as co-owner of the immovable property intentionally, alternatively negligently, through his conduct, created the impression that Ms D[...] and John Jacobs were persons lawfully in the position to conclude a binding agreement of sale in respect of the immovable property. They said further that, as a consequence of the misrepresentation by the applicants, relied upon by Ms Fourie, she had acted to her prejudice.

- [22] As explained in Legator McKenna the principles applicable to agreements in general also apply to real agreements. There are no statutory requirements for the validity of a real agreement and, accordingly, whilst an estoppel cannot be raised to render lawful what the legislator has declared to be unlawful under s 2(1) of the Act, it may legitimately be raised to defeat a seller's denial of the real agreement.[10]
- [23] Generally, the courts are not easily persuaded to hold that a owner is estopped from vindicating their property.[11] A party seeking to raise an estoppel in these circumstances must establish:
- (a) That there had been a representation by the owner, by conduct or otherwise, that the person who disposed of his or her property was the owner of it or was entitled to dispose of it;
 - (b) the representation must have been made negligently in the circumstances.
 - (c) the representation must have been relied upon by the person raising the estoppel; and
 - (d) a reliance upon the representation must be the cause of their acting to their detriment.[12]
- [24] As I have explained, the respondents rely on an estoppel by conduct. In our law a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if, in addition, the representee acted reasonably in construing the representation in the sense in which the representee did.[13]
- [25] As I have said Ms Fourie, as purchaser, had no interaction of any nature with the applicants prior to signature of the agreement. She said in her answering affidavit that she was unable to comment on the bond repayments history during the subsistence of the co-ownership because the applicants had not annexed the banking statements to their founding papers. She declared:
- “As is evident from the First Applicant’s Founding Affidavit the Applicants had already been divorced for a period of time, with the Second Applicant having effectively abandoned all responsibility in respect of the immovable property herein.”*
- [26] I do not consider that it is evident from the first applicant’s founding affidavit that Mr D[...] had effectively abandoned all responsibility in respect of the property. He remained in occupation until his remarriage and thereafter permitted the first applicant to reside in the property with their children. His inability to meet his financial obligations were beyond his control and no basis was laid for the suggestion that it amounted to an abandonment of his rights in the property. It is apparent that the property was let from 2016 and it is not known how the rental income was divided. It is also not evident from the papers whether the rental was used to make payments to Standard Bank on the bond, but, significantly, there is no allegation in Ms D[...]’s founding affidavit that he had abandoned his responsibilities. More importantly, it is apparent from the first respondent’s own averments that she had no knowledge of the history of repayments, or of the occupation of the property when she

signed the deed of sale or at the time of the registration of transfer. The argument arose ex post facto and is rooted in Ms Daniel's founding affidavit in this application. Thus, the respondents have not demonstrated any reliance on these circumstances at the time of the transaction.

- [27] The uncontradicted evidence of Ms D[...] is that she and the children resided in the property from 2013 to 2016. However, it has been held that mere entrusting of possession to the possessor is not sufficient to constitute a representation that the possessor was entitled to dispose of the property. It must be entrusted with indications of ownership or entitlement of disposal.[14] In Adams[15] De Villiers CJ explained:

"In regard to the case of a person who has lent or let or otherwise entrusted his goods to another I am clearly of the opinion that he does not lose his right of vindication if the goods are improperly parted with, unless he has so entrusted his goods under such

circumstances which might fairly and reasonably induce third persons to believe that the ostensible owner was the real owner or had authority from the true owner to dispose of the goods. The burden of proving that such circumstances exist lies upon the one who resists the owner's right of vindication."

- [28] The onus is not easily discharged as explained in Electrolux[16] where Trollip J remarked:

"[t]he Court should not be quick or over anxious to infer from an owner's conduct, including his negligence, a representation that the possessor is vested with the dominium or jus disponendi; the conduct should be such as to proclaim clearly and definitely to all who are concerned that the possessor is vested with the dominium or jus disponendi; secondly, if the owner's conduct does measure up to that high standard, the Court should then scrutinise the evidence of the respondent carefully and closely to ascertain whether the representation was indeed the real and direct or proximate cause of the respondent believing that the possessor did have the dominium or jus disponendi."

- [29] A divorced man's consent to his former wife to live in the property, owned jointly by them, in order to house his children does not signal to a reasonable person that she is entitled to deal with the property to his exclusion. As I have said, she was not even in occupation at the time of the sale of the property, which was let at the time, and it is not alleged that Mr Jacobs ever occupied the property. No facts have been alleged as to how the contract of lease was concluded, what role Mr D[...] played in it or who received the rental. Accordingly, no foundation was laid for the conclusion that second respondent had

"abandoned his rights" in respect of the property. I do not consider that Ms Fourie could reasonably have construed from these circumstances that Ms D[...] and John Jacobs were the persons lawfully in a position to conclude a binding agreement of sale.

- [30] The respondents have not demonstrated any reliance on a representation, whether oral or by conduct, by Mr D[...]. On the contrary, the transaction came about by virtue of their knowledge of the pending sale in execution and the judgment obtained by Standard Bank. The judgment had been obtained against Mr and Ms D[...]. They were registered in the deeds

office as joint owners. The offer of purchase, prepared on behalf of Ms Fourie, recognised Mr D[...]’s right of ownership and reflected the seller as Mr and Ms D[...]. They did not believe that Mr Jacobs was entitled to sign the contract, on the contrary, on respondents’ version Mr Jacobs was an imposter and represented to them that he was in fact Mr D[...]. The power of attorney signed nearly two months later also recognised Mr Daniel’s right of ownership and the necessity for his signature. Again, no reliance was placed on any representation made by Mr D[...], because they believed that Jacobs was Mr D[...] and they required his signature because they recognised his interest in the property.

- [31] Whether the respondents in fact knew that Jacobs was not authorised to sign, and was not Mr D[...], cannot be determined without resolving the dispute of fact, which cannot be done on the papers. However, on their own version the respondents did not rely on any representation made by Mr D[...], rather, they relied on the representation by Mr Jacobs that he was in fact Mr D[...]. For an estoppel to succeed the respondents had to establish that the appearance, the representation, had been created by Mr D[...]

himself. The fact that Jacobs held himself out to be Mr D[...], or his agent, cannot assist.[17]

- [32] In conclusion, the respondents have not established an estoppel which could detract from Mr D[...]’s uncontradicted denial of any participation in or knowledge of the transaction. The result is that ownership did not pass and the deed of sale and the power of attorney, at least to the extent that it relates to Mr D[...]’s right of ownership, were of no force or effect and are to be set aside. The applicants are therefore entitled to restitution of the property.

- [33] The nullity of the agreement of sale entitles the applicants to vindicate their property. Section 28(1) of the Act provides that a person who has performed partially, or in full, in terms of an alienation of land which is of no force or effect in terms of s 2 of the Act is entitled to recover from the other party that which he has performed under the alienation or contract, together with interest and other expenses as detailed in s 28(1)(a). As I have said, it is common ground that a substantial portion of the purchase price was repaid shortly after the conclusion of the contract and when the parties appeared before me Mr D[...] tendered to repay the balance of the purchase price. Neither party has presented evidence of the financial issues which flow from s 28(1) and it is accordingly not possible in this judgment to deal with the respondents’ entitlement under s 28. I accordingly made no order in respect thereof.

- [34] As adumbrated earlier, Ms Fourie played no part in the negotiations which were conducted by Mr Postumous, Ms Stevens and Mr Bekker. Accordingly, the applicants sought an order that they pay the costs occasioned by the retransfer of the property into the names of the applicants. On the facts presented I consider it to be fair.

- [35] For these reasons I issued the order set out earlier.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances: For 1st & 2nd Applicants: In Person For 1st, 2nd & 4th Respondents: Adv White instructed by Manilal Brewis Attorneys, Gqeberha

[1] Act 68 of 1981

[2] Trust Bank van Afrika Beperk v Eksteen

[1964] 3 All SA 507 (A), 1964 (3) SA 402 (A); Strydom v Die Land- en Landboubank van Suid-Afrika [1972] 2 All SA 22 (A), 1972

(1) SA 801 (A) at 815B-C; and Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd [2001] 4 All SA 273 (A); 2001

(4) SA 142 (SCA)

[3] Wilken v Kohler 1913 AD 135

[4] Wilken at p. 143

[5] Wilken at p. 144

[6] Christie's: The Law of Contract in South Africa (8th ed) p. 158

[7] Legator McKenna Inc and Another v Shea and Others 2010 (1) SA 35 (SCA) at 44 para [21]

[8] Legator McKenna at para [22]

[9] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C

[10] Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others 2011

(2) SA 508 (SCA) at para [31]

[11] For example, Grosvernor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 (A) at 427D

[12] Silberberg and Schoeman's: The Law of Property (5th ed) p. 255-256; Amler's Precedents of Pleadings (9th ed) p. 188

[13] Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter 2004

(6) SA 491 (SCA) at 495A-C; and Leeuw v First National Bank 2010

(3) SA 140 (SCA)

[14] Electrolux (Pty) Ltd v Khota and Another 1961

(4) SA 244 (W) at 247B, referred to with approval in Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Limited 1976

(1) SA 441 (A) at 452E; and Konstanx Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk [1996] ZASCA 28; 1996

(3) SA 273(A) at 286E-H.

[15]Adams v Mocke (1906) 23 SC 782 at 788

[16] Electrolux at p. 250C-E

[17] Compare Broekman v TCD Motors (Pty) Ltd 1949 (4) SA 418 (T) where the owner of a motor vehicle delivered not only the registration papers of the vehicle, but also the notice of change of ownership. Nevertheless, the court held that the inducing cause was not the handover of these documents, but the fraudulent representation of the third party that he was acting as agent for the owner and consequently the owner was not estopped from

vindicating his vehicle. The approach in Broekman was applied in Saambou National Building Society v Friedman 1977 (3) SA 268 (W).

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