

SOUTH AFRICA / JUDGMENT

Radebe and Another v Sheriff For the District of Vereeniging and Others (31495/13) [2014]

ZAGPJHC 228 (25 September 2014)

[2014] ZAGPJHC 228

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nicholls

CASE / FILE NUMBER

31495/13

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IN

THE HIGH COURT OF SOUTH AFRICA

SOUTH

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case

number: 31495/13

DATE:

25 SEPTEMBER 2014

In

the matter between:

RADEBE,

GORDAN NDZIMANDE.....First

Applicant

RADEBE,

LETT

IE.....Second

Applicant

And

THE

SHERIFF FOR THE DISTRICT OF

VEREENIGING.....First

Respondent

NEDBANK

LIMITED.....Second

Respondent

MAMOSHUBANE,

LUCAS MALOMA.....Third

Respondent

CLOETE,

CORNELIA MARIA N.O.....Fourth
Respondent
KAPLAN,
HARRY
N.O.....Fifth
Respondent
DE
OLIVIERA, ANNA PAULA N.O.....Sixth
Respondent
POOPEDI,
SOPHIE M N.O.....Seventh
Respondent
REGISTRAR
OF DEEDS, JOHANNESBURG.....Eighth
Respondent

JUDGMENT

NICHOLLS J:

- [1] The applicants, Mr and Mrs Radebe, are purportedly the victims of a fraudulent scheme perpetrated by a company known as Brusson Finance (Pty) Ltd. (“Brusson”) which is currently in liquidation. This application concerns the ownership of a house situate at Erf 13307 Kwa-Thema (“the property”). The second respondent is Nedbank who holds a mortgage bond over the property. The third respondent is a so-called “investor” in the Brusson scheme. The 4th to 7th respondents are cited in their capacity as liquidators of the insolvent estate of Brusson. The 1st respondent is the Sheriff and the 8th respondent the Registrar of Deeds.
- [2] The applicants seek a rescission of a default judgment granted in favour of Nedbank against the investor on 22 February 2011; the setting aside of all agreements signed by the applicants pursuant to the Brusson scheme; a declaration that the applicants are entitled to restitution of the property; and an order setting aside the mortgage bond that Nedbank holds over the property. At the commencement of the hearing counsel for the applicants advised that they were only seeking rescission of paragraph 4 of the judgment, namely that the property be declared especially executable.
- [3] The application is opposed only by Nedbank who, in anticipation of the applicants being successful, filed a conditional counterclaim against the investor for R277 171.48, being the amount advanced to them under the mortgage loan. In view of the fact that it is only rescission of the order of executability that is now sought, the counterclaim becomes redundant.

- [4] The property has been the home of the applicants for the past 20 years. Before falling prey to the Brusson scheme they were the joint owners of the property. A mortgage bond of approximately R31 000 was registered over the property. Firstly, I shall deal with previous findings that Brusson's modus operandi constitutes a fraudulent scheme.
- [5] Brusson purported to provide loans to financially vulnerable persons who were unable to access loans from recognised financial institutions. The scheme operated in the following manner. A "client" (in this case the applicants) would transfer his/her property to an "investor" (the third respondent) who would obtain a mortgage bond over the property. Brusson would take monthly payments from the clients on the pretext that they were the loan repayments. Brusson would make the mortgage payments to the bank. The property could be sold back to the client in terms of an instalment sale agreement once all outstanding loan amounts had been paid up. On fulfilment of the agreement the property would be transferred back to the client.
- [6] The scheme has been held to be fraudulent by various courts[1]. In *Ditshego and Others v Brusson Finance (Pty) Ltd*[2] it was described as follows:

"AH these features are strange and foreign to usual and bona fide agreements of safe of immovable property. Seen in conjunction with

Brusson's own 'client procedure information sheet' supra, it becomes clear that;

- a. the investor does not really intend buying the property and never takes occupation thereof;
- b. the client (applicants) does not really intend selling the property and does not lose occupation thereof;
- c. the investor pays nothing and stands to lose nothing if anything goes wrong;
- d. the applicants sell the house for far less than the market value and immediately buy it back for R42 000 more;
- e. the R42 000 does not accrue to the investor but to Brusson except 15% thereof;
- f. Brusson arranges everything, receives and pays whatever is received or has to be paid;
- g. in the event of default by the applicants, Brusson ends up owner of

the property to the value of more than the initial outlay of

R168 000, of which part, in any event, accrues to Brusson as fees,

etc."

- [7] The court went on to say that the real intention was that the applicants were obtaining a loan from Brusson against security of their property and the agreements were nothing more than simulated transactions. Brusson, together with so-called investors, lends money to borrowers. Brusson guarantees the obligations of the parties to the different agreements and

bears the risk of default by the borrower. In the event of default it becomes entitled to obtain and retain ownership of the property. The scheme, according to Jordaan J amounts to nothing less than a pactum commissorium.

- [8] The illegality of the scheme therefore brooks no doubt. The courts, while declaring the scheme unlawful, ordered restitution in such a manner that the bondholders' rights were protected. However, in those cases the applicants were the net beneficiaries of their participation in the Brusson

me and the court restored them to their original position. It was for that reason that the court granted orders in the alternative. The applicants were entitled to restitution on condition that they paid the bondholder the amount by which they benefited. Alternatively the property was transferred to them subject to a bond in the amount they had benefitted.[3] In the previous cases there was no suggestion that the obligations that arose from the mortgage loan agreement were not enforceable by the bondholder, being the investor.[4] The essential difference in this case is that it is the original owners seeking relief, not the investors.

- [9] The events, as described by the applicants, that led to their involvement in the Brusson scheme are that in 2007 the first applicant saw an advertisement by Brusson offering loans to people who were blacklisted and unable to procure credit from other financial institutions. Because of their financial difficulties at the time, the applicants approached Brusson for a loan in the sum of R160 000. They were informed that the property would be used as security against the loan. After the applicants signed certain documents Brusson paid R38 000 into the applicants' bank account. Brusson also paid off the outstanding bond of R31 000 on the property, a total of R69 000.
- [10] The applicants say that they paid monthly amounts of between R3500 to R4500 to Brusson from early 2007 until 2009. They stopped paying after a dispute arose regarding amounts that were still allegedly owing. The first applicant states that by the end of 2009 a sum of R80 000 had been paid back to Brusson. Although only R69 000 was loaned from Brusson, the first applicant learnt that a loan of R248 000 had been recorded. As pointed out by Nedbank, no evidence of any amounts received or repayments made has been provided by the applicants.
- [11] The applicants state that they have subsequently been told that the documents which they signed, and which are no longer in their possession, pertained to a sale of their property. The applicants attach to the papers the following documents: blank pro forma copies of an Offer to Purchase; a Deed of Sale; and a Memorandum of Agreement. These, say the applicants, are identical to the documents they signed at Brusson's offices.

- [12] In the first document, the Offer to Purchase, the applicants were sellers and the details of the purchaser were left blank. The sale was conditional upon the buyer being able to raise bond finance to cover the purchase price which was also left blank. In terms of the second document, the Deed of Sale, the property was sold back to the applicants by the investor. The details of the seller/investor were blank and the applicants completed details as the buyer.
- [13] The third document, the Memorandum of Agreement, was between the applicants, Brusson as surety for the applicants and a 'first party'. In terms thereof the applicants acknowledged that they were uncreditworthy and that Brusson had incurred huge financial risk in standing surety. In the event of default by the applicants the investor would sell the property to Brusson for the same price that the property was acquired for in the first agreement.
- [14] The applicants state that they did not understand that they were concluding an agreement of sale. It was never their intention to sell their property, merely to secure a loan in the sum of R160 000. No-one ever informed them they were selling their property nor did they ever contemplate selling. They signed the documents in the belief that this was necessary to obtain a loan. The applicants tender any amount that may be owing in order to restore their ownership of the property.
- [15] On 22 February 2011, Nedbank obtained judgment against the investor and attached the property. The first time that the applicants became aware that their property had been sold was when a writ of execution was delivered at the property on 28 March 2011. They contacted their attorneys who sent a letter to Nedbank and the Sheriff asking them not to proceed with the attachment of property on the basis that the Brusson scheme had already been found to be fraudulent by a court of law. As there was no response the applicants assumed that the matter had been resolved.
- [16] On 18 July 2013 the applicants received a notice that the property would be sold in execution on 28 August
2013. Despite requests to stay the sale, Nedbank insisted on proceeding with the sale in execution. As a result this application was launched, initially on an urgent basis.
- [17] Nedbank, although they have no direct knowledge of the facts, dispute the applicants' avowed ignorance that the tripartite agreements constituted an agreement of sale.
- [18] Central to the applicants' case is the illegality of the Brusson scheme. As a result of Brusson's fraud and deception, they signed documents purporting to sell their property when it was never their intention to do so. Neither did the investor, as third respondent, have any intention to purchase the property.

- [19] After years of uncertainty as to whether the causal theory or abstract theory of transfer of immovable property is applicable, the Supreme Court of Appeal has now come down firmly in favour of the abstract theory[5]. That is to say that ownership of immovable property passes not only through the formal process of registration in the Deeds office but a further requirement of the real agreement must be present. Notwithstanding formal registration of transfer, mere delivery is insufficient and the intention to transfer on must also be present.
- [20] The requirements for the transfer of immovable property are therefore twofold: delivery effected by registration of transfer in the Deeds Office and the existence of a 'real agreement', the essential elements of which are an intention on the part of the transferor to transfer ownership of the property and an intention on the part of the transferee to acquire ownership of the property. 6 If there is any defect in the real agreement, that is the lack of intention on the part of the transferor and transferee to transfer

and acquire ownership of the property respectively, then ownership will not pass despite registration. So, too, if the agreement is tainted by fraud or obtained by some other means that vitiates consent.[6]

- [21] On the facts of this case it is clear that the applicants did not have the necessary intention to transfer their property. Although not specifically stated by the investor who has not opposed these proceedings, if regard is had to the scheme, it appears that there was no intention on the investor's part to take transfer of the property. In such circumstances ownership of the immovable property cannot be said to have taken place. The applicants are accordingly entitled to be granted an order setting aside all agreements signed by them pursuant to the Brusson scheme and a declaration that they are entitled to restitution of the property.
- [22] Nedbank raises as a point in limine that the application is substantially out of time and no condonation has been sought. On the merits Nedbank submits that it was the intention of the applicants to transfer ownership of their property, as evidenced by the various agreements that they signed. Secondly they argue that the applicants are estopped from relying on any defect in the agreements and that the applicants were negligent.
- [23] It is argued that the applicants recognised all the relevant documents which they stated were identical to those signed at Brusson's office. The first applicant recollected that in signing the Deed of Sale the details of the sellers were left blank. They recall having signed the Memorandum of Agreement wherein the main parties were Brusson and themselves and the details of the "first party" were left blank. Further, that the draft agreement which the first applicant signed was left blank where Brusson and the investor had to sign.
- [24] All of the above, argues the respondent, is indicative of a buyer who knew exactly what he was signing. At no stage did the applicants allege that they could not read or understand English. On their own version they were aware that they were concluding agreements which would create rights and obligations and entail the encumbrance of the property.

- [25] Notwithstanding the fact that no direct allegation is made that the documents were not read and not understood, I accept that legal documents can often be confusing to a layperson. In my view it is inherently improbable that any person would have knowingly entered into the Brusson agreements. If the applicants had intended to sell their property they would have done exactly that. There would be no sense in approaching Brusson unless they believed that they were applying for a loan. It is incomprehensible that the applicants would have participated in such a scheme if their true intention was to sell their property. This, especially in circumstances where they had borrowed money to, inter alia, pay off the mortgage bond on the very house that the respondent would have us believe they wanted to dispose of.
- [26] In respect of estoppel the argument is that the applicants are to be estopped from relying on any defect in the agreement because by signing the agreement they negligently represented that the property could be transferred to a third party. Further, the applicants should have known that when signing the contract it created rights and obligations that bound them. They should have read the terms and conditions contained therein. They knew or should have known that the property would be utilised as security and be mortgaged in favour of a financial institution such as Nedbank. In essence the applicants should have known that a third party purchaser might sell the property and that such person or a person to whom the third party purchaser sold the property would obtain a bond from a financial institution. Nedbank in good faith accepted the representations made by the applicants, namely that the property had been sold in terms of a validly concluded sale agreement and the pursuant registration.
- [27] The argument of Nedbank is not that it seeks to render valid the sale agreements or any other of the tripartite agreements concluded by the applicants. It states that it merely seeks to prevent the applicants from relying on the voidness of the sale agreement for the setting aside of the respondent's security and from enforcing their alleged ownership of the property against Nedbank to secure ownership of the property unencumbered. In other words it seeks to estop the applicants from relying on lack of intention to transfer the properties.
- [28] This latter argument seems somewhat disingenuous because the crux of the applicants' case is their lack of intention to transfer their property. This lies at the heart of the illegality of the Brusson scheme - to procure the appearance of an intention to transfer despite the fact that the owners have no knowledge (or intention) that they are doing so. To argue that it is not contended that the agreements are valid for any other purpose makes no sense. If the applicants are estopped from denying their lack of intention to transfer, this means that the agreements are enforceable against them, thus rendering an unlawful scheme lawful.
- [29] The Supreme Court of Appeal has held: It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine

of estopper [7]. The applicants point out that the fraudulent transfer of the immovable property pursuant to the Brusson Scheme constitutes a state of affairs contrary to the public interest. I agree. The defence of estoppel must fail.

- [30] The third defence raised by Nedbank is that of negligence in that the applicants foresaw or should have foreseen that when signing a contract, this created certain rights and obligations which would bind them. They ought to have read the terms and conditions created therein but did not. In such a situation in terms of the caveat subscriptor rule they are bound by the terms of the contract.
- [31] What Nedbank fails to consider is that the maxim does not apply where the person signing the document was misled regarding the nature of the contract. In such an instance the signatory, would have acted under justus error.[8]
- [32] The real issue in this matter is whether the applicants had the requisite intention to sell their property. They state clearly that they did not; they merely intended to procure a loan using their property as collateral. However, the intention to enter into a contract for a loan does not amount to the intention to enter into an agreement of sale of the property.
- [33] Nedbank attempted to raise the Plascon Evans rule to argue that it is disputed that the applicants were unaware that the tripartite agreements constituted an agreement of sale. Although having no direct knowledge it is argued that they are entitled to dispute a fact taking into account the probabilities of the applicant's version. This submission is misplaced in my view. That the applicants would enter into such a bad bargain is inherently improbable. At the time they approached Brusson there was an amount of R31 000 outstanding on their property. The bond granted to the investor by Nedbank in 2008 over the property was R227 000. The applicants received loans in the sum of R69 000 and on their version paid back R80 000. If they had willingly and knowingly sold their property on these terms, this conduct defies all logic. Moreover, if to sell the house was their intention, then they could have sold it on the open market, presumably for a sum of at least R200

000.

- [34] I agree with the argument put forward by the applicants that the only plausible basis on which one could ever participate in such a scheme is if one were deceived as to its true nature. That the applicants knowingly and willingly sold their house on these terms is so improbable that it can be rejected on the papers.
- [35] Insofar as it is argued that the applicants have brought their application out of time without applying for condonation, it is not clear when the application should have been brought. The applicants' attorneys wrote to Nedbank immediately when they became aware of the judgment against them. When Nedbank did not respond for a period of two years they were entitled to think that the matter had been resolved.

[36] The applicants are entitled to the relief sought. In respect of the rights of the bondholder, Nedbank, they are not left without recourse. Paragraphs 1- 3 of the default judgment remain intact. Nedbank is entitled to its judgment in the sum of R243 497.50 against the investor.

In the result I make the following order:

1. Paragraph 4 of the default judgment granted against the third respondent on 22 February 2011, declaring the property situated at Erf 13307 Masanabo Street, Kwa-Thema Ext 2, Springs executable, is hereby rescinded.
2. The following agreements are declared invalid, unlawful and of no force or effect:
 - 2.1. The agreement signed between the first and second applicants (as seller) and the third respondent (as purchaser) headed 'Offer to Purchase';
 - 2.2. The agreement signed between the third respondent (as seller) and the first and second applicant (as purchaser) headed 'Deed of Sale';
 - 2.3. The agreement signed between the first and second applicant, the third respondent and Brusson Finance (Pty) Ltd (represented by fourth to seventh respondents) collectively as parties, headed 'Memorandum of Agreement'.
3. The above agreements are set aside.
4. The applicants are entitled to the restitution of the property situated at Erf 13307 M Street, Kwa-Thema Ext 2, Springs.
5. The mortgage bond granted by the second respondent to the third respondent in respect of the acquisition of Erf 1 M Street, Kwa-Thema Ext 2, Springs, is declared invalid, unlawful and of no force and effect.
6. The mortgage bond granted by the second respondent to the third respondent in respect of the acquisition of Erf 1 M Street, Kwa-Thema Ext , Springs is set aside.
7. The second respondent is to pay the costs of this application.

C. H. NICHOLLS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION JOHANNESBURG

Appearances

Counsel for the applicants Adv. N C Ferreira

Instructing Attorneys The Legal Resources Centre

Counsel for the 2nd respondent Adv. H P van Nieuwenhuizen

Instructing Attorneys ; Cliffe Dekker Hofmeyr Inc

Date of hearing 19 August 2014

Date of judgment 25 September 2014

6 Legator Mckenna Inc v Shea and Others 2010 (1) SA 35 (SCA) para 22; Klerck v Van Zyl and Maritz NNO and Another 1989

(4) SA 263 (SE).

[1] Mabuza v Nedbank and Others, Case no 67456/2010, North Gauteng High Court; Ditshego v Brusson Finance (Pty) Ltd and Others, Case no 5144/2009, Free State High Court; Jacobs v Nedbank Ltd Case no 56968/2010 North Gauteng High Court judgment delivered on 20

September 2012.

[2] Ditshego v Brusson Finance (Pty) Ltd and Others, Case no 5144/2009, Free State High Court, para 28.

[3] Ditshego y Brusson Finance (Pty) Ltd and Others paragraphs 32-34.

[4] Absa Bank Limited v Boshoff Case no 2410/2012, judgment delivered on 28 August 2012, para 6 -8, Ditshego v Brusson Finance (Pty) Ltd and Others para 34.

[5] Legator Mckenna Inc v Shea and Others 2010

(1) SA 35 (SCA) para 22.

[6] Nedbank v Mendelow and Another NNO 2013 (6) SA 130 (SCA) para 12 -14.

[7] City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008

(3) SA 1 (SCA) at para 18.

Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands 1994

(2) SA 518 (C) at 524; Du Toit v Atkinson's Motors Bpk 1985 (2) SA 893 (A); Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986

(1) SA 303 (A),

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