

SOUTH AFRICA / JUDGMENT

Papas N.O. v Motsere Trading CC and Others (46011/2012) [2014] ZAGPJHC 144 (6 June 2014)

[2014] ZAGPJHC 144

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

46011/2012

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REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT

LOCAL DIVISION, JOHANNESBURG

CASE NO: 46011/2012

DATE: 6 JUNE 2014

NOT REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between

CONSTANTINOS PAPAS NO.....APPLICANT

and

MOTSERE TRADING CC.....FIRST RESPONDENT

TEMIS BUSINESS ENTERPRISES CC.....SECOND RESPONDENT

DLUKULA RONALD NTOMBELA.....THIRD RESPONDENT

HLONGWA ATTORNEYS & CONVEYANCERS.....FOURTH RESPONDENT

THE REGISTRAR OF DEEDS, JOHANNESBURG.....FIFTH RESPONDENT

Ownership of immovable property - application for a declarator that deceased is lawful owner of immovable property - only first respondent opposed application in challenging the deceased estate's title - owner of property (now deceased) concluded an Abandonment Agreement with the City of Johannesburg (COJ) - in terms thereof deceased abandoned property to the COJ in exchange for set-off of his arrear indebtedness in respect of property municipal rates and taxes - deceased died subsequently and property vesting in deceased's estate - property fraudulently transferred from deceased to first respondent and from first to second respondent - agreement analysed and interpreted - principles of abandonment examined and re-stated - agreement not amounting to an abandonment - deceased estate therefore declared the lawful owner of the property - costs of application - fraudulent conduct by attorneys and involvement of Registrar of Deeds in fraudulent transfers - no explanation tendered by either - costs ordered against them as well as against the unsuccessful first respondent

J U D G M E N T

VAN OOSTEN J:

- [1] This is an application brought by the applicant, in his capacity as the executor in the deceased estate Michael Papas (Papas), for a declarator that the deceased estate is the owner of a certain immovable property. Only the second respondent (Temis) opposed the relief sought. The fifth respondent, although not having entered the fray has submitted a report to this court, to which I will revert later in the judgment.
- [2] The issue in the application concerns the ownership of an immovable property, described as Erf [...], Johannesburg (the property). It is common cause that Michael Papas (the deceased) was the registered owner of the property. On 24 January 2006 the deceased entered into a written agreement with the City of Johannesburg (the COJ) styled, Abandonment Agreement. The deceased was in arrears with payment of taxes and municipal service fees in respect of the property, in the sum of R3m. In terms of the agreement the deceased 'abandoned' the property in favour of the COJ, in exchange for a set-off of the indebtedness in respect of taxes and service fees (the agreement). The deceased died on 25 June 2008 and Papas was duly appointed the executor in the deceased estate which was vested with all the assets of the deceased including the property. In July 2012 Papas discovered that the property had unbeknown to him, been sold to another party. Upon investigation it became apparent, and this is common cause, that the property had been transferred on 27 June 2012 from the deceased to the first respondent and simultaneously therewith from the first respondent to Temis. Both transfers were fraudulent involving the first, third, fourth and fifth respondents. Temis is an innocent party having purchased the property for a purchase consideration of R1m. Against this background Papas seeks a declarator that the estate is the lawful owner of the property and for an order setting aside the fraudulent transfers of the property. For the sake of completeness I need to add that an order was granted by Spilg J on 18 December 2013, in terms of part A of the notice of motion, in effect preserving the property pending finalisation of this application, which is part B of the notice of motion.

- [3] The basis of opposition to the application by Temis is that the applicant does not have the requisite locus standi to vindicate the property. Temis does not assert ownership of the property but simply contends that the deceased in concluding the agreement, unilaterally abandoned the property to the COJ. Some vague reference was made in the papers to the alleged abandonment being bilateral but this was, wisely I should add, not pursued before me. Estoppel, although raised in the papers, was likewise not persisted in. The sole issue I am accordingly required to determine is whether the deceased in fact abandoned the property when the agreement was concluded.
- [4] An abandonment of property by the owner thereof, with the intention to relinquish ownership, results in the loss of ownership by derelicto. The abandoned property becomes res nullius and is open to acquisition by another (see *Reck v Mills en 'n ander* 1990 (1) SA 751 (A) 757C-D; *Wille's Principles of South African Law* 9th ed 490/1; *CG van der Merwe Sakereg* 2nd ed 377). For abandonment there must be an intention by the owner to abandon the property (see *Meintjes NO v Coetzer and others* 2010 (5) SA 186 (SCA) [16]). Whether a clear intention of abandonment exists is a question of fact to be proved in each case (cf *Salvage Association of London v SA Salvage Syndicate* 1906 SC 169 at 171; *Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936/7). The act relied on for evidencing the deceased's alleged intention to abandon in the present matter is the conclusion of the agreement. It is accordingly necessary to consider and interpret the relevant provisions of the agreement.
- [5] The recitals in the preface to the conditions in the agreement record that the 'seller' (the deceased) is indebted to the 'purchaser' (the COJ) in the sum of approximately R3m, in respect of arrear rates and municipal service fees; that 'the seller' has agreed to abandon the property to 'the purchaser' in lieu of 'the purchaser's'

claim; that the parties have agreed to 'set-off any purchase consideration against the arrear amounts due to the purchaser'

and 'the purchaser wishes to take transfer of the property on the basis aforesaid'. The 'abandonment' of the property and the quid pro quo in respect thereof, are provided for as follows:

'2. ABANDONMENT

The SELLER hereby abandons to the PURCHASER who hereby accepts the property on the terms and conditions set out herein.

3. ABANDONMENT CONSIDERATION

3.1 The purchase price for the property shall not be paid by the PURCHASER but shall, and immediately prior to registration, be set-off against the PURCHASER'S claim against the SELLER in respect of arrear rates and municipal service fees in connection with the property.

3.2 In addition to the aforesaid, registration will constitute a full and final settlement of all claims by the PURCHASER against the SELLER in respect of arrear rates and municipal service fees up to date of registration in connection with the property.

3.3 It is specifically recorded that the PURCHASER reserves all its rights to recover any amounts in respect of the aforesaid arrear

rates and municipal service fees from any other source from which it may recover such amounts.'

Finally, as to possession and risk concerning the property, the agreement provides:

'5. POSSESSION AND RISK

Upon signature of this agreement:

5.1 All the benefits and risks of ownership including the right of possession of the property shall pass to the PURCHASER;

5.2 The PURCHASER shall be entitled to any rents accruing from the property.'

[6] The words indicating abandonment, one the one hand, and a purchase and sale on the other, are used interchangeably and in themselves are not conclusive of any particular meaning in interpreting the agreement. Counsel for Temis contended that the provisions of clauses 2 and 5, read together, unequivocally show an intention by the deceased to abandon the property. I am unable to agree. The use of the word 'abandon' in clause 2 is of no moment: it must be read in the context of the agreement as a whole. Nor do the provisions of clause 5 support counsel's contention: the benefits and risks mentioned in the clause are merely incidental to ownership which an owner is entitled to alienate without thereby relinquishing ownership. As correctly pointed out by counsel for Papas, ownership of immovable property, in any event, is transferred only and therefore vests upon registration in terms of s 6 of the Deeds Registries Act, 47 of 1937 (the Act).

[7] The terms and conditions of the agreement, in my view, are clear. It does not provide for an abandonment of the property by the deceased. The word abandon is used merely to convey the notion of the deceased surrendering the property to the COJ in exchange for a set-off of his indebtedness which constitutes the quid pro quo. Abandonment in the face of a quid pro quo is plainly legally untenable. Until the final registration of the property in the name of the COJ has occurred, the deceased remains the owner thereof: as much is to be inferred from the express provision in clause 3.1 quoted above, providing for the set-off to take place 'immediately prior to registration'. Pending registration of transfer the parties are in a contractual relationship in respect of which the usual contractual remedies in the event of a breach of contract apply. Counsel for Papas has referred me to the article by Prof JC Sonnekus (TSAR 2004-4, at 747) where the legal nature and effect of contracts, such as the agreement we are here concerned with, are dealt with. The conclusion with which I am in agreement, reads as follows:

‘In die lig van die voorgaande is dit duidelik dat dit in belang van beide partye sou wees om ‘n uitdruklike ooreenkoms te bereik waarkragtens die plaaslike owerheid onderneem om die grondeienaar kwyd te skeld van alle aanspreeklikheid vir enige verskuldigde bedrae wat verband hou met die tersake perseel mits die grondeienaar die eiendom aan die plaaslike owerheid oordra. Die kern van sodanige ooreenkoms sit eintlik reeds in kiem in die formulering benut deur die plaaslike owerheid in die hierbo aangehaalde formulering as daar sprake is dat die owerheid “will write off the outstanding balance”. Die implikasie is dat die owerheid quasi die perseel by die grondeienaar “koop” teen die ooreengekome bedrag wat die skuldoorsaak uitmaak van die vordering

wat aan die wortel van die litigasie lê, maar dat die partye van die verskuldigde bedrag die eiendomsreg op die perseel aan die owerheid oorgedra word. Omdat ‘n “normale” afgeleide en geen oorspronklike wyse van regsverkryging nie ter

sprake is, sou dit egter ook ‘n uitdruklike afspraak veronderstel dat die owerheid die nodige “klaringsbewys”

sonder verdere omhaal sal uitreik ten einde die oordrag in sy eie naam te kan registreer. Die owerheid kan daarna oor die perseel as regmatige eienaar beskik en kan byvoorbeeld besluit om dit aan te wend vir hersoneerde benutting as informele of minder formele

dorpstigting of ‘n behuisingskema waarmee die behuisingsnood in die omgewing aangespreek sal word en waarmee terselfdertyd die huidige negatiewe persepsie oor die omgewing verander kan word deur aan die regmatige nuwe okkupeerders ‘n sin van betrokkenheid by die nuwe behuisingskema en buurt te kweek. Sodoende word die primêre verantwoordelikhede van die plaaslike owerheid jeens die behoeftiges ten beste gedien en is die voormalige grondeienaar terselfdertyd die meulsteen wat die perseel vir hom geraak het, kwyd.’

[8] For all these reasons I conclude that Temis has failed to discharge the onus to prove an abandonment of the property by the deceased (Meintjes para [16]). It follows that the application must succeed.

[9] It remains to deal with the costs of this application. Counsel for Papas submitted that Temis was opportunistic in opposing the relief sought by Papas as it in any event did not assert ownership, and that its opposition has not advanced the matter in any way. For these reasons counsel asked for a punitive costs order against Temis. I am not satisfied that a punitive costs order is justified. It is true that Temis in the present application could not in effect achieve any positive result. On the other hand all aspects concerning the property, in particular such entitlement as Temis may have in regard damages it may have suffered, have not yet been dealt with. Temis after all is an innocent purchaser of the property. I am accordingly not inclined at this stage to come to any final conclusions as far as those aspects are concerned. It follows that the normal costs as between party and party ought to apply.

- [10] Finally, I am called upon to comment on the conduct of the third, fourth and fifth respondents concerning their involvement in the fraudulent transfers I have alluded to. The third respondent is an attorney and conveyancer as well as a commissioner of oaths and the fourth respondent a firm of attorneys and conveyancers. Their involvement in the transfers arises from the fact that they were not in possession the original Deed of Transfer in the name of the deceased, which was a requirement for effecting the transfers. An application in terms of regulation 68(1) promulgated under the Act, was accordingly submitted. The preparation clause thereof was signed by the third respondent on behalf of the fourth respondent. An affidavit purportedly deposed to by the owner, the deceased, was filed, declaring inter alia that the original deed had actually been lost or destroyed. It purports to have been commissioned by the third respondent on 15 May 2012, which was almost four years after the deceased had died. The deceased's signature to the affidavit was clearly forged. The document accordingly was forged for the purpose of effecting the transfers. Full particulars of the third respondent's fraudulent conduct are set out in the founding affidavit in this application which was duly served on the third and fourth respondents. Neither of them has filed any response to the application, although a costs order is sought in the notice of motion against all the respondents. The conduct of the third and fourth respondents not only deserves the censure of this court which is to be reflected in the costs order I propose to make, but also needs to be referred to the Law Society for investigation and possible disciplinary steps.
- [11] This brings me to the fifth respondent. Allegations concerning untoward conduct by officials employed in the office of the Registrar of Deeds are made in this application. The transfers were effected in the face of a caveat, dated 30 May 2012, in terms of which 'the property should not be transferred without the written consent of the City of Johannesburg'. In addition hereto the power of attorney lodged with the Registrar of Deeds was patently defective in numerous aspects. All these defects having been brought to the attention of the Registrar of Deeds in a letter by the attorneys acting for the COJ, dated 4 October 2014, elicited nothing but the lame response that the Registrar of Deeds had no authority to note an interdict other than a court order. The Registrar of Deeds filed a report in this matter but none of the serious allegations made against it, are dealt with. This conduct is plainly unacceptable and deserves the censure of this court to be reflected in the costs order that I propose to make. Finally, the employment of two counsel by the applicant for the hearing of this matter was clearly warranted.
- [12] In the result I make the following order:
1. It is declared that the estate of the late Michael Papas (Estate Number [...]) is the lawful owner of the immovable property described as Erf [...], Johannesburg Township, Registration Division IR, Province of Gauteng ('the property').
 2. The transfer of the property to the first respondent and the subsequent transfer of the property to the second respondent is cancelled and set aside.

3. The fifth respondent is directed to take all such steps and do all such things and make all such endorsements as may be required to give effect to paragraphs 1 and 2 of this order.
4. The first, second, third and fourth respondents (and anybody in the fourth respondent's employ) are interdicted and restrained from selling or purporting to sell, transfer or otherwise alienate the property to any third party or encumbering or dealing in any way with the property.
5. The second respondent, the third respondent and the fifth respondent are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of this application, including:
 - 5.1 The costs reserved on 18 December 2013; and
 - 5.2 The costs consequent upon the employment of two counsel, where so employed.
6. A copy of this judgment must forthwith be sent to the Law Society for the Northern Provinces in Pretoria for the purpose of an investigation to be conducted into the conduct of the third and/or fourth respondents as set out in this

judgment.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT: ADV SJ DU PLESSIS SC

ADV AW PULLINGER

ATTORNEYS FOR APPLICANT: MOODIE & ROBERTSON

COUNSEL FOR SECOND RESPONDENT: ADV EL THERON

SECOND RESPONDENT'S ATTORNEYS: ROSSOUWS LESLIE INC

DATE OF HEARING: 28 MAY 2014

DATE OF JUDGMENT: 6 JUNE 2014

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