

SOUTH AFRICA / JUDGMENT

Tshatshu and Another v Standard Bank of SA Limited and Others (1787/2014) [2016] ZAECHGHC 43 (6 May 2016)

[2016] ZAECHGHC 43

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas

CASE / FILE NUMBER

1787/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case

No: 1787/2014

DATE:

06 MAY 2016

In

the matter between:

XOLISWA
MAUREEN
TSHATSHU.....First
Applicant
ALFRED
THOZAMILE
TSHATSHU.....Second
Applicant
And
STANDARD
BANK OF SA
LIMITED.....First
Respondent
DREAM
WORLD INVESTMENTS 457 (PTY) LTD
(in
liquidation).....Second
Respondent
ASSET
MANAGEMENT SPECIALISTS
(in
liquidation).....Third
Respondent
REGISTRAR
OF DEEDS, SOUTH
AFRICA.....Fourth
Respondent
CONSTANT
WILSNACH
N.O.....Fifth
Respondent
PETRUS
VAN STADEN
N.O.....Sixth
Respondent
DEIDRE
BASSON
N.O.....Seventh
Respondent
THE
NATIONAL CREDIT
REGULATOR.....Eighth
Respondent

JUDGMENT

REVELAS J:

- [1] The applicants seek vindicatory relief. They contend that they are the victims of a fraudulent, so-called “reverse mortgage scheme” (“the scheme”) in that they were hoodwinked into signing certain documents in consequence of which they unintentionally sold their house to the second respondent (“Dream World”) as part of a scam overseen by the third respondent, a deregistered company (“AMS”). Dream World was placed under final liquidation in 2007 at the behest of the bank.
- [2] The first respondent (“the bank”) is the holder of a mortgage bond registered over the immovable property that was the applicants’ residential property, subsequently sold to Dream World (“the property”). The mortgage bond was registered pursuant to agreements concluded between the applicants, Dream World and AMS. In 2010, after it had obtained judgment against Dream World for arrear bond repayments, the bank instituted eviction proceedings against the applicants, who had remained in occupation of the property ever since.
- [3] The applicants seek to have the agreements and certain other documents signed by them as part of scheme, set aside. They also seek declaratory orders. The applicants contend that the agreements concluded with Dream World are invalid on the basis that they

constitute a fraudulent attempt to acquire the applicants’ property without their true consent. The vindicatory nature of the relief sought by the applicants is evidenced by their request for an order for restitution, i.e. that the property be transferred back into their names.

- [4] The several impugned agreements and associated documents are listed in the applicants’ notice of motion and it is convenient to cite the relief sought by them in full. The applicants seek orders as follows:

“1 That the following agreements purportedly concluded between the applicants and the second and third respondents are declared to be invalid and unlawful of no force and effect:

1.1 mandate to third respondent to “restructure assets and to obtain finance in consequence of such restructuring”, attached to the founding affidavit as annexure G1;

1.2 purchase and sale of our home [the property] number 87 Wodehouse street, attached to the founding affidavit as annexure G2;

1.3 negotiation agreement in respect of the proceeds from the transfer of the property, attached to the founding affidavit as annexure G3;

1.4 an irrevocable payment instruction, attached to the founding affidavit as annexure G4;

1.5 an option agreement, attached to the founding affidavit as annexure G5;

- 1.6 a lease agreement, attached to the founding affidavit as annexure G6;
- 1.7 acceptance of all costs and undertaking to pay, attached to the founding affidavit as annexure G7;
- 1.8 irrevocable letter of authority to proceeds of purchase price and or mortgage bond, attached to the founding affidavit as annexure G8;
- 1.9 power of attorney to pass bond and a first mortgage bond in favour of AMS in the sum of R500 000, attached to the founding affidavit as annexure G9;
- 1.10 power of attorney to pass transfer, attached to the founding affidavit as annexure G10;
- 1.11 client's understanding and undertaking, attached to the founding affidavit as annexure G11; and
- 1.12 release and waiver of liability, assumption of risk and indemnity, attached to the founding affidavit as annexure G12.

2 [That] the agreements listed in paragraph 1 above is set aside.

3 [That it be] declared that the applicants are entitled to restitution of [8....] [W.....] [S.....], [K.....] [W.....] [T.....], Eastern Cape ("the property").

4 [That] the fourth respondent be ordered to register the property in the name of the applicants within one month of this order."

[5] Although no relief is sought against the bank per se, the possible implications and effect of the relief sought by the applicants will deprive the bank of the security of the mortgage bond over the property without it having repaid the loan secured thereby, leaving the bank in the unenviable position of having a worthless claim against Dream World. The bank opposes the application only to the extent that the consequences of the relief sought by it has the aforementioned prejudicial effect on the bank's rights. The bank argued that its real right vested in the mortgage bond over the property, is as strong as the applicants' real right of ownership thereof.

[6] During an application brought by the bank for the liquidation of Dream World in 2007, the bank asserted that Dream World was a participant in a fraudulent scheme operated by AMS. The deponent to the founding affidavit in that application, Mr Lorcan

Kennedy (who is also the deponent of the bank's answering affidavit in the present application), gave a detailed description on how the scheme was implemented. He based his knowledge in this regard on information he had obtained from a Mr Barnard, the controlling mind behind AMS and the scheme, during an interview. AMS intended to wind up various shelf companies forming the AMS structure. Hence the meeting. Barnard had been convicted and imprisoned for fraud and was an unrehabilitated insolvent at the time of the interview. The affidavit in question was attached to the applicants' founding affidavit.

The Scheme

- [7] The interview with Barnard revealed the following: AMS was part of a group comprising of various shelf companies and approached the general public mainly by way of advertising. It represented to members of the public that it could obtain mortgage bonds on behalf of individuals who have been blacklisted at the credit bureau and therefore unable to raise credit for themselves. Gullible individuals in dire financial straits would be lured into believing that AMS' product or services would alleviate their cash flow problems.
- [8] The only prerequisite to be assisted by AMS with a loan, was that the hopeful individual ("the client") had to be the registered owner of immovable property.
- [9] Once the client submitted an application for the credit, AMS would have the property evaluated to establish whether there was any equity in it, taking into consideration any existing mortgage bond on the property. (The applicants had an existing mortgage bond of approximately R241,000.00 in favour of First National Bank or "FNB" registered over their property).
- [10] The client's immovable property would then be sold and transferred to a company (such as Dream World) specifically incorporated for this purpose. Thereafter the client will lease the immovable property from the shelf company resting in one of the companies forming part of the AMS group. In this particular case it was AMS 4 (Pty) Ltd, which was in control of the shelf company as its sole shareholder.
- [11] AMS would then arrange a mortgage bond to be registered over the immovable property with the assistance of creditworthy individuals

who were in a position to provide security to the financial institutions concerned (like the bank), in the form of a suretyship.

The guarantor would receive a fee or payment of 5% of the amount raised by the mortgage bond. What was required of the guarantor

was to sign a mandate and power of attorney in favour of AMS and AMS 3 (Pty) Ltd, authorizing them to utilize its proven income and clean credit record and/or assets to obtain finance for an independent third party to obtain a loan to purchase the property. The guarantor was also furnished with a written deed of indemnity against loss or damage arising from an action instituted by the bank that granted a loan to be secured by a mortgage bond.

- [12] The guarantors also signed undated resignation forms as a director of the shelf company at the inception of the transaction. Such a form of resignation permitted AMS to submit the resignation of a guarantor at any time. A Mr. Coetzee (Barnard's cohort) was appointed as the sole director of at least 52 shelf companies. He also proceeded with the voluntary winding up of these companies. Hence the intervention of the bank in 2007.

- [13] The client would also be required to enter into a written lease agreement with the shelf company in respect of the property he or she previously owned and then sold, in terms of a written deed of sale, to the shelf company. The client would then become liable to pay monthly rental at a rate equal to the bond repayments the shelf company would be liable towards the bank. This amount was invariably much higher than the client's initial bond repayment before he or she became embroiled in the scheme.
- [14] The client who is to become a lessee of the property sold to the shelf company, also enters into a further agreement with the shelf company, called an option agreement. This agreement grants the client the option to purchase the same property after 18 months had expired, against payment of the same price the property was sold for to the shelf company. The client is also required to pay an amount equal to 12,5% of the purchase price to secure the option.
- [15] When the clients who had sold their properties found themselves unable to pay their monthly rentals, their failure to pay resulted in the voluntary winding up of the shelf company concerned, in terms of the option agreement. Also, if the client fell in arrears with rentals for more than two months, the option to buy back the property would be forfeited. AMS provided its so-called clients with a summary of all the costs before proceeding with the above scheme, which is approximately 30% of the bond amount.
- [16] During his interview with Barnard, Kennedy learnt that about 150 individuals had been induced to sign the relevant documentation

necessary, to embroil them in the scam in which they lost their homes. The most important of the documents they had to sign

were:

An agreement of sale in terms of which they disposed of their properties, a lease agreement providing for the lease of their former

properties, and the option agreement in terms whereof they could buy back their properties after eighteen months.

AMS would also earn agent's commission (in the present matter it was R45,000.00) notwithstanding that it provided no agency services.

- [17] In soliciting the services of guarantors, AMS advertised an opportunity to win R750,000.00 in referral fees, and a chance to win a motor vehicle. In these advertisements AMS promised to help individuals with severe cash flow problems that they could "keep their properties".
- [18] The fraudulent and pernicious character of the scheme can best be illustrated by the example used in the affidavit deposed to by Kennedy in the liquidation application:

“An individual who had been servicing a bond of for instance R857,061.00, would, once he or she has signed up with AMS, end up servicing a bond of R3 million in the form of lease payments to a shelf company.”

All the costs referred to, were to be for the client's account. Usually the purchaser of immovable property pays the transfer fees concerned. AMS ensured that the seller (the duped individual) also paid the transfer fees. The individual in the aforesaid example would also be liable for the guarantor's fees of R150,000.00, (5% of the amount raised in the mortgage bond) and AMS' commission of R256,500.00 (7,5% of R3 million).

The Applicants' Case

[19] As did many other individuals, the applicants fell for the scheme and signed all the documents that set in motion the alienation of their property to a shelf company (Dream World), who became a lessor from which they leased their former property, over which a bond was now registered in favour of the bank. They were also held liable for all the costs that the scheme entailed as illustrated above.

[20] In the applicants' case, the background facts were as follows: The applicants had purchased their property in 2004 for an amount of R250,000.00 and the property was registered in both their names. The bond securing their home loan was registered over the property in favour of FNB, as previously stated.

[21] During 2006, the first applicant required a further loan of R100,000.00 to repay smaller debts she had incurred, and she wanted

to renovate the property. Since the applicants' had been blacklisted by a credit bureau they could not obtain a loan from any commercial bank. The first applicant also wished to restructure her debts, and in July 2006, when she read the advertisement placed by Dream World in a local newspaper promising loans to the public, irrespective of poor credit records, she decided to apply for such a loan.

[22] According to the advertisement, the only condition attached to qualifying for a loan was that prospective the applicant for the loan must be a homeowner. The first applicant responded to the advertisement by calling the telephone number provided in the newspaper. She was invited to the offices of AMS in Summerstrand, Port Elizabeth and subsequently met with a Mr and Mrs Breytenbach who advised her that in order to receive a R100,000.00 loan, she had to agree to a bond being registered over the property. She was further advised that her then current bond repayments of R2,000.00 per month, would be increased to R3,349.00 per month.

- [23] The Breytenbachs recorded all the first applicant's details and took a copy of her identity document and payslip. The applicant was comfortable with the arrangement and she signed the application form presented to her. This document entitled "Mandate", was the only document she signed on the same day she met with the Breytenbachs. This document also included the application form for the loan and is the document referred to in paragraph 1.1 of the applicants' notice of motion.
- [24] As promised, Mrs Breytenbach posted the remaining documents (referred to in paragraphs 1.2 – 1.12 of the applicants' notice of motion) to the first applicant. The applicants went through these documents at home and according to the first applicant, they understood the documentation only to be for the registration of a second bond over the property.
- [25] The first applicant was emphatic that they never realized that they were actually selling their house to Dream World by signing all the documents concerned. The documents were signed on 23 May 2006. The document referred to in paragraph 1.12 was signed on 02 June 2006.
- [26] By entering into the three main agreements, the applicants sold their property to Dream World for R600,000.00. Their outstanding bond in favour of FNB was approximately R241,000.00 at that stage. Of the R100,000.00 loan the first applicant only received R96,000.00 since R4,000.00, as Mrs Breytenbach explained, was appropriated for administration and bond fees. The first applicant only realized that she and the second applicant no longer owned the property when she learnt in January 2007, that the bond registered over their property in favour of FNB, was fully paid up.
- [27] On 21 December 2007, Dream World was liquidated. On 07 March 2008 Attorneys Pretorius & Wilsnach Inc, the liquidators, notified the applicant that she owed Dream World money and that she had first preference to purchase the property. The first applicant was unable to purchase the property at its then current value since she could not afford the bond repayments. The subsequent sale of the property to a Mrs. Bam on public auction, was cancelled because according to the first applicant she refused to vacate the property as she believed she was the owner, but for the fact that she was a victim of a scam.
- [28] The applicants argued that the bank was the author of its own predicament since a deeds office and company search would have revealed the fraudulent nature of the scheme. Coetzee was the sole director of Dream World, and also the sole director of 52 other

companies and AMS. The applicants further submitted that in the absence of a proper explanation from the bank concerning the factors and criteria that were taken into account by the bank when granting the loan to Dream World, its assertion that it was acting in the normal course of business and was an entirely innocent party remains unsubstantiated.

The Documents Signed By the Applicants

[29] The bank highlighted certain aspects regarding the documents in question in its heads of argument to support its contention that the applicants were fully aware of the nature and consequences of these documents. The relevant portion of the heads of argument as highlighted, reads as follows:

“21. The agreement signed by Applicants included:

21.1 An agreement of purchase and sale of immovable property which is initialed on each page and signed by the Applicants on page 7 above the word “seller”;

21.2 A negotiation agreement in respect of proceeds from transfer;

21.3 Standard terms and conditions for the negotiation of the proceeds from the registration of the transfer;

21.4 Irrecoverable payment instruction;

21.5 An option agreement;

21.6 An agreement of lease which reflects the Applicants as lessee (in this document the Applicants signed directly above the words “signature of lessee”);

21.7 An acceptance of all costs. This document provides for payment of any fees, costs or amounts due will be made out of the proceeds of the sale whereby the Applicants sold their property to Dreamworld. In this document the Applicant signed below the statement “I, the seller, accept the amounts payable by myself as stated herein are due and payable by myself out of the proceeds of the sale.”

21.8 A power of attorney to transfer;

21.9 A client’s understanding and undertaking in which the Applicants initialed the declaration which stated that they confirmed and declared that they were aware of the fact that they could sell their property in the open market or refinance their property at a financial institution or take out a personal loan but that notwithstanding the aforementioned they still decided to enter into the property structure finance plan.”

The Bank’s Case

[30] The bank raised the point that the applicants’ claim for restitution of the property had prescribed since the applicants, on their own version, first became aware of the fact that their property had been sold in January 2007, more than three years ago.

[31] The bank submitted that it was inconceivable that a person such as the first applicant, a retired school teacher, would sign all of the abovementioned documents and still be under the impression that she was only applying for a loan (and a second bond) and that her house was not being sold to Dream World. Accordingly, the bank argued, a real agreement between the applicants and Dream World was concluded in order to transfer the property to Dream World. Relying on the abstract theory[1], the bank contended that Dream World obtained good title to the property, and the bank obtained a valid and enforceable mortgage bond in respect thereof.

[32] In the alternative, the bank contended that the applicants were estopped from denying their intention to give transfer of the

property to Dream World. It was argued that by signing the documents under consideration, the applicants must have realized that the result would be to commence a process pursuant whereunto, a title to the property would be reflected in the appropriate deeds registry as having passed to Dream World, and the latter would procure the registration of a bond based on the transfer title as so recorded to finance the acquisition of the property. The bank argued that it was entitled to rely upon the fact of registration of transfer into the name of Dream World to support the bond, and argued that if banks were not so entitled, the process of granting bonds to acquire property would become too risky and complex and limit the opportunities of owing private property.

[33] By signing the documents sent to them by AMS agents, and by permitting and facilitating the transfer of the property into Dream

World's name, the argument continued, the applicants represented to the world at large, that Dream World had become the owner of the property, and not only of a property which Dream World may dispose of, but one over which a mortgage bond could be

registered. The applicants, who allegedly did not read the documents signed by them, nonetheless created the appearance of, and thus made a representation to the world at large, that a legitimate transfer took place, and therefore, were grossly negligent in making this representation. Had it not been for this representation, the bank argued, it would not have advanced the funds to Dream World.

[34] It was the applicants, and not Dream World, who misrepresented the true position to the world at large. Accordingly, their loss was not caused by Dream World. The bank also disputed that Dream World had committed a fraud and submitted that "[t]he Second Respondent did no more and no less than act in accordance with the exact provisions of all the documentation signed by the Applicants. These documents are unambiguous and even a cursory perusal thereof reflects the true nature of the agreement".

[35] In contrast with what it termed the applicants' "grossly negligent conduct", the bank stressed that at the time it approved a loan to Dream World, and the mortgage bond was registered, it had no reason to doubt the bona fides of Dream World. The bank disputed the notion that Dream World's application for finance was extraordinary or that the sale of the property was

impeachable, or in any way irregular. The bank submitted that the loan was granted to Dream World in the ordinary course of its business and that it could not be expected of the bank to conduct an in depth investigation into the financial affairs of every applicant for a loan as that would prove most disruptive to its operations.

[36] In support of its estoppel argument, the respondent relied on the judgment in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC & Others*[2] wherein the requirements of estoppel in the context of negligent representation (which the bank submitted did occur, the fraud notwithstanding) were set out as follows:

1. There must have a representation by the true owner of the property in question by conduct or otherwise, that the person who disposed of the property was the owner and/or was entitled to dispose of it;
2. The representation must have been made negligently in the circumstances;
3. The representation must have been relied on by the person raising the estoppel.
4. Such person's reliance upon the representation must have been the cause of his detriment.

Discussion

[37] Prescription

Neither party hereto disputed the vindicatory nature of the relief sought by the applicants. The bank expressly categorized it as such. After reviewing various authorities, the Supreme Court of Appeal in *ABSA Bank Ltd v Keet*, [3] held that a claim under the *actio rei vindicatio* did not become prescribed by virtue of section 10 of the Prescription Act 68 of 1969, since it was not a “debt” as contemplated in the aforesaid section. Accordingly, the point of prescription raised by the bank cannot succeed.

The Applicable Legal Principles

[38] The AMS “reverse mortgage bond scheme” was not the only one of its kind. There have been hundreds of cases such as the present one, according to the Legal Resources Centre in Grahamstown. Many of these cases concerned the so-called Brusson[4] scam, wherein the controlling mind behind the scam devised and implemented a fraudulent scheme which was operated along virtually identical principles as AMS’ scam. Brusson was also liquidated and the fallout left many individuals to litigate against the banks, as had happened in the present matter.

[39] The courts, when dealing with these type of matters have generally adopted the approach that individuals who had been fraudulently

induced to sell their homes, were entitled to vindictory relief – the registration of their properties into their names and declaratory orders rendering the documents underpinning the impugned transactions null and void.[5] The applicants argued that the facts of their case were on all fours with the facts in the *ABSA v Moore and Quartermark* cases. The applicants submitted that these two decisions of the Supreme Court of Appeal enjoin me to grant the relief as set out in their

notice of motion. In response to this assertion, the bank argued that the issue of estoppel was not considered by the Supreme Court of Appeal in the aforesaid two cases and was applicable to the facts of the present matter.

[40] In *ABSA v Moore*, the Moores were also lured into a reverse mortgage bond scheme (the Brusson Scheme or scam) when they responded to an advertisement

which promised loans irrespective of a person's credit record, provided such persons "own property". Lewis JA summed up the unusual features of the Brusson Scheme (and which summary applies equally to the AMS Scheme under consideration)

as follows[6]:

"The investor does not really intend buying the property and never takes occupation; the client does not really intend selling the property and does not lose occupation; the investor pays nothing, but applies for a bond over the property as he has a good credit rating; the price payable in terms of the installment sale agreement accrues not to the investor but to Brusson; all payments are made to Brusson in the event of default by the clients, Brusson is entitled to take transfer of the property."

[41] The aforesaid is what occurred in the present case. In *ABSA v Moore* it was held that the agreements signed by the Moores were not simulated agreements as found in *Ditshego v Brusson Finance (Pty) Ltd*[7]. Lewis JA observed that, the real question was "whether they were rendered invalid as a result of a fraud perpetrated on the victim client" and further, "what the victim clients really intended to achieve by contracting with Brusson and the so-called investors". The court found that the Moores were induced to enter into the agreement by fraudulent misrepresentations made by Brusson.

[42] With reference to several other decisions of the Supreme Court of Appeal[8], including her own judgment, Lewis JA restated and confirmed "the same fundamental principle: where the so-called transferor does not intend to transfer ownership the registration has no effect"[9]. Accordingly it was held that the bond registered over the property was also invalid.

[43] In my view, the facts of the present matter are hardly distinguishable from *Moore's* case, except that the applicants were to a certain degree perhaps more naïve and gullible than the Moores had been, in that they signed significantly more documents which clearly identified the parties to the agreement of sale and the lease agreement.

- [44] Perhaps it can be said that the applicants were indeed negligent. They had, after all, ample time to read and consider these documents in the comfort of their home and had sufficient time to mull over the contents or to avail themselves of advice, which they did not do. As demonstrated by the bank, the applicants signed at various places on several documents which depicted quite clearly in what capacity they were signing and what the nature of the documents were. It must have been clear to them at the very least, that they were signing a deed of sale as sellers, a lease agreement as lessees, and all in respect of their (then) own property. They were already in debt and chose to become increasingly more indebted. The first applicant used the money she had loaned from Dream World to pay off her small debts and improve her house with wooden floors, tiles, cupboards and the like.
- [45] Should the applicants be successful in the present application, the property would be registered in their name again with one very substantial difference, namely the applicants would also be the proud owners of an improved property, with no debts and no bond to service. (The proceeds of the sale of their property settled their home loan account with FNB.) By contrast, the bank would have no security in respect of the unpaid loan it had advanced to Dream World.
- [46] Counsel for the bank stressed the irony and unfairness of such a turn of events. Here I must pause to point out that the bank has also in some measure contributed to the situation. It granted a loan to a fraudster. It did not demonstrate what criteria was relied upon to determine Dream World's creditworthiness. This aspect tends to support the applicant's argument that the bank ought to have been more diligent in this regard. The shelf companies in this transaction had one director who was the sole director of 52 such companies. He was also a director of AMS. The guarantor's identity – at least in these proceedings – is an unknown entity or person. The bank's argument that it was "business usual" or a transaction in the ordinary course of banking takes the matter no further.
- [47] The most important question to determine in the present matter is whether the applicants indeed intended to transfer their house, or whether they were induced by fraudulent misrepresentations to sign the agreements and other documents in question.
- [48] It is hardly likely in my view, that any homeowner would sell a house worth R600,000.00 and over which a R241,000.00 bond is registered, for a mere R94,000.00 (what the applicants received from AMS or Dream World) and then use that money to improve the house he or she occupies as a mere tenant. The applicants, negligent and naïve as they may have been, were clearly hoodwinked as to the nature of the transactions and "they believed them to serve some other purpose entirely".[10] This matter is not distinguishable from *ABSA v Moore and Quartermark* and the principles enunciated therein find application to in the present matter.

Restitution

- [49] The order of the court a quo in *ABSA v Moore* was that the Moores were entitled to restitution of the property in question subject to the reinstatement of the five bonds over it and payment by the Moores of the amount they received from Brusson, less any of the payments made to it. On appeal ABSA argued that the Moores should be ordered to pay what they have tendered to pay ABSA, against registration of a bond securing that amount. The court declined to do so, reasoning: “[W]e cannot order that the Moores pay an amount they did not owe to the bank, nor that they register a bond over their property in favour of the bank. There is no longer any contractual nexus between these parties. The court a quo did not have the power to make a contract for the parties.”
- [50] In the present matter there has never been a “contractual nexus” between the bank and the applicants. Accordingly, the tender made by the applicants along similar lines as the court a quo in *ABSA v Moore*, and subsequently withdrawn by the applicants, cannot be enforced.

Estoppel

- [51] In the *Oriental Products*[11] matter, on which the bank relies in support of its argument that the applicants are estopped from obtaining the relief sought, the

facts

were briefly the following: The third respondent (the erstwhile manager of the appellant) was tasked with procuring a new buyer for certain immovable property of the appellant, after the sale thereof to someone else fell through. At the end of 2005, the third respondent (without authority) sold and transferred the same property to the second respondent who subsequently sold and transferred the property to the first respondent. Both transactions were entered into the records of the relevant deeds register. It was common cause that the third respondent had no authority to transfer the property and had done so fraudulently by forging signatures on the relevant transfer documents. By December 2006, the directors of the appellant were aware that the property had been transferred into the second respondent’s name but did nothing. Thereafter, the property was sold and transferred to the first respondent in February 2007. Only in May 2008 the appellant launched its application for vindication against the first respondent, almost 17 months after knowing that the property had been fraudulently sold and transferred to a third party.

- [52] The court concluded that the appellant’s inaction was a negligent misrepresentation which led the first respondent to rely on it. Harms DP said the following about estoppel in such circumstances[12]:

“[26] ... And, because the first purchaser did not become owner, it, in turn, was unable to transfer ownership to the second purchaser. All this, in my respectful view, has nothing to do with the abstract system of transfer which, in any event, is a well-established principle of our law. Because counsel argued the case before the court below with reference to the abstract system, it incorrectly found that the second transfer was valid — something no one argued before us.

[27] The real issue in this case concerns estoppel. The two requirements for a valid reliance on estoppel at issue in this

case require consideration: misrepresentation and negligence. Although the issues are legally discrete, they become intermingled

because the same facts are relevant to both issues.

...

[31] Counsel for the appellant argued that a finding that the first respondent could rely on estoppel, meant that estoppel has become

a method of acquisition of ownership while it is supposed to be a shield of defence, and not a sword of attack. That estoppel may only be used as a defence is part of English law, and since the Roman-Dutch roots of the doctrine are said to be found in the *exceptio doli*, a legal defence rather than an action, the same may be said to apply in our law. Whether this formalistic approach can still be justified need not be considered in this case, even though the effect of the successful reliance on estoppel is that the appellant may not deny that the first respondent holds the unassailable title in the property, or that the deeds registry entry is correct. This means that should the latter wish to dispose of the property, the appellant would not be able to interfere. If this means that ownership passed by virtue of estoppel, so be it. The better view would be that the underlying act of transfer is deemed to have been validly executed.” (Emphasis added.)

[53] Harms DP explained[13] that although the fact of a registration is not a guarantee of any right registered, a party will not take transfer of immovable property if he has reason to suspect that the register is wrong. “By knowingly leaving the register to reflect the incorrect position as to ownership, the appellant, by omission, represented to the world in general, and to the first respondent in particular that the second respondent was the true owner of the property. It could not be said with any measure of confidence that the first respondent did not take transfer in the light of this representation”.

[54] The position of the first respondent (the purchaser) in the *Oriental* case is clearly different from the so-called purchaser (*Dream World*) in the present matter. The facts of the present matter

are also distinguishable from those in the *Oriental* case for other reasons mostly to be found in the intricacies of the elaborate scheme to which the applicants fell victim. The approach adopted by the Supreme Court of Appeal in *Oriental* is not applicable to the present matter and estoppel cannot operate against the applicants. There are also other considerations as to why estoppel does not apply to the present matter.

[55] The negligence on the part of the appellant in *Oriental*, as found by the court, was premised on the appellants’ certain knowledge that the property was transferred and its failure to do anything about it. In the present matter, the appellants did not know that their property had been transferred until long after the transfers had taken place and even though they never

intended it to be transferred it was, and they had unwittingly become tenants of their own property. That was never their intention and the absence of such an intention excludes any representation to the world at large. In addition, the fraudulent nature of the scheme, an unlawful state of affairs, ought not to be perpetuated by estoppel. That would “clothe with legal efficacy something which the law has decreed a nullity”.^[14]

- [56] In *Markus and Another v Skei and Others*^[15], another reverse mortgage matter, the court found that estoppel cannot operate to render an unlawful agreement enforceable. The court stated:

“If I should find, as pleaded by Nedbank, that the applicants cannot rely on their lack of intention to sell their property, I would in effect be finding that the underlying agreements are enforceable, irrespective of the applicant’s intention. Surely this can’t be the case. It is contrary to case law, ... public policy... principles of what is just and equitable...”

- [57] A party relying on estoppel is required to demonstrate that the negligent representation relied upon caused that party to act to his detriment.^[16] The test is whether the representation is “the proximate” or “real and direct cause” of the party acting to its detriment. There must be a causal nexus.^[17]
- [58] The crucial question to be answered is whether it was the misrepresentation of the person being estopped (the applicants) or the fraudulent acts of the third party (Dream World) which induced the plaintiff (the bank) to act to its detriment.^[18] Dream World approached the bank for a loan, representing it was creditworthy. As a result the bank lent Dream World the money and thus (unwittingly) facilitated a fraudulent scheme. Dream World never intended to repay the bank, but left it to two defrauded and indigent tenants to do so. That situation was indeed to the prejudice of the bank but was caused by Dream World and AMS.

- [59] In *OK Bazaars (1929) Ltd v Universal Stores Ltd*^[19] by Corbett J (as he then was) stated:

“As in the present instance, cases of estoppel by negligence often involves the fraudulent conduct of a third party and the complaint

against the person sought to be estopped, is that his negligence permitted or facilitated the fraud. In this situation our

Courts have rejected, as being too broadly stated, the so-called ‘facilitation theory’, viz. that wherever one of two

innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

It has, on the contrary, been held that such cases must be adjudged by the ordinary general principles relating to estoppel by

negligence; and, of course, the fraudulent intervention of a third party is an important factor in determining whether the conduct of the person sought to be estopped proximately caused the other's mistaken belief and resultant loss...". (Emphasis added.)

It can be said with confidence in this regard, that it was not the applicants who caused the bank's mistaken belief and resultant loss.

Conclusion

[60] For all the reasons and considerations as set out hereinbefore, it follows that the applicants are, in accordance with all the relevant legal principles, entitled to the relief they seek.

[61] The following order is made:

1. It is hereby declared that the applicants are the owners of [8.....] [W.....] [S.....], [K....] [W.....] [T.....], Eastern Cape, otherwise known as [Erf 2.....], [K.... W.....] [T....], Local Municipality of Buffalo City, Division of King William's Town.
2. The documents listed in paragraphs 1.2 to 1.12 of the applicants' notice of motion are declared null and void, and are set aside.
3. The fourth respondent is ordered to register the property in the names of the applicants within one month of this order.
4. The costs of the application is to be paid by the first respondent.

E REVELAS

Judge of the High Court

Appearances:

For the applicants, Adv N Ferreira and Adv K Harding

Instructed by Legal Resources Centre, Grahamstown

For the respondents, Adv S Symon SC and Adv FSG Sievers

Instructed by Wheeldon Rushmere & Cole, Grahamstown

Date heard: 17 March 2016

Date delivered: 06 May 2016

[1] As set out in *Legator McKenna Inc and Another v Shea and Others* 2010

(1) SA 35 (SCA) at para [24].

[2] 2011 (2) SA 508 (SCA) at paragraph [19].

- [3] 2015 (4) SA 474 (SCA) at para [25].
- [4] Named after Brusson Finance (Pty) Ltd
- [5] Ditshego v Brusson Finance (Pty) Ltd [2010] ZAFSHC 68; Cloete NO v Basson [2010] ZAGPJHC 87 (4 October 2010); ABSA Bank v Boshoff
- [2012] ZAECHGHC (28 August 2012); Mabuza v Nedbank [2014] ZAGPPHC 513 2015 (3) SA 365 (GP); ABSA v Moore [2015] ZASCA 171 (26 November 2015). This is not an exhaustive list. See also decision in Quartermark Investments (Pty) Ltd v Mkhwanazi and Another 2014
- (3) SA 96 (SCA) which did not concern Brusson, but a different scam.
- [6] Paragraph [24].
- [7]
- [2010] ZAFSHC 68.
- [8] Meintjies NO v Coetzer & Others 2010
- (5) SA 186 (SCA) paragraph [9]; Gainsford & Others NNO v Tiff Ski Property Investments (Pty) Ltd & Others 2012
- (3) SA 35 SCA paragraphs [38] and [39]; Quartermark (footnote
- 5) above); and Nedbank Ltd v Mendelow and Another NNO 2013
- (6) SA 130 (SCA) at paragraphs [13] and [14].
- [9] Paragraph [37], Paragraph [38].
- [10] As stated by Lewis JA in ABSA v Moore at paragraph [26].
- [11] 2011 (2) SA 508 (SCA) at paragraph [19].
- [12] At pages 516 D and 517 E.
- [13] At 516 G – H.
- [14] Klerck NO v Van Zyl and Maritz NNO and Another and Related Cases 1989
- (4) SA 263 (SE) at 282B; City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008
- (3) SA 1 (SCA) at para 16.
- [15] Case No. 1181 of 2015 at para [49].
- [16] Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976
- (1) SA 441 (A) at 452G.
- [17] Standard Bank of SA Ltd v Stama (Pty) Ltd 1975

(1) SA 730 (A) at 965 C.

[18] Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den 2001

(3) SA 597 (SCA) at para 10.

[19] 1973 (2) SA 281 (C) at 287H-288B.

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