

SOUTH AFRICA / JUDGMENT

Rampedi and Another v Njisane and Others (03876/2014) [2015] ZAGPJHC 184 (3 August 2015)

[2015] ZAGPJHC 184

COURT

South Gauteng High Court, Johannesburg

BEFORE

R Keightley

CASE / FILE NUMBER

03876/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 03876/2014

DATE: 03 AUGUST 2015

In the matter between:

MADUMO WINSTON RAMPEDI.....First Applicant

THABEIKI RAMPEDI.....Second Applicant

And

LULAMA ZENITHI NJISANE.....First Respondent

MZUKISI NJISANE.....Second Respondent

HENDRIE ANDRES MARIAS.....First Interested Party

REGISTRAR OF DEEDS,

JOHANNESBURG.....Second Interested Party

ABSA BANK LIMITED.....Third Interested Party

J U D G M E N T

KEIGHTLEY, AJ:

INTRODUCTION

- [1] The applicants in this matter are Mr and Mrs Rampedi. They are the registered owners of certain immovable property, situated at 3.... V..... Street, R....., Roodepoort (“the property”). They took transfer of the property on or about 11 December 2013.
- [2] The respondents are Mr and Mrs Njisane. They were the previous registered owners of the property. They have remained in occupation of the property notwithstanding its transfer to the Rampedis.
- [3] In the main application, the Rampedis seek an order evicting the Njisanes from the property on the basis that they (the Rampedis) are the lawful owners of the property, and the Njisanes are in unlawful occupation.
- [4] The Njisanes oppose the eviction application. In addition, they have instituted a counter-application. In essence, it is aimed at declaring the transfer of the property to the Rampedis to be invalid, and directing that the property be re-transferred to the Njisanes. Clearly, if I find in favour of the Njisanes in their counter-application, the eviction application will fall by the wayside, as it is squarely based on the Rampedis being the lawful owners of the property.
- [5] This is not the end of the matter, however, as the Rampedis in turn have filed a conditional counter-application, the details of which I deal with later.
- [6] Before dealing with the merits of the main and counter-applications, it is necessary to set out the history of the dispute between the parties.

HISTORY OF THE DISPUTE

- [7] The Njisanes were married in community of property. The property formed part of their joint estate. On 5 December 2012 a decree of divorce was issued terminating their marriage (“the divorce order”). The divorce order included a proprietary order with specific provisions in respect of the property. It provided as follows:

“Appointment of Receiver (Liquidator):

Mr HENDRIE ANDRIES MARIAS of H A MARAIS TRUSTEES CC is appointed as receiver to deal with the asset referred (sic) to in para 7.2.1 and to deal with same as per para 7.2.1 to 7.2.4 of Exhibit ‘B.’” (emphasis in the original)

- [8] Mr Hendrie Andries Marais, referred to in the divorce order, has been joined in these proceedings as the first interested party.

I will refer to him as “the liquidator” to avoid introducing too many personalities into my judgment.

[9] Exhibit B referred to in the divorce order was the settlement agreement entered into between the parties. It was made an order of court in terms of the divorce order.

[10] The relevant terms of the settlement agreement included the following:

[10.1] The liquidator, who was expressly identified as Mr Marias, was to be appointed “to dispose of the immovable property (and) ... to divide the nett (sic) proceeds between the parties” after the deduction of various amounts. These included the deduction of the amount owing on existing bonds, the Njisane’s

share of the rates and taxes due and any other costs associated with the fulfillment of the Njisane’s obligations under the

agreement of sale. This was recorded in clause 7.2.1.

[10.2] In terms of clause 7.2.2, “both parties agree(d) that they shall co-operate with Mr Marais with regard to the sale of the property, whether by private purchaser or auction, and that neither shall attempt to obstruct the other or Mr Marais.”

[10.3] Clause 7.2.3 recorded that the parties agreed that “as soon as the property has been sold, they will co-operate with regard to signature of essential documentation necessary to pass transfer when called upon by Mr Marais or his agent to do so”.

[10.4] In terms of clause 7.2.4, the transfer was to be done by Van Rensburg Attorneys.

[10.5] Clause 9 constituted a non-variation clause providing that no variation, or abandonment or waiver of any rights or obligations

would be binding unless they were reduced to writing and signed by both parties.

[11] The liquidator proceeded to sell the property by way of a public auction. The auction was held on the premises of the property on 18 January 2013. It is common cause that Mrs Njisane and Mr Njisane were present on the premises when the auction took place. Mr Njisane’s then attorney was also present. Various issues are raised by the Njisanes about what did and did not take place at the auction and thereafter. To the extent that they are materially relevant to the legal issues raised, I will deal with them later.

[12] There was some to-ing and fro-ing before the liquidator finally accepted an offer on the property. The details are not materially

relevant. What is relevant is that after putting in an initial offer on the property at the auction, Mr Rampedi subsequently upped his offer against a later, higher offer by a third party. In so doing, Mr Rampedi secured the property for R950 000.

00. The offer was accepted by the liquidator on 8 March 2013.

- [13] On 20 March 2013, the liquidator instituted an urgent application to compel Mrs Njisane to permit access to the property for purposes of obtaining a valuation and electrical compliance certificate (“the liquidator’s application”).

The application became necessary after Mrs Njisane refused to permit access to the property by a valuator who had been appointed to value the property for purposes of the Rampedi’s bond application.

- [14] Mrs Njisane opposed the liquidator’s application. She filed an answering affidavit on 27 March 2014. In it she averred, among other things, that she and Mr Njisane had decided that she would take over ownership of the property against payment to him for his half share, and that they no longer wanted to proceed with the sale of the property. She stated that she and Mr Njisane had already prepared an addendum to the settlement agreement to this effect. Furthermore, she stated that she had instructed her attorneys to lodge an application to challenge the sale of the property. She indicated that she would ensure that a copy of that application was produced at the hearing.

- [15] The liquidator disputed the existence of the alleged agreement between the Njisanes, and noted that Mr Njisane had not annexed it to her affidavit.

- [16] It is common cause that the Njisanes have never produced a copy of the alleged agreement between them amending the settlement

agreement, nor was an application made to court to amend the divorce order in this respect. It is also common cause that Mrs Njisane did not institute proceedings to set aside the sale agreement entered into by the liquidator as she averred she had instructed her attorneys to do.

- [17] The court granted the liquidator’s application on or about 17 April 2013.

- [18] The Rampedis secured a mortgage bond and complied with their other obligations under the sale agreement. They also paid

amounts outstanding by the Njisanes in respect of rates and taxes to ensure that a rates clearance certificate was obtained.

- [19] Mr Njisane was not a party to the liquidator’s application. Until 29 October 2013 Klinkenberg Inc attorneys (“Klinkenberg”) represented Mr Njisane. From January 2013 until they ceased to represent Mr Njisane, a series of letters was exchanged between Klinkenberg, on behalf of their client, and the liquidator pertaining to the sale of the property.

- [20] It is not necessary to deal with these letters in detail. It is clear from them that Mr Njisane’s most pressing concerns were directed at when he would be required to vacate the property pursuant to the sale at auction, and what price the property had fetched.

[21] Significantly, for reasons that will appear later, on 20 March 2013, Klinkenberg requested the liquidator to provide them with “a copy of the signed offer that was accepted by yourself on behalf of our client and Ms Njisane” (emphasis added). From mid-July 2013, the correspondence shows that Klinkenberg were advised twice by the liquidator that he was awaiting transfer of the property. This was after Klinkenberg had requested a progress report from the liquidator.

[22] There was no reference in any of the correspondence from Klinkenberg to the alleged agreement between the Njisanes regarding

Mrs Njisane’s take over of the property. Nor was there any reference to the alleged agreed amendment to the settlement

agreement, or to the Njisanes no longer wanting to pursue the sale of the property to the Rampedis.

[23] In the following months the transfer process took its course. The liquidator appointed Scholtz Attorneys as the conveyancers to attend to the transfer. In their affidavits supporting their counter-application the Njisanes made something of the fact that the settlement agreement identified a different firm of attorneys to deal with the transfer. However, at the hearing before me counsel for the Njisanes confirmed that they were not pursuing a case of collusion between the liquidator and Scholtz Attorneys. In the circumstances, nothing turns on this.

[24] The liquidator signed the relevant transfer documents. The power of attorney to pass transfer is dated 14 October 2013. It specifically records that the liquidator passes the power of attorney “in (his) capacity as Liquidator and Receiver” of the Njisanes, and as “duly appointed by virtue of a Court Order dated 5 December 2012”. The liquidator’s signature appears above the description “The Liquidator and Receiver of” each of the Njisanes.

[25] By early December 2013 the transfer documents were lodged and registration of transfer was pending.

[26] On 2 December 2013 the Njisanes purported to terminate the liquidator’s mandate by advising him that they had decided to do so. They requested that he urgently stop the transfer of the property. The liquidator’s refusal to do so in the absence of a valid termination of his mandate led to the Njisanes launching an urgent application in this court (“the urgent application”). They sought an order terminating the liquidator’s mandate, and interdicting him from transferring or disposing of the property to any third party. In part B of their application (which was not sought on an urgent basis) they sought the removal of the liquidator and the reversal of the sale to the Rampedis.

- [27] In their urgent application the Njisanes averred that they had “decided not to proceed with the sale or disposition of this aforesaid property using the services of the first respondents (sic) as a liquidator of our asset” (emphasis added). They stated that this was because they no longer had confidence in him. According to the Njisanes, they were “jointly abandoning” that part of the divorce order appointing the liquidator.
- [28] The urgent application was dismissed for lack of urgency.
- [29] On 13 December 2013 the transfer of the property to the Rampedis was registered.
- [30] As I indicated earlier, the Njisanes have never vacated the property. I was advised by their counsel at the hearing that pending the settlement of the present dispute the Njisanes have declined to accept payment of the net proceeds of the sale of the property. However, the effect of the transfer was to cancel their mortgage bond obligations to First National Bank. The Rampedis, on the other hand, disclose in their affidavits that they (the Rampedis) have assumed and met mortgage bond commitments to Absa Bank in the amount of R7698. 00 per month.
- [31] This state of affairs led to the Rampedi’s eviction application and, in turn to the Njisane’s counter-application.

THE ISSUES RAISED IN THE APPLICATIONS

- [32] As I have indicated, the Ramedis seek the eviction of the Njisanes on the basis that they (the Rampedis) are the owners of the property and that the Njisanes are in unlawful occupation. The Rampedis submit that they have complied with the requirements for the granting of an eviction order under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] (“PIE”).
- [33] The Njisanes raise a technical point regarding compliance with PIE.
- [34] The necessity to determine the eviction application only becomes relevant if I find against the Njisanes in their counter-application. This is because their counter-application is based squarely on an attack on the valid transfer of ownership to the Rampedis.
- [35] There are three legs to the Njisane’s attack on the validity of the transfer of ownership to the Rampedis:
- [35.1] In the first instance, they contend that the liquidator acted fraudulently in transferring the property to the Rampedis.
- [35.2] Second, they contend that the liquidator had no authority under the divorce order and settlement agreement to sign the necessary transfer documents on their behalf.

[35.3] Finally, they contend that at the time of transfer they had no intention to transfer the property to the Rampedis. From a legal point of view, this boils down to a contention that the “real agreement” necessary for the transfer of ownership was absent at the time of registration of transfer.

[36] In heads of argument handed to the court at the hearing of the matter counsel for the Njisanes submitted that the allegations of fraud on the part of the liquidator raised material disputes of fact that were not capable of resolution on the papers before me. On this basis, he argued as a point in limine that I should not dismiss the counter-application without a referral to oral evidence.

[37] The Rampedis dispute each of the three legs of the counter-application. They also take issue with the contention that there are material disputes of fact warranting a referral to oral evidence.

[38] In addition, the Rampedis filed a conditional counter-application. It is conditional on the court finding in favour of the Njisanes in their counter-application and declaring the registration of transfer invalid. In this event, the Rampedis

seek an order directing the Njisanes to sign all documents and to take all the necessary steps to effect a valid transfer of the

property to the Rampedis.

[39] The conditional counter-application is premised on the existence of a binding sale agreement in respect of the property. The Rampedis submit in this regard that even if there were defects at the time of transfer of the property, the sale agreement itself was valid and binding on the Njisanes. Accordingly, they submit that the Njisanes are bound to comply with the obligations placed on them under the agreement, and to effect a valid transfer of the property to the Rampedis.

[40] The core of the present dispute lies in the Njisane’s counter-application. As such, I will deal with it first.

In so doing, I will consider the submissions made on their behalf that I should not dismiss their counter-application without a

referral to oral evidence.

[41] If I order a referral to oral evidence, the remaining issues will be dependent on the outcome of the proceedings that follow.

[42] If I find in favour of the Njisanes on their counter-application without a referral to oral evidence, this will dispose of the eviction application regardless of the outcome of the Rampedi’s conditional counter-application. However, a finding in favour of the Njisanes will necessitate that I consider the Rampedi’s conditional counter-application.

[43] If, on the other hand, I find that there are no material disputes of fact warranting a referral to oral evidence, and I find

against the Njisanes on their counter-application, the only further issue that will remain to be determined is the eviction application.

THE COUNTER-APPLICATION

[44] The first issue to be determined for purposes of the Njisane's counter-application is whether the liquidator acted fraudulently in transferring the property to the Rampedis.

[45] The Njisanes initially submitted that the liquidator had committed fraud by signing the transfer documents when he lacked the authority to do so under the divorce order and settlement agreement. Their contention, as I explain in more detail shortly, is that they were the only persons authorised to sign the transfer documents.

[46] The difficulty with this line of argument, of course, is that at best for the Njisanes, it establishes no more than that the

liquidator was mistaken as to the extent of his authority under the divorce order, not that he acted fraudulently. This is

particularly so given that counsel for the Njisanes confirmed that his clients were not placing reliance on any alleged collusion

between the liquidator and other parties regarding the transfer.

[47] As the hearing proceeded, counsel for the Njisanes clarified his clients' position regarding the allegation of fraud on the part of the liquidator. He confirmed that it was limited to the contention that the fraud was committed by the liquidator placing his own signature above the names of the Njisanes on a document headed "Bond cancellation information sheet required for possible refunds on bond accounts".

[48] There is no evidence to suggest, let alone establish, that the liquidator intended to mislead anyone in signing the document as he did. It appears to have been a standard form document prepared by the conveyancers. The names "Lulama Zenith Njisane" and "Mzukisi Njisane", above which the liquidator's signature appears, are typed in. Quite clearly the names were inserted by the conveyancers as part of the standard form of the document. A file reference number appears below the names and signatures. This indicates that the document was part of a fuller set of documents contained in the relevant conveyancing file. It did not stand on its own. Critically, as I indicated earlier, the liquidator properly disclosed and described the authority under which he was attending to the transfer of the property in the power of attorney to pass transfer.

- [49] Therefore, it is inconceivable that anyone involved in the conveyancing process was misled by the liquidator signing above the names of the Njisanes on the bond cancellation information sheet. It is also inconceivable that the liquidator intended to mislead anyone in this regard. Anyone involved in the conveyancing process would have understood that in signing his name above the Njisane's names the liquidator was signing on their behalf in the capacity described in the power of attorney to pass transfer.
- [50] Given the limited ambit of the Njisane's case based on the liquidator's alleged fraud, there is clearly no warrant for a referral to oral evidence in this regard. The issue is eminently capable of resolution on the papers.
- [51] I find that there is no merit in the Njisane's contention that the liquidator acted fraudulently in the transfer of the property. Accordingly, the Njisane's must fail on the first leg of their counter-application.
- [52] The second leg of the counter-application is grounded on the alleged absence of authority on the part of the liquidator to sign the transfer documents.
- [53] The Njisanes accept that the liquidator was authorised to act as their agent under the divorce order. However, they contend that these powers were circumscribed by the terms of the order and, in particular, its reference to paragraphs 7.2.1 to 7.2.4 of the settlement agreement. The Njisanes say that they understood that the effect of these provisions was that the liquidator did not have the power to sign on their behalf.
- [54] The Rampedis dispute the interpretation relied on by the Njisanes. They contend that the divorce order gave the liquidator the powers to sign the transfer documents and that he acted within the scope of his authority in doing so.
- [55] The issue of whether or not the liquidator had the necessary authority to sign the transfer documents ultimately turns on the proper interpretation of the divorce order and settlement agreement. There are no material disputes of fact warranting a referral to oral evidence in this regard. The points of contention between the parties are easily resolvable on the papers.
- [56] The Njisanes place reliance on paragraph 7.2.3 of the settlement agreement as the cornerstone of their contended interpretation of the liquidator's powers. They submit that by agreeing to "co-operate with regard to the signature of essential documentation necessary to pass transfer when being called upon to do so by (the liquidator)", they retained for themselves the power to sign the transfer documents. In other words, their contention is that this provision required the liquidator to present the transfer documents to them for signature and prohibited him from signing the transfer documents on their behalf.
- [57] In interpreting documents courts must attribute meaning to the words used. A number of factors guide this process. These include the language itself, the context in which the relevant words appear, the purpose of the provision in question, the circumstances in which the document came about, and what was known to the parties at the time. Interpretation is an objective rather than a subjective exercise. A sensible meaning must be preferred to one

that leads to insensible or unbusinesslike results, or that undermines the apparent purpose of the document.[2]

[58] As far as the wording of the relevant provisions is concerned, the settlement agreement gave the liquidator the power “to dispose” of the property. The liquidator was appointed for purposes of dealing with the Njisane’s immovable property. The way in which immovable property is disposed of in our law is to effect a registration of transfer in the name of the new owner. Therefore, it seems plain to me from the language used in describing the liquidator’s appointment that his powers were intended to be wide enough to permit him to sign the transfer documents on behalf of the Njisanes. In the absence of a clear contrary intention, the power of disposal of immovable property must include the power to do all that is necessary to effect the

transfer of the property, including signing the transfer documents.

[59] On this interpretation, the effect of clause 7.2.3 was to ensure that if the liquidator elected to request the Njisanes to sign the transfer documents they were obliged to do so. The Njisanes submit that this interpretation is not correct. They submit that the use of the word “when” in clause 7.2.3 is an indication that the liquidator was required to obtain their signatures on the transfer documents. They submit that if the liquidator was intended to have an election in this regard, the word “if” would have been used instead.

[60] In my view, the Njisane’s contrary interpretation overlooks a critical factor, viz. the purpose of the settlement agreement, and clause 7 in particular.

[61] The purpose of the provision was to ensure that the property would be disposed of and the net proceeds divided between the

parties. The papers filed by the parties indicate that the Njisane’s divorce was acrimonious. Although they ultimately reached a settlement, they could not agree on the manner in which the property should be divided between them. It was for this reason that the liquidator was appointed specifically to deal with the disposal of the property.

[62] On the Njisane’s interpretation of clause 7.2.3, there is no fallback provision in the event that either or one of them failed to co-operate with the liquidator in signing the transfer documents. It does not say that in the event of a refusal to co-operate the liquidator would be authorised to sign the transfer papers. This means that the liquidator would have been required, in those circumstances, to approach the court for an order directing the recalcitrant party to sign. This is because, on their interpretation, only the Njisanes could sign the transfer documents.

[63] An arrangement of this sort is incompatible with the underlying purpose of the appointment of the liquidator. It would lead to an inevitable delay in reaching finality on the division of the property between the parties. This was the very purpose for which the liquidator was appointed. In the circumstances, it seems to me that the adoption of the Njisane's interpretation

of the settlement agreement would have an insensible and unbusinesslike result.

[64] On the other hand, the interpretation favoured by the Rampedis aids the underlying purpose of the provision. It gives the liquidator the choice of securing the signatures of the Njisanes on the transfer documents, or simply signing the documents himself. In this way, the ultimate aim is more readily achieved, viz. to dispose of the immovable property with as little further disputation as possible. Accordingly, in my view, preference should be given to the interpretation favoured by the Rampedis.

[65] There is a further reason for preferring the Rampedi's interpretation of the liquidator's powers to that of the

Njisanes. The Njisanes aver that their understanding of the powers accorded to the liquidator was that only they would have the authority to sign the transfer documents. However, the facts do not support this averment.

[66] I referred earlier to the chain of correspondence between Klinkenberg, on behalf of Mr Njisane, and the liquidator. The correspondence discloses an express understanding on the part of Mr Njisane, at least, that the liquidator had the authority to sign the sale agreement on behalf of the Njisanes. Had Mr Njisane believed that this authority did not extend to the liquidator signing the transfer documents, I would have expected some reference to this in the correspondence that followed. However, on the contrary, despite the fact that Mr Njisane was advised on more than one occasion, from mid-July 2013, that the liquidator was awaiting transfer of the property, he again raised no question about the liquidator's alleged absence of authority to sign the necessary transfer documents.

[67] For this reason I am unable to accept the Njisane's averment that it was the common understanding of the parties that the liquidator did not have the authority to sign the transfer documents.

[68] It follows that on the question of the authority of the liquidator I find that on a proper interpretation of the relevant

provisions of the settlement agreement the liquidator was accorded the authority to sign the transfer documents.

[69] As indicated by the power of attorney to pass transfer, he did so expressly in his capacity as liquidator under the divorce order, which incorporated the settlement agreement. It is common cause that the liquidator did not request the Njisanes to sign the transfer documents. In my view, under the terms of his appointment, he did not have to do so. He

had already experienced obstruction from Mrs Njisane in his attempts to effect a sale of the property, necessitating an urgent application to court. Given the prevailing situation, the liquidator cannot be faulted for proceeding to sign the transfer documents himself.

[70] In these circumstances, I find that there was no defect in the transfer of the property to the Rampedis stemming from an absence of authority on the part of the liquidator.

[71] The final leg of the Njisane's counter-application rests on the contention that, at the time of the registration of transfer, they had no intention to transfer the property to the Rampedis. In other words, they submit that there was no real agreement to transfer the property, rendering the transfer invalid.

[72] As will appear more clearly from my discussion of the relevant issues, below, it is possible to determine this question on the facts as they appear in the papers, without the necessity for a referral to oral evidence.

[73] It is well settled that our legal system follows the abstract theory of transfer, and that this extends to the transfer of

immovable property.[3] In terms of the abstract theory, the transfer of ownership is dependent on two elements. The first, delivery, being the objective element, and what is referred to as the real agreement (or "saaklike ooreenkoms"), being the subjective element.

[74] The real agreement requires an intention on the part of the transferor to give ownership, and a corresponding intention on the part of the transferee to receive ownership. This intention must exist at the time of transfer. If there is an absence of such intention, the purported transfer of ownership, even if registered, will be invalid. The real agreement cannot be equated to the underlying agreement establishing the causa for the transfer, i.e. the agreement of sale in respect of the property. Thus, a defect in the underlying agreement does not necessarily lead to a defective real agreement. The question whether transfer of ownership has validly taken place will depend on whether or not there is a defect in the real agreement.[4]

[75] The Njisane's contend that at the time of transfer they had no intention of transferring the property to the Rampedis.

They aver that it had long been their intention to transfer the property to Mrs Njisane, rather than to a third party, and that this intention was communicated to the liquidator. In addition, they point to their urgent application, which sought the removal of the liquidator and an interdict against the transfer of the property to the Rampedis. This, they say, further evidences the absence of an intention on their part to transfer the property.

[76] Regarding the first of these averments, the evidence simply does not support a finding that the Njisanes had agreed to transfer the property in full to Mrs Njisane, rather than to sell it to a third party.

- [77] As I highlighted earlier, on 27 March 2013, in response to the liquidator's application, Mrs Njisane stated that the parties had agreed to transfer the property to her, and that they had completed an addendum to the divorce order to give effect to this agreement. The Alienation of Land Act requires a written and signed deed of alienation for the effective alienation of land.[5] The divorce order and settlement agreement required that any amendment to the settlement would not be effective unless reduced to writing. To date the Njisanes have failed to produce any document evidencing their alleged agreement to transfer the property to Mrs Njisane or the alleged addendum to the settlement agreement.
- [78] This leads to the inescapable conclusion that the alleged agreement does not exist.
- [79] This conclusion is supported by the content of Klingenberg's correspondence with the liquidator, referred to earlier. From this correspondence it is evident that Mr Njisane had not agreed to the sale of the property to Mrs Njisane. Had this been the arrangement between the parties, Mr Njisane's attorneys would have dealt with this in their communications with the liquidator. If Mr Njisane had not agreed to the arrangement alleged by Mrs Njisane, then no such arrangement existed, no matter how strongly Mrs Njisane may have hoped or believed that her ex-husband might support her if asked.
- [80] It is also telling that in their founding papers in their urgent application launched on 4 December 2013 the Njisanes did not aver that they wanted to halt the transfer of the property to the Rampedis because they had agreed that Mrs Njisane would take full ownership. In the founding affidavit of Mrs Njisane, which is confirmed by Mr Njisane, it is stated that they "have decided not to proceed with the sale or disposition of this aforesaid property using the services of the (liquidator)" (emphasis added). This, they alleged, was because they no longer had confidence in him. Throughout the affidavit, reference is made to their decision not to proceed with the transfer through the liquidator. It is clear from this that the basis of the Njisane's urgent application, and their bid to halt the transfer of the property, as stated at the time, was because they had lost confidence in the liquidator. It was not to give effect to an alleged existing agreement between them to transfer the property to Mrs Njisane.
- [81] For these reasons, I find that the Njisane's averment that they had agreed to transfer the property to Mrs Njisane, rather than to proceed with the sale to the Rampedis, must be rejected. There was no defect in the real agreement on this basis.
- [82] That leaves for determination the Njisane's second contention regarding the absence of a real agreement to transfer the property to the Rampedis. The Njisanes purported to revoke the liquidator's appointment on 2 November 2013, and they launched an urgent application to do so, and to halt the transfer of the property to the Rampedis, on 4 November 2013. Does this conduct on their part render the real agreement defective?
- [83] In my view, it does not.

[84] While the real agreement is generally referred to as the “subjective element” in the transfer process, this does

not mean that the Njisane’s subjective state of mind is determinative of the legal question at issue. Whether or not

there was an intention to give transfer of ownership involves a factual inquiry, and must be determined with reference to all the

relevant facts of each case.[6]

[85] A central feature of the present case is that the transfer of the property took place under the auspices of a court order. In concluding the settlement agreement and incorporating it into the divorce order, the Njisanes bound themselves to the authority of that order. In the absence of a court-sanctioned amendment of the divorce order, the Njisane’s had no authority to revoke the liquidator’s appointment. Similarly, in the absence of appropriate relief from a court, they had no authority to override the liquidator’s transfer of the property.

[86] The Njisanes did not succeed in obtaining the relief they sought from the court prior to the registration of the transfer. Thus, at the time of registration, the liquidator had the necessary legal capacity under the divorce order and settlement agreement to dispose of the property by effecting the registration of transfer.

[87] Whatever was the subjective state of mind of the Njisanes at the time of transfer, this is not determinative of the issue. The existence of an effective real agreement in this case depended on the intention of the liquidator, acting under the authority of the divorce order and settlement agreement, to give transfer of the property to the Rampedis. That the liquidator had the requisite intention at the time of transfer is not in doubt.

[88] Counsel for the Njisanes attempted to persuade me at the hearing that the doctrine of res litigiosa prevented the liquidator from proceeding with the transfer of the property once the urgent application was filed. His submission was that although the urgent application was dismissed prior to transfer, Part B of the application stood over. He submitted that the validity of the transfer of ownership to the Rampedi’s was expressly contested in Part B and that this pending issue prevented the liquidator from effecting transfer in the interim.

[89] Counsel’s submissions are based on a flawed understanding of the application of the doctrine of res litigiosa. The doctrine applies in circumstances where contested property (res litigiosa) is the subject matter of successive sales. The doctrine provides that where a second sale of the property occurs (to a second purchaser) pending the determination of the dispute over the property, the rights of the first purchaser will be enforceable as

against the second purchaser.[7] However, the fact that property may be res litigiosa is not a bar to the transfer of the property to the second purchaser. It simply means that the first purchaser may proceed later to give effect to his rights in the contested property.[8]

[90] The doctrine of *res litigiosa* has no application in the present case, which is not concerned with successive sales. The simple question is whether transfer was validly effected to the Rampedis. This question must be determined on the basis of whether the liquidator had the necessary capacity and intention to transfer ownership at the time of registration. There is simply no need for the application of the doctrine of *res litigiosa* in determining these issues.

[91] For all of the above reasons, I find that the conduct of the Njisanes in launching the urgent application did not give rise to any defect in the real agreement underpinning the transfer of the property to the Rampedis. The liquidator had the necessary

capacity and intention to transfer ownership at the time of registration notwithstanding the Njisane's attempts to thwart

the transfer.

[92] Consequently, all three legs of the Njisane's counter-application fail.

[93] This renders it unnecessary to consider the Rampedi's conditional counter-application.

[94] The final question to be considered is whether the Rampedis are entitled to an eviction order.

THE EVICTION APPLICATION

[95] My dismissal of the counter-application has the effect of confirming the Rampedi's ownership of the property. It has the further effect that the Njisane's occupation of the property is unlawful. In these circumstances, I may grant an order of eviction if I find that it is just and equitable to do so, taking into account all relevant circumstances. I must also be satisfied that the necessary procedural requirements for an order of eviction have been satisfied. [9]

[96] The Njisanes raise one technical defence to the eviction application. They do not dispute that the Rampedis obtained the necessary Notice under section 4(2) of PIE, and that this was duly served on the municipality. It is common cause that the initial hearing date for the matter was postponed. What the Njisanes submit is that section 4(2) requires that a new Notice should have been served on the municipality after the postponement. For this reason, they say that the PIE process was defective and that the Rampedis should be deprived of the relief they seek until they cure the defect.

[97] Counsel for the Njisanes was unable to cite any authority for his submission. This does not surprise me. To interpret

section 4(2) in the manner suggested would be to place form above substance for no good reason. The municipality received Notice under section 4(2) indicating the original date of the hearing. It took no steps to indicate an intention to become involved in the eviction proceedings. One can only presume that the nature of the present dispute is not such that the municipality envisages

that it will have any role to play in the matter going forward. This is a reasonable inference to draw, given that there is no indication from the papers that the Njisanes will not be able to make arrangements for their own accommodation. To require further service on the municipality in these circumstances would serve no purpose, save to delay what, in all respects, is a lawful and justifiable eviction.

[98] I find that there is no merit in counsel's submissions in this regard.

[99] In my view, it is just and equitable to order an eviction in the present case. The Njisanes have been well aware, since at least March 2013 that the property was sold to the Rampedis. Mr Njisane has been aware since February 2013 that he will need to vacate the property. This is reflected in the correspondence between Klingenberg and the liquidator. Although Mrs Njisane has stated that she told the liquidator in early 2013 that she wanted to purchase the property, she took no steps to give effect to this, or to protect her position. Despite threatening legal action, she did nothing until the eve of transfer in December 2013, to give effect to these threats. Mrs Njisane must have appreciated that her continued occupation of the property was precarious, and that she may need to consider alternative accommodation arrangements.

[100] More than eighteen months have elapsed since the property was transferred to the Rampedis. In all of that time the Njisanes have continued to live in the property without any recompense to the Rampedis. The Rampedis have incurred substantial expenses, including monthly bond repayments, over this period. The Njisanes, on the other hand, have been released from their bond obligations as a result of the transfer of the property to the Rampedis. In these circumstances, any further delay in

permitting the Rampedis full use and enjoyment of their property would be unjustified.

[101] The Njisanes will have the balance of the purchase price at their disposal to put towards finding alternative accommodation for themselves. From figures included in the Rampedi's affidavits, it appears that this will be in the region of over R600

000. 00. To this must be added the interest that has accrued on this amount since the date of transfer. In addition, the settlement agreement places an obligation on Mr Njisane to pay maintenance towards the monthly needs of Mrs Njisane and their dependents (who are both adults). From these facts, I am satisfied that neither Mr nor Mrs Njisane will be rendered homeless by an order of eviction.

[102] I accordingly find that the Rampedis are entitled to an order of eviction in the event that they do not vacate the property within a period of 30 calendar days.

[103] I make the following order:

1. The First and Second Respondents' counter-application is dismissed.

2. The First and Second Respondents, and all persons occupying through or under them, are directed to vacate the immovable property situated at 3... V..... Street, R....., Roodepoort, held the under Title Deed T47357/2013 (“the property”) within 30 calendar days of the date of this order.
3. In the event that First and/or Second Respondents, and/or all persons occupying through or under them fail to vacate the property as directed in paragraph 1, they may be evicted from the property forthwith.
4. First and Second Respondents are directed jointly and severally to pay the costs of the First and Second Applicants, and the First Interested Party in the eviction application, the counter-application and the Applicants’ conditional counter-application.

R KEIGHTLEY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 5 June 2015

Date of Judgment: 03 August 2015

Counsel for the Applicants: M A Kruger

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Counsel for Respondent: C van der Merwe

Instructed by: Mketsu & Associates Inc

[1] 19 of 1998

[2] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

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

[4] Legator McKenna Inc, above, [22]

[5] Act 68 of 1981, section 2(1)

[6] Badenhors et al Silberberg and Schoeman’s: The Law of Property (5ed) p74

[7] Kootbodien v Mitchell’s Plain Electrical Plumbing & Building 2011 (4) SA 624 (WCC), [62]

[8] Kootbodien, above, [88]

[9] Section 4 of PIE

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