

SOUTH AFRICA / JUDGMENT

Nedbank Ltd v Mendelow NO and Another (686/12) [2013] ZASCA 98; 2013 (6) SA 130 (SCA) (5 September 2013)

[2013] ZASCA 98

COURT

Supreme Court of Appeal

BEFORE

Lewis, Maya, Malan, Shongwe, Zondi

CASE / FILE NUMBER

686/12

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 686/12

In the matter between:

NEDBANK LIMITED APPELLANT

and

RONALD MENDELOW NO FIRST RESPONDENT

LAZARUS LEDWABA NO SECOND RESPONDENT

Neutral citation: Nedbank Limited v Mendelow NO (686/12) [2013] ZASCA 98 (5 September 2013)

Coram: LEWIS, MAYA, MALAN AND SHONGWE JJA AND ZONDI AJA

Heard: 16 August 2013

Delivered: 5 September 2013

Summary: Where the Master of the High Court and the Registrar of Deeds perform clerical acts that result in the registration of transfer of immovable property pursuant to a fraud, and there is no intention on the part of a beneficiary of a deceased estate to transfer ownership, registration does not effect a transfer of ownership; the person in whose name the property is registered is not the owner and cannot grant a valid mortgage bond over the property. Purely clerical acts do not amount to administrative action reviewable under the Promotion of Administrative Justice

Act 3 of 2000.

ORDER

On appeal from North Gauteng High Court, Pretoria (Baqwa AJ sitting as court of first instance):

The appeal is dismissed with costs including those of two counsel where so employed.

Lewis JA (Maya, Malan and Shongwe JJA and Zondi AJA concurring):

- [1] Mrs Emily Valente owned immovable property in Gauteng. She executed and signed a will in 1994, leaving her estate in equal shares to her two sons, Evan Valente and Riccardo Valente, the eighth respondent in the high court. At that stage the property formed part of the estate. Some three years later she signed a codicil, bequeathing money to each of her grandchildren.
- [2] On 23 January 2001, the property was sold to a company, U Valente Africa (Pty) Ltd (the company), in liquidation at the time of the proceedings before the high court. Mrs Valente's signature on the deed of sale was forged by Riccardo. A week later Mrs Valente died. An attorney (the seventh respondent a quo) and Riccardo were appointed as co-executors of the will and as administrators of the estate. Although nominated as an executor and administrator Evan declined the appointments since he was living in the United Kingdom at the time. The attorney resigned as an executor of the estate in May 2007.
- [3] At the time of Mrs Valente's death her estate comprised shares in the company, the property, cash and miscellaneous movable items. The directors of the company before her death were Mrs Valente, Evan and Riccardo. The respondents, Mr R Mendelow and Mr L Ledwaba NNO (to whom I shall refer as the executors), in their capacities as the joint executors of Mrs Valente's deceased estate (appointed in 2009), applied to the North Gauteng High Court, Pretoria for an order in effect setting aside a purported transfer of the property to the company, and the registration of a bond over the property in favour of Imperial Bank Ltd, registered in October 2008. That bank was acquired by the appellant, Nedbank Ltd (Nedbank), in 2010.
- [4] In their application the executors alleged that the sale and transfer of the property to the company, and the registration of the bond in favour of Nedbank, had been vitiated by fraud: Riccardo had forged Mrs Valente's signature on the deed of sale and forged Evan's signature on a document entitled 'consent to sale'. Riccardo had also had Evan removed as a director of the company and obtained a mortgage bond over the property first from BoE Bank Ltd (cancelled when the subsequent bond was registered) against a loan of some R2 million and later the mortgage bond in favour of Nedbank, the cancellation of which the executors sought. It should be noted that the bond in question (granted as security for a loan advanced to the company of R6 million) was registered over the property shortly before the provisional winding-up order was granted. I shall return to the allegations of fraud and forgery later in the judgment, but should note at this point that in my view they are central to and decisive of the dispute.

- [5] The basis of the application was initially s 341(2) of the Companies Act 61 of 1973 and s 42(2) of the Administration of Estates Act 66 of 1965, the executors arguing that the company had mortgaged its property when in the process of being wound up and unable to pay its debts, and that the provisions of s 42(2) had not been complied with since the Master had signed a certificate permitting the transfer of the property as a result of the fraudulent misrepresentation by Riccardo that the deed of sale of the property was genuine.
- [6] Those causes of action were transformed at the hearing in the high court to a review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The high court (Baqwa AJ) characterized the relief sought as follows: the executors sought to review and set aside the certificate issued by the Master in terms of s 42(2) of the Administration of Estates Act since his action had been induced by the fraud of Riccardo; the property should be returned 'at administrative law'; and the bond should be cancelled. The high court ordered that the property should be returned to the deceased estate, not by virtue of a *condictio* or *rei vindicatio*, since the former remedy was not pursued at the hearing and the latter was mistakenly considered

by the legal representatives of the executors to be unavailable to the estate, but by virtue of 'administrative law'. The 'decision' of the Master in signing a certificate authorizing the transfer and (by implication) the ensuing act of the Registrar of Deeds in registering the property in the name of the company constituted 'administrative action' reviewable under the PAJA. I shall deal with this finding in due course.

- [7] As the high court pointed out, Nedbank did not dispute that Riccardo's conduct was fraudulent. It raised various other defences, principally that s 341(2) of the Companies Act did not entitle the executors to set aside the bond, and that the executors did not have *locus standi*. It argued that, in the event of those contentions failing, the court was not required to set aside the bond as being void since the only person who would derive any benefit from the relief sought was Evan who, despite being aware of the sale of the property to the company, and the registration of the bond, had taken no action to set the transactions aside. He was content, Nedbank argued, to ignore the fraud and asked only for equal representation on the board of the company. He had known of the fraudulent transactions at least since July 2007, and had applied for the winding-up of the company in 2008.
- [8] In December 2008 the company was placed under provisional winding-up at the instance of Evan. The winding-up order was made final in April 2009. The application for winding-up was premised on s 344(h) of the Companies Act: that it would be just and equitable to wind up the company.
- [9] The grounds for the review, said the high court, were Riccardo's forgeries of the signature of his mother (on the deed of sale of the property) and of Evan on the consent to sale: the Master had been fraudulently induced to sign a certificate permitting the transfer of the property to the company. The Registrar of Deeds had registered the bond in favour of Imperial Bank as a result of Riccardo's fraudulent scheme. The Master's certificate was thus

set aside and the Registrar was ordered to transfer the property to the estate and to cancel the bond. A number of ancillary orders were also made by the high court. Nedbank, the only respondent to oppose the application and the only appellant before this court, appeals against the decision with the leave of the high court.

- [10] Nedbank argued on appeal that the high court misconceived the relief granted: the PAJA does not make provision for vindicatory relief. A prior question, I would have thought, is whether the PAJA is applicable at all and I shall deal with that briefly. But first I shall deal with the principal issue which seems to me to form the nub of the relief that the executors have asked for.
- [11] It is common cause that Riccardo forged his mother's signature on the deed of sale of the property to the company and that he forged his brother Evan's signature on a document entitled 'consent to sale' that was used to induce the Master of the high court to sign a certificate that no objection to the sale was made by any beneficiary. This was necessary to enable the Registrar of Deeds to effect the transfer of the property to the company.
- [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'.¹ And it is a source of information about those rights.² 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.
- [13] This court has recently reaffirmed the principle that where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect. In *Legator McKenna Inc v Shea*³ Brand JA confirmed, first, that the abstract theory of transfer of ownership applies to immovable property, and, second, that if there is any defect in what he termed the 'real agreement' – that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively – then ownership will not pass despite registration. Thus while a valid underlying agreement to pass ownership, such as a sale or donation, is not required, there must nonetheless be a genuine intention to transfer ownership. This principle was unanimously approved in *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd*⁴ and has been followed consistently since then.
- [14] However, if the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass: *Preller v Jordaan*.⁵ That principle was applied recently by this court in *Meintjies NO v Coetzer*⁶ and *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd*.⁷

- [15] It is clear, therefore, that when Riccardo forged his mother's signature on the deed of sale of the property and the signature by a beneficiary of her will, Evan, on the consent to the sale, Evan did not intend to transfer ownership of the property and that the power of attorney signed by the Master to permit the registration of transfer was vitiated by the fraud and the forgery. Ownership did not pass to the company. And accordingly the bonds registered first in favour of BoE and then Imperial Bank were not valid: the company was not the owner of the property mortgaged. Nedbank cannot resist the claim of the executors for cancellation of the registration of the bond. And the executors are entitled to reregistration of the property in the name of the deceased estate.
- [16] Nedbank nonetheless argued that the executors had not based their claim on ownership of the property: they had not instituted the *rei vindicatio*. And Evan, it contended, complained of the fraud and forgery only when precluded from having any say in the company. The elements of a *rei vindicatio* had not been pleaded or proved. The executors, Nedbank argued, could not deviate from the case which they had brought before the high court, and with which they had persisted before the hearing of the appeal when the principles relating to transfer were brought to their attention by this court.
- [17] Nedbank argued that the executors were not entitled to rely on principles raised by the court *mero motu*. The argument ignores the authorities in this court that state that where the facts to which those principles apply are squarely raised in the papers before the court (and that were before the high court) a court should not allow the continuation of a wrong because the legal representatives of the parties did not appreciate the correct legal principles. That proposition was reiterated by Brand JA in *Cuninghame v First Ready Development 249* (Association Incorporated under section 21),⁸ relying on *Thompson v South African Broadcasting Corporation*⁹ where Harms JA said:
- 'The function of oral argument, especially in a Court of appeal, is supplementary to the written argument. If a party chooses not to raise an obvious issue in his heads, he does so at his peril. The Court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself. If the parties have to be forewarned of each and every finding, the Court will not be able to function.'
- [18] This principle was expressed as follows by the Constitutional Court in *CUSA v Tao Ying Metal Industries*:¹⁰
- '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. That would infringe the principle of legality.'

- [19] The elements of the *rei vindicatio* appear clearly in the papers and are not disputed. The executors alleged that the estate acquired ownership of the property on the death of Mrs Valente; that registration in the name of the company was procured through the fraud and forgery of Riccardo, and that it was entitled to the return (the reregistration in the name of the estate) of the property. No more needed to have been pleaded.
- [20] Nedbank argued nonetheless that the application was a sham: that the executors were the alter ego of Evan who should have instituted action himself to set aside the various transactions. Evan, it contended, had been aware of the fraud and forgery committed by his brother and had been content to ignore it for several years. That he sought to liquidate the company was not any indication that he wished to claim return of his share of the property. But Nedbank has not shown that the executors are *mala fide* or that they wish to condone the unlawful conduct of Riccardo.
- [21] Nor can this court condone the fraud in the exercise of some discretion that Nedbank urges that we have. That is clear from the dictum of the Constitutional Court set out above, as well as from this court's decision in *Meintjies NO v Coetzer*¹¹ where Shongwe JA said that where the 'real agreement' was falsified and the defendants effectively asked the court to countenance the fraud (by recognizing a waiver of the right to rely on it) such conduct would be contrary to public policy. He said, referring to the request to recognize the waiver, that the parties were asking this court 'to give life to an illegal and fraudulently obtained right', which would be contrary to the values enshrined in the Constitution and to public policy.
- [22] I conclude therefore that the executors must succeed in their claim for the registration of the property in the name of the deceased estate and for the cancellation of the bond in favour of Nedbank. There is thus no need to deal with the other defences raised by Nedbank. But I do wish to say something more about the finding of the high court that the conduct of the Master and of the Registrar of Deeds amounted to administrative action which was subject to review.
- [23] The executors argued in the high court that the conduct of the Master and of the Registrar of Deeds amounted to administrative action reviewable under the PAJA. And the basis of the orders granted by the high court was indeed that because the action of the state officials was induced by the fraud of Riccardo, the Master's certificate, the transfer of the property to the company and the registration of the bond in favour of Nedbank should be set aside by virtue of sections 6 and 7 of the PAJA.
- [24] As I said in *Kuzwayo v Estate Late Masilela*,¹² not 'every act of an official amounts to administrative action that is reviewable under PAJA or otherwise'. I found there that the act of signing a declaration by a Director-General of the Department of Housing to the effect that a site permit be converted into the right of ownership, and the signing of the deed of transfer giving effect to that declaration, were simply clerical acts.

[25] Administrative action entails a decision, or a failure to make a decision, by a functionary, and which has a direct legal effect on an individual.¹³ A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts within the definition of the PAJA or even under the common law. As Nugent JA said in *Grey's Marine* '[w]hether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so . . .'.¹⁴

[26] A distinction must thus be drawn between discretionary powers and mechanical powers. Professor Hoexter points out¹⁵ that a mechanical power involves no choice on the part of the holder of the power. A discretionary power, on the other hand, does impose such a choice. Whether the Master or the Registrar exercises a mechanical power or one that is discretionary involves an enquiry as to what he or she is called upon to do. There may be situations where the functionary is required to make genuine decisions whether to perform a duty. But where the requirements for registration have been met no choice is given to the Registrar. Section 3(1) of the Deeds Registries Act 47 of 1937 imposes a duty on a Registrar of Deeds to, inter alia,

'(d) attest or execute and register deeds of transfer of land, and execute and register certificates of title to land;

. . .

(r) register any real right, not specifically referred to in this subsection, and any cession, modification or extinction of any such

registered right; . . .'

[27] In *The Cape of Good Hope Bank v Fischer*¹⁶ De Villiers CJ said:

'The Registrar of Deeds in this Colony is entrusted with the formal duties formerly performed by judicial officers, but his chief duties are of a ministerial nature, and consist in registering deeds and bonds duly passed before him . . .' (My emphasis.)

The Chief Justice also stated that if a properly executed mortgage bond were presented to the Registrar for registration 'it is his duty to register it in the manner required by law'.¹⁷

[28] It may be that the Master and the Registrar are called upon from time to time to make evaluations of the documents presented to them and to exercise some judgement or choice.¹⁸ In that event their functions are quasi-judicial and have been so regarded by our courts over decades. In *Jones: Conveyancing in South Africa* H S Nel states:

‘Although . . . the office of registrar of deeds is descended from that of a judge’s . . . today he is not considered a judicial officer. His duties have been described as semi-judicial. Nevertheless, although a registrar naturally dare not usurp the functions of the courts in determining the rights and obligations of parties in dispute on registered matters, on matters about to be registered it seems to be a different story, for there is no doubt that his opinions carry a good deal of weight and in the execution of his

duties it is no exaggeration to say that he and his examiners are called upon . . . to solve exactly similar legal problems as occupy counsel and judges for hours if not days on end . . . A registrar is not an ordinary public servant performing statutory duties.’¹⁹

Accordingly ‘[l]ike a judicial officer, a registrar of deeds must weigh the evidence submitted to him and determine whether to allow registration or to force the parties to the court . . .’²⁰ If that occurs the conduct of the Registrar would be quasi-judicial and no doubt reviewable under the PAJA. But we are not concerned in this matter with any decision that has required the assessment of evidence or the exercise of a discretion or the making of a choice.²¹

[29] In my view, the executors were entitled to vindicatory relief – the reregistration of the property in the name of the estate – and to an order cancelling the bond in favour of Nedbank. The high court granted that and ancillary relief and the appeal must accordingly fail.

[30] The appeal is dismissed with costs including those of two counsel where so employed.

C H Lewis

Judge of Appeal

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¹Frye’s (Pty) Ltd v Ries 1957 (3) SA 575 (A) at 583E-F.

²Ibid.

3Legator McKenna Inc v Shea 2010 (1) SA 35 (SCA) paras 21 and 22.

4Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd 1941 AD 369.

5Preller v Jordaan 1956 (1) 483 (A) at 496. See P J Badenhorst, Juanita M Pienaar and Hanri Mostert Silberberg and Schoeman's The Law of Property 5 ed (2006) pp 222-224 and 230-232.

6Meintjies NO v Coetzer 2010 (5) SA 186 (SCA) para 9.

7Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd 2012

(3) SA 35 (SCA) paras 38 and 39. See also Knysna Hotel CC v Coetzee NO [1997] ZASCA 114; 1998 (2) SA 743 (SCA) at 753A-I.

8Cuninghame v First Ready Development 249 (Association Incorporated under section 21) 2010 (5) SA 325 (SCA) paras 29 and 30.

9Thompson v South African Broadcasting Corporation [2000] ZASCA 76; 2001 (3) SA 746 (SCA) para 7.

10CUSA v Tao Ying Metal Industries [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.

11Meintjies NO v Coetzer 2010 (5) SA 186 (SCA) para 15.

12Kuzwayo v Estate Late Masilela [2011] 2 All SA 599 (SCA) para 28. See also Seale v Van Rooyen NO: Provincial Government, North West Province v Van Rooyen 2008 (4) SA 43 (SCA) para 12.

13See the definition in s 1 of the PAJA: a decision made by an organ of state under an empowering provision of a statute that 'adversely affects the rights of any person and which has a direct, external legal effect'. In Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 23 Nugent JA suggested that 'adversely affects' means 'has the capacity to affect legal rights'.

14Para

24. See also President of the Republic of South Africa v South African Rugby Football Union 2000 (2) SA 1 (CC) para 141.

15C Hoexter Administrative Law in South Africa 2 ed (2012) pp 46-48.

16The Cape of Good Hope Bank v Fischer (1885-1886) 4 SC 368 at 375.

17At

375. See also Boltman v Kotze Community Trust concerning Farm Quisberg 805 District of Calvinia [1999] JOL 5230 (LCC) para 29.

18See Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd [2009] JOL 24392; [2010] 4 All SA 282 (SCA). The issue was not considered by the court on appeal.

19H S Nel Jones: Conveyancing in South Africa 4 ed (1991) p 13.

20Ibid p 14. See also P J Badenhorst, Juanita M Pienaar and Hanri Mostert Silberberg and Schoeman's The Law of Property 5 ed

(2006) 215-216.

21Section 95 of the Administration of Estates Act provides for the 'review' of, or appeal against, any appointment or decision made by the Master. The signature of the certificate by the Master was thus reviewable under this Act, and the ground for review would have been the fraud of Riccardo. But that does not make the signature 'administrative action' in terms of the PAJA.

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