

SOUTH AFRICA / JUDGMENT

Sidwell N.O v Buisson N.O and Others (4944/2014) [2015] ZAFSHC 177 (18 August 2015)

[2015] ZAFSHC 177

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

4944/2014

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Application Number: 4944/2014

DATE: 18 AUGUST 2015

In the matter between:-

THAKELI THUBAKA SIDWELL N.O.....Applicant

And

PHILLIPUS MARTINUS DU BUISSON N.O.....First Respondent

SANET DU BUISSON N.O.....Second Respondent

N.O. OELOFSE ATTORNEYS.....Third Respondent

STANDARD BANK OF SOUTH AFRICA.....Fourth Respondent

TSEPO PAULOS BOTSANE N.O.....Fifth Respondent

TSEPO BENEDICT SEBUTSOE N.O.....Sixth Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN.....Seventh Respondent

MASTER OF THE HIGH COURT,

BLOEMFONTEIN.....Eighth Respondent

RURAL DEVELOPMENT AND LAND

REFORM DEPARTMENT, BLOEMFONTEIN.....Ninth Respondent

CORAM: VAN ZYL, J

DELIVERED ON: 18 AUGUST 2015

[1] The applicant brought this application in his capacity as one of the duly appointed trustees of the TBS Farming Trust, No: IT1156/05 (“TBS Trust”). The fifth and sixth respondents are the duly appointed co-trustees of the said trust. The first and second respondents are the duly appointed co-trustees of the Doringboom Trust, No: IT1797/04. The applicant is seeking the following relief:

“1. An order cancelling and setting aside the registration of the farm Guarriekop 330, district Senekal, in the province of the Free State, presently registered on the 17th January 2014 in the name of Doringboom Trust, IT 1797/2004.

2. An order directing the First and Second Respondents to sign all the necessary transfer documents to register the aforesaid farm in the name of the Trustees of the TBS Farming Trust, IT 1156/2005.
3. An order that failing the First and Second Respondents to transfer the aforesaid farm to the Trustees of the TBS Farming Trust IT 1156/2005, within seven (7) days of the order of the Honourable Court, the Sheriff of the High Court, Senekal, is hereby authorised to sign the transfer documents to transfer the ownership of the farm to the Trustees of the TBS Farming Trust, IT1156/2005.
4. Cost order against the First, Second and Third Respondents.”

[2] The applicant was the founder of the TBS Trust. In terms of the letters of authority issued by the eighth respondent (“the Master”) on 26 August 2005, the applicant, the fifth and sixth respondents and one Ettiene Stone were appointed as the trustees of the TBS trust. The farm Guarriekop 303 (“the farm”) was originally bought by the Government in conjunction with the ninth respondent as part of an initiative to empower previously disadvantaged individuals. It was then registered in the name of the trustees of TBS trust on 9 May 2006. The registration of the farm in the name of the trustees of the TBS trust was done by the offices of the third respondent (to whom I shall refer to as “Oelofse Attorneys”) and was filed at the deeds office by its correspondent, Mrs Lynette Joubert. According to the applicant, Mr Stone resigned as a trustee on 10 June 2009.

[3] On 18 November 2013 Mr Van Reenen Steyn who is a practising attorney at Oelofse Attorneys and who also deposed to the answering affidavit on behalf of the first, second, third, fifth and sixth respondents, called the applicant to the offices of Oelofse attorneys. According to the applicant, Mr Van Reenen Steyn then advised the applicant that the farm had been sold to the first and second respondents and requested the applicant to sign a deed of sale in this regard. The first, fifth and sixth respondents were also present. The applicant refused to sign the deed of sale. He however requested a copy of the said deed of sale and

was provided with same, signed only by the first respondent at the time. The applicant left the meeting.

[4] On 10 January 2014 the applicant was telephonically contacted by the first respondent and instructed to remove cattle from the farm. The first respondent also informed the applicant that the farm was now his property. It eventually turned out that the farm had been sold to and registered in the name of the trustees of the Doringboom Trust on 17 January 2014, as reflected on the title deed with number T441/2014, attached to the founding affidavit as Annexure “L”. The title deed also reflects that a bond in the amount of R 1 000 000.00 had been registered over the property, which bond is in favour of the fourth respondent (to whom I shall refer as “Standard bank”).

[5] Further documents were thereafter obtained by the applicant and attached to the founding affidavit, of which the following are relevant to this judgment:

5.1 The deed of sale, Annexure “I”, which reflects the first respondent as the buyer “in my hoedanigheid as trustee van die Doringboom Trust” and the fifth respondent as the seller “in my hoedanigheid as trustee van die TBS Farming Trust”.

5.2 A copy of the power of attorney to pass transfer, Annexure “J”.

5.3 A resolution dated 20 November 2013, Annexure “P”, which purports to be a resolution by the trustees of the TBS trust regarding the sale of the farm.

5.4 A letter from Mr Stone addressed to the eighth respondent, dated 12 November 2013 and received by the eighth respondent on 20 November 2013, Annexure “M”, in which letter Mr Stone tendered his resignation as a trustee of the TBS Trust.

5.5 A letter from the eighth respondent addressed to the applicant regarding the resignation of Mr Stone, dated 21 November 2013, Annexure “O”.

6. The first, second, third, fifth and sixth respondents are opposing the application. I will refer to them as a group as “the respondents”. In the answering affidavit deposed to by Mr Van Reenen Steyn on behalf of the respondents, additional documents were referred to and attached to the said answering affidavit, of which the following are relevant to this judgment:

6.1 A resolution dated 20 November 2013, Annexure “VRS 2”. In the answering affidavit it is alleged to be a resolution passed by the majority of the trustees of the TBS trust to sell the farm and authorising the fifth respondent to sign any documentation on behalf of the TBS Trust in relation to the transport of such sale.

6.2 The trust deed of the TBS Trust, Annexure “VRS 3”.

In an interlocutory application by the respondents which served before me on the day of the hearing of the main application, the respondents sought leave to file an additional affidavit, with an Annexure “A” attached thereto. In the said affidavit it was explained that two resolutions were

passed by the trustees of the TBS Trust and that due to an administrative error during the compilation of the papers and annexures, the wrong Annexure “VRS 2” was attached to the answering affidavit – it in fact should have been the resolution attached to the additional affidavit as Annexure “A”. The applicant opposed the application by filing opposing papers. Mr Hlatshwayo, who appeared on behalf of the applicant, initially presented argument in support of the opposition of the application, but later in his argument he indicated that he no longer objects to the application

being granted. I in any event considered it to be in the interest of justice to allow the additional affidavit and particularly Annexure “A” thereto in order for the disputes to be properly ventilated. I therefore granted the requested relief, ordering the respondents (first, second, third, fifth and sixth respondents) in the main application to pay the costs of the application, including the costs of the opposition thereto, payment by the one, the other to be absolved. I will refer to this resolution as the resolution attached to the additional affidavit in order to distinguish it from Annexure “VSR 2”.

- [7] According to the respondents the applicant was not requested during the meeting held on 18 November 2013 to sign the deed of sale, as the trustees of the TBS Trust had at that stage not yet resolved to sell the farm. The first respondent only signed the offer to purchase on the said date. All parties present, including the applicant, then agreed to meet again on 20 November 2013, inter alia for the TBS Trust to hold a trustee meeting regarding the possible sale of the farm. The applicant did however not attend the meeting on 20 November 2013 despite having been informed about it. I will return to the detailed allegations regarding the passing of the relevant resolutions.
- [8] In supporting affidavits deposed to by the the fifth and sixth respondents, attached to the answering affidavit, they averred that since their appointment as trustees, the applicant was unwilling to effectively work with the fifth and sixth respondents regarding the farming activities. They highlighted certain alleged problematic activities by the applicant in this regard. Due to the applicant’s alleged failure to work together with the fifth and sixth respondents as trustees, they (the fifth and

sixth respondents) decided to take steps to sell the farm.

- [9] Mr Hlashwayo referred in his argument to the abstract system of transfer of immovable property which is applicable in the South African legal system and submitted that the power of attorney to pass transfer is fatally defective, with the result that there is a defect in the real agreement between the parties which entitles the applicant to the cancellation of the transfer of ownership.

[10] Mr Van der Merwe, who appeared on behalf of the respondents, in his argument relied on the very same abstract theory of passing of ownership and submitted that the requirements for a valid transfer of ownership had been met. In this regard he contended that the errors on the power of attorney are bona fide errors which can be rectified in terms of section 4(1)(b) of the deeds Registries Act, 47 of 1937, and which do not invalidate the registration of the farm in the name of the first and second respondents.

[11] It is by now trite that the abstract theory of transfer applies to immovable property. This was again confirmed in *LEGATOR McKENNA INC AND ANOTHER v SHEA AND OTHERS* 2010 (1) SA 35 (SCA) at par [21]. In par [22] of this judgment this theory was explained as follows:

“[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A) at 922E - F; Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg Preller and Others v Jordaan 1956 (1) SA 483 (A) at 496; Klerck NO v Van Zyl and Maritz NNO supra at 274A - B; Silberberg and Schoeman op cit at 79 - 80).”

[12] The validity of the deed of sale is therefore not relevant and need not be decided. The relief sought by the applicant is dependent upon the question whether there was a defect in the real agreement or not. However, the following principles enunciated in *NEDBANK LTD v MENDELOW AND ANOTHER NNO* 2013 (6) SA 130 (SCA), are also applicable:

“[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'. And it is a source of information about those rights. 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] ...

- [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 and Others v Jordaan*. That principle was applied recently by this court in *Meintjes NO v Coetzer and Others* and *Gainsford and Others NNO v Tiffski Property Investments (Pty) Ltd and Others*. (Own emphasis)
- [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.”
- [13] Some essential elements of transfer by registration have also been dealt with by the learned authors in Silberberg and Schoeman's: *The Law of Property*, 5th Edition, at p.220 and further:

“(b) The transferor and the transferee must have the necessary legal capacity to effect a valid and enforceable transfer. Apart from a limited legal or contracting capacity, an owner’s capacity to effect transfer by registration can be limited by legislation, conditions of title, and the like. If an act of registration by someone without the necessary capacity somehow occurs, the completed transfer of the right will remain intact until it is reversed by the prescribed registration act, based upon the defective transfer. In some cases, the transfer of ownership will in any event not be reversible. The transferor must be the registered owner of the land to be transferred, or must be duly authorised by the owner, and act as his or her agent. Section 20

of the Deeds Registries Act supports the common-law rule that no-one may transfer more rights than that which is held by him- or herself, by providing that only the landowner may give transfer of the land or land rights to another. This means that, normally, the existing title deed with regard to the relevant land must be in the name of the transferor or his or her principal.

- (d) The transferor must have the intention to transfer the land or rights to it, and the transferee must have the intention to receive transfer of it. What is required, therefore, is consensus between the parties. This requirement refers specifically to the so-called “real agreement” which is aimed specifically at the passing of ownership, as opposed to the underlying contract to the transaction. In the context of registration of land, the intention of the transferor usually is apparent from the power of attorney granted to the conveyancer to effect transfer and registration in the name of the transferee. If the power of attorney has been granted due to fraudulent behaviour or misrepresentation, or if the owner him- or herself has been fraudulent, the fraud or misrepresentation as such would not reverse the completed registration procedure, even though the fraud or error might relate either to the essence or to the detail of the transaction. Further proceedings in the deeds office, subsequent to an order of court or a mutual arrangement between the parties involved, would be necessary in order to correct the situation. The fraud, misrepresentation or error would serve as the reason in a claim for rectification of the register, but if no rectification is

requested or made, the “erroneous” registration would have full effect.

...

Compliance with the requirements set out above must appear from the deeds or documents to be presented upon an application for registration of the transfer.”

[14] In the current instance one should be mindful of the fact that the farm was the property of the TBS Trust prior to transfer and registration and not that of the trustees, although a Trust acts through its trustees. It should therefore be ascertained whether the trustees were duly authorised and therefore had the legal capacity to affect a valid transfer of the farm.

[15] Section 21 of the Trust Property Control Act, 57 of 1988, determines as follows regarding the resignation of a trustee:

“Whether or not the trust instrument provides for the trustee's resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship.”

[16] The Trust deed itself, provides as follows in clause 5.6.3 thereof:

“The office of a trustee shall be vacated if, amongst others, he resigns his office by no less than

(60) days (or such shorter period as the remaining trustees or trustee may agree to) by written notice to the remaining trustees or trustee.”

[17] In the judgment of MEIJER NO AND ANOTHER v FIRSTRAND BANK LIMITED (Formerly Known as First National Bank of Southern Africa) AND ANOTHER: IN RE FIRSTRAND BANK LIMITED (Formerly Known as First National Bank of Southern Africa) v MEIJER NO AND OTHERS [2013] JOL 30560 (WCC) the question whether a trustee who resigns need to comply with Section 21 or whether he or she may resign in terms of the manner prescribed in the relevant Trust deed, was raised. However, I do not deem it necessary to determine the said issue in this instance. Although the applicant made an allegation that the trustee, Mr Stone, had resigned as trustee on 10 June 1999, it is evident from the letter to which the applicant refers, Annexure M, which Mr Stone addressed to the Master, that it is only dated 12 November 2013. According to the date stamp, it was received by the Master on 20 November 2013 and the Master acknowledged receipt

thereof on 21 November 2013, by means of Annexure “O”.

Considering the aforesaid MEIJER-judgment, par [11] thereof, it seems that only 21 November 2013 can be considered to be the effective date of his (purported) resignation; hence, after the passing of the two resolutions and after the signing of the power to transfer. In addition, there is no allegation whatsoever by any of the parties that Mr Stone had also notified the beneficiaries in writing of his resignation as determined in Section 21. He, therefore, in my view, did not comply with the provisions of Section 21.

When considering the provisions of clause 5.6.3 of the Trust deed, there is again no allegation by any of the parties that Mr Stone had given written notice to any of the remaining trustees and there is no such indication in the papers, to the contrary. His purported resignation was therefore also not done in accordance with the said provisions of the Trust deed.

[18] In the circumstances I have to find that Mr Stone still held office as a trustee of the TBS Trust on 20 November 2013 and even today still. I may mention that from the Master's report it is evident that no Amended Letters of Authority has yet been issued regarding the TBS Trust. Due to my finding that his purported resignation did in any event not comply with the necessary requirements, I however do not have to make a finding regarding the principle enunciated in *WM SOEKOE AND OTHERS v LE ROUX*, Case number 898/2007, ZAFSHC.

[19] The effect of my aforesaid finding is that there were indeed four trustees holding office on 20 November

2013. The respondents rely on clause 22.2.1 of the Trust deed which determines that when there are more than two trustees, resolutions are passed by way of an ordinary majority of votes. They further rely on clause 7.4 of the Trust deed which stipulates that a majority of trustees constitute a quorum for purposes of a meeting and that the meeting held on 20 November 2013, complied with this provision. They

made the following allegations in this regard in paragraph 19 and 20 of the answering affidavit:

19. In accordance with paragraph 7.4 of the trust deed, a quorum was needed to hold a meeting of trustees, whilst the fifth and sixth respondents were in my office, I contacted Mr Stone telephonically in order to ensure that there was a quorum and that a resolution could be passed.
20. Mr Stone informed us that he had resigned as a trustee of the TBS Farming Trust, but for the sake of caution that he would have no objection to a resolution being passed by the majority of the trustees that the farm be sold and that he would sign such a resolution. In terms of this resolution, the fifth respondent was authorised to sign any documentation on behalf of the TBS Farming Trust in order to sell the farm."

The last mentioned resolution is the resolution attached to the additional affidavit.

[20] In the founding affidavit the applicant made the allegations that Mr Stone was not in attendance at the offices of Oelofse Attorneys on 20 November 2013 and that he signed the said resolution in the absence of the other trustees. This was not denied by the respondents.

[21] When clause 7.4 is read in context, in conjunction with the other sub-clauses of clause 7 which deals with meetings of trustees, there is no provision which even nearly authorises or provides that a quorum can be constituted by one or more trustees who are not present at a meeting. To the contrary. Clause 7.6 determines as follows:

“A resolution in writing signed by all the trustees shall be valid and effectual as if it had been passes at a meeting of “ the trustees duly called and constituted. (Own emphasis)”

In my view the provisions of clause 7.6 is clearly indicative of an intention that all other resolutions, hence, resolutions that are not signed by all the trustees and/or oral resolutions, have to be passed at a duly constituted meeting where a quorum of trustees are present. The resolution attached to the additional affidavit as Annexure “A”, falls within the ambit of the last mentioned category of resolutions as it was only signed by three of the four trustees. This resolution was passed at a meeting that was not attended by a quorum of trustees and is therefore not valid.

[22] The aforesaid resolution reflects the alleged decision of the trustees of the TBS Trust to sell the farm to the first and second respondents at a certain price and it contains the following:

“Tsepo paulus Botsane in sy/haar hoedanigheid as `n TRUSTEE gemagtig word om alle dokumente te onderteken wat nodig mag wees vir registrasie van die oordrag van die bogenoemde eiendom aan die Trustees indertyd van die DORINGBOOM TRUST..”

[23] Although I am not called upon to decide upon the validity of the deed of sale, I pause to mention that this resolution in any event did not specifically authorise the fifth respondent to sign the deed of sale on behalf of the Trust. But, in any event, my further findings regarding the effect of the invalidity of this resolution on the power of attorney to give transfer, Annexure “J”, will mutatis mutandis be applicable to the deed of sale.

[24] My finding regarding the invalidity of the resolution attached to the additional affidavit, is mutatis mutandis applicable to the other resolution, Annexure “VRS 2” attached to the answering affidavit.

[25] My finding of invalidity regarding the two resolutions, has the consequence that the fifth respondent was not authorised to sign the power of attorney to give transport, Annexure “J”. He was not authorised to conclude the real agreement and to give transport to the first and second respondents by means of Mrs Lynette van Zyl nie. The unauthorised power of attorney and the consequent unauthorised transfer to and registration of the farm in the name of the first and second respondents, constitutes, in my view, a fatal defect in the real agreement. It is similar to the situation referred to in the Legator – judgment, para [25], where it is stated that “transfer by a curator without letters of curatorship would therefore not pass ownership to

the transferee”.

[26] In addition to the aforesaid, Annexure “J” incorrectly recorded that the fifth respondent is the sole trustee of the TBS Trust and that it is in that capacity that he authorises the transfer of the farm. In fact, the part that initially made reference to “kragtens Resolusie”, has even been deleted. Mrs Lynette van Zyl attested to an affidavit in which she explained how these errors came about, although her allegations in that regard partly constitute hearsay evidence as she was not personally involved in the process explained. Be that as it may, the

fact remains that the registration was executed by the

Registrar of Deeds who unknowingly acted upon a power of attorney which again was invalid, for the reason that the fifth respondent was not the sole trustee and could therefore not have authorised the transfer and registration in such a capacity. This again is not a defect in the underlying agreement (the deed of sale), but in fact a fatal defect in the real agreement.

[27] Mr Van der Merwe contended that the aforesaid “errors” can be rectified in terms of Section 4(1)(b) of the Deeds Registries Act, 47 Of 1937. In my view this contention does not hold water. It is evident from the said legislative provisions that their applicability is restricted to certain specific errors, which are merely administrative in nature. In the current instance the incorrect recorded alleged basis of the authorisation is a crucial aspect which affects the root and validity of the real agreement.

[28] I am consequently of the view that the applicant is entitled to the essence of the relief sought.

[29] Mr Hlashwayo requested that should I grant the relief sought, I should consider to also grant as further relief, the cancellation of the bond registered over the farm. He relied on the MENDELOW- judgment, *supra*, for the requested relief. In my view it is evident from the said judgment that the requested additional relief actually follows inevitably as a result of the main relief being granted.

[30] Regarding the costs, Mr Van der Merwe submitted that even should the applicant be successful, he should still be ordered to pay the costs of the application, including the costs of the opposition, In this regard Mr Van der Merwe contended that due to the unsubstantiated allegations of fraud on the part of Oelofse Attorneys, the respondents were entitled to oppose the application.

[31] I did not make any findings regarding the allegations of fraud, as I did not deem it necessary. Although I can understand that Oelofse Attorneys view the allegations in a very serious light, they could have come onto record by means of an affidavit explaining and recording the surrounding circumstances according to their version, without having had to necessarily oppose the application on its merits. Instead, the respondents profusely opposed the merits of the application and therefore I am of the view that there is no cogent reason why the costs should not follow the result.

[32] The following orders are made:

1. The transfer to and registration of ownership in the name of the Trustees of Doringboom Trust, IT 1797/2004 of the farm GUARRIEKOP 330, Senekal, Free State Province, on 17 January 2014, is hereby cancelled and set aside.

2. The first and second respondents are ordered to sign all necessary documentation to transfer and reregister ownership of the said farm to and in the name of the Trustees of TBS Farming Trust, IT 1156/2005, within 7 days of a request thereto by or on behalf of the applicant, which request may only be made after 14 days of date of this order.
3. Should the first and/or second respondents fail to adhere to the order in 2 above, the Registrar of this Court is authorised and directed to sign the requested documentation to affect such transfer and reregistration of ownership.
4. The seventh respondent is requested and directed to do all necessary steps to execute the aforesaid orders of transfer to and reregistration of ownership of the said farm in the name of the Trustees of the FBS Farming Trust.
5. The mortgage bond registered over the said farm on 17 January 2014 in favour of the fourth respondent is hereby cancelled and set aside and the seventh respondent is requested and directed to do all necessary steps to execute this order.
6. The first, second and third respondents are ordered to pay the costs of the application, jointly and severally, payment by the one, the other to be absolved.

C. VAN ZYL, J

On behalf of the applicant: Mr M.D. Hlashwayo

On Instructions of: Ngwane & Associates Attorneys

Bloemfontein

On behalf of the 1st, 2nd, 3, 5th & 6th Respondents:

Adv. R. Van der Merwe

On Instructions of: Bezuidenhouts Inc.

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