

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 39

case Number: 39683/2019

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

REVISED. No

24 January 2023

In the matter between:

MAKOMA MOHALI

Applicant

And

PHETOLE VICTOR MOHALI

1st Respondent

GIDEON GORDON DIBANE

2nd Respondent

MAKOMA NGUMI MOHALE

3rd Respondent

SELLO MOHALI

4th Respondent

MASTER OF THE HIGH COURT SOUTH

GAUTENG JOHANNESBURG

5th Respondent

REGISTRAR OF DEED OFFICE PRETORIA

6th Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

7th Respondent

PHANGENIPROPERTIES

8th Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 24 January 2023

Summary:

JUDGMENT

Introduction

[1] This is an unopposed application in which the applicant seeks the following order:

- (a) a declaratory that the sale, transfer, and registration of the immovable property at erf [...], S[...], Section, T[...], Gauteng Province (the property) carried out by the first and second respondents to be invalid and set aside.
- (b) interdict the second respondent from destroying the structure of the building at the property in question.
- (c) to set aside the appointment of the first respondent by the Master of the High Court as administrator or executor of the estate of the late Mohale Wilson Mohale as invalid.

Background facts

[2] The applicant alleges in the founding affidavit that she was married to the deceased, Mr Walton Mohale, in terms of customary rites, on 27 May 1977. She has misplaced their marriage certificate. In support of the contention that she was married in terms of customary rites she relies on annexure "MM2" to support her allegation. Annexure MM2 is a document issued by the then East Rand Bantu Affairs Administration dated 28 March 1977 and the title deed.

[3] During their marriage, the applicant and the deceased stayed at the abovementioned property. They owned the property jointly in terms of the title deed dated 12 March 2002. The marriage was blessed with now two adult children.

[4] The deceased concluded a second customary marriage with Mokgadi Mohale. The marriage was blessed with three children, Makoma Nguni Mohale, Victor Mohale, and Sello Mohale. The three survived their mother, who died on 21 November 2015.

[5] Due to ill health, the applicant relocated to Limpopo in 2000 and left the house at T[....] with her daughter Modjaji Anna Chauke.

[6] It is apparent that by agreement with the applicant, the first respondent, Mr Victor Mohale moved from Limpopo to settle at the property in T[....]. Having taken occupation of the property he operated a tavern business in the backyard rooms. However, that business failed, and arrangements were then made to rent out the outside rooms. The tenants are charged a monthly rental of R 6500.00. It is alleged that the first respondent collected the money from the tenants without the authorization of the applicant or her daughter.

[7] The controversy that arose between the applicant's daughter and the first respondent regarding the issue of the collection of the rental resulted in the first respondent vacating the property voluntarily.

[8] Following the first respondent's application after the passing away of the deceased, he was issued the letter of authority by the Master of the High Court on 14 March 2018.

[9] After the passing away of his mother, the first respondent was appointed the administrator of the late estate of his mother on 15 June 2018.

[10] The controversy between the parties concerns the allegation that the first respondent obtained the letters of authority to sell the property in the sum of R450,000 without the applicant's consent and did so fraudulently.

[11] The property was sold and transferred to the second respondent, Mr Gideon, Gordon Dibane.

[12] The applicant contends that the sale of the property was fraudulent because the first respondent misrepresented who the true owner of the proper was when he made an application in terms of section 4 (1) (b) of the Deeds, Registries Act.¹

[13] In the affidavit, the first respondent alleges that he was attesting to the affidavit in his capacity as representative of the deceased, Mr Walton Mohale and the late estate of his mother, Mokgadi Mohale. He further alleged that someone had incorrectly written the name "Makoma Mohale" on the Certificate of the Registered Rights of the Leasehold." The alleged error, according to him, was made during the drawing of the documents. According to him, the correct name is Mokgadi Mohale, (his deceased mother) and the identification number is [...].

[14] Before dealing with the issue of the validity of the transfer of the property, it is apposite to touch briefly on whether the applicant was married to the deceased by customary marriage.

[15] Although the applicant has yet to produce the marriage certificate as required in terms of section 4 (8) of the Recognition of Customary Marriage Act,² she has introduced the best evidence in her affidavit to support the allegation about her marital status. The documentary evidence supports the evidence that she was married to the deceased in terms of customary marriage. I am accordingly satisfied that the applicant was married to the deceased.

¹Act number 47 of 1937.

² Act number 120 OF 1998.

[16] I proceeded to deal with the controversy of whether there was a real intention to transfer the property to the second respondent. As I understand it, the applicant's case is that the first respondent was not legally competent to transfer the property to the second respondent.

[17] The Supreme Court of Appeal in *Liegator Mckenna Inc and Another v Shea and Others*,³ held that the abstract theory in respect of the passing of ownership was applicable in our law. The two requirements to be satisfied for ownership to pass from one person to another are the following:

- (a) there must be a real agreement between the parties.
- (b) The transfer must be legally competent.

[18] In *Ned Bank Limited v Mendelow NO*,⁴ the Court held that the second respondent was not authorized to execute the late estate of the deceased due to his fraudulent and misrepresentation in obtaining letters of authority. The Court further held that only a truly representative or executor or executrix of the deceased estate could form an intention to transfer the property. Because there was no real agreement to transfer the property, the Court found the transfer to be void *ab initio*. Although the respondents dealt with the first respondent as a *bona fide* seller, the property transfer to them was also found to be void *ab initio*, since the second respondent had never become the property owner.

[19] It has been said that "fraud unravels all subsequent transactions even..... a subsequent sale to a *bona fide* purchaser."⁵ In *Firststrand Bank Ltd t/a Rand Merchant Bank and Another v The Master of the High Court, Cape Town*,⁶ the Court after considering the fraudulent misrepresentation made by the attorney to the Master of the High Court said:-

³ 2010 (1) SA 35 (SCA).

⁴ [686 (12) [2013] ZASCA 98.

⁵ *Moseia and Others v Master of the High Court: Pretoria and Others* (36201/2018) [2021] ZAGPPHC 37 (26 January 2021).

⁶ case no: 679/13 (11 November 2013), ZAWCHC, 2013, 173, at paragraphs [20] to [22]

"[20] It is trite that the effect of fraud is far-reaching. In Farley (Aust) Pty Ltd v JR Alexander & Sons (Qld) Pty Ltd [1946] HCA 29; (1946) 75 CLR 487 the High Court of Australia, per Williams J, said this:

'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'

[21] And in Lazarus Estates Ltd v Beasley [1956] 1 QB 702 (CA) at 712 one finds Lord Denning's well-known remarks:

'No court on this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.'

[22] In South Africa, the 'insidious effect of fraud permeates the entire legal system'. It renders contracts voidable. It is one of the elements of delictual liability. It constitutes a crime. Fraud excludes the effect of an ouster clause in the legislation. See Narainsamy v Principal Immigration Officer 1923 AD 673 at 675. It also nullifies a contractual exemption clause which purports to exclude a party from the consequences of fraudulent conduct. See Wells v SA Alumnite 1927 AD 69 at 72."

[20] In this matter, it is clear that the first respondent misrepresented to the Master of the High Court that the true owners of the property were his father and his deceased mother. What he represented to the Master of the High Court was clearly incorrect, and there is no dispute that the first respondent knew about this fact.

[21] He misrepresented to the conveyancer during the transfer process that the property belonged to his father and mother. In the conveyancing process, he falsely presented an affidavit stating that the applicant's names, as they appear in the title

deed, were erroneous. The typographical error regarding the names of the applicant's deceased mother's names was, according to him, made during the drafting of the papers. He misled the conveyancers.

[22] The sale and registration of the property in the name of the second respondent were consequently fraudulent and invalid.

[23] In the circumstances, I find that the applicant has made out the case as prayed for in the notice of motion.

Order

[24] In the premises the following order is made:

1. The sale transaction of immovable property referred to as Erf [....] S[....] location T[....], Gauteng Province entered into between first respondent and second respondent is declared invalid and set aside;
2. The registration of the immovable property referred to as Erf [....] S[....] location T[....], Gauteng Province in the names of second respondent by sixth respondent is invalid and set aside;
3. The second respondent is to desist from damaging and destroying any structure or building on the premises of immovable property referred to as Erf [....] S[....] location T[....], Gauteng Province belonging to applicant;
4. The appointment of first respondent by fifth respondent as an executor of the late Mohale /Yalton Mohale under late estate with reference number 005813 dated 15 march 2018 is declared invalid and set aside.
5. There is no order as to costs.

E MOLAHLEHI
Judge of the High Court
Gauteng Local Division, Johannesburg

Representations:

Counsel for the applicant:	Ad. A Moholo
Instructed by:	M L Matame Inc.
Counsel for the defendant:	No appearance
Hearing date;	7 September 2022
Delivered:	24 January 2023.