


**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE****CASE NO: 2398/2016**

(1)	REPORTABLE: YES/ <del>NO</del>
(2)	OF INTEREST TO THE JUDGES: YES/ <del>NO</del>
(3)	REVISED.
07/02/2018 DATE	
 SIGNATURE	

In the matter between:

**BHYAS INVESTMENTS (PTY) LTD**  
**REGISTRATION NO.: 1984/005396/07****APPLICANT**

and

**I E BHAYAT PROPERTY HOLDING COMPANY (PTY) LTD**  
**REGISTRATION NO.: 1979/004626/07****FIRST RESPONDENT**

BOTHA HORAK INC

SECOND RESPONDENT

HAASBROEK & BOEZAART ATTORNEYS

THIRD RESPONDENT

THE REGISTRAR OF DEEDS (PRETORIA)

FOURTH RESPONDENT

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## JUDGMENT

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**SUMMARY:** - Where an immovable property is transferred based on a valid Power of Attorney from the seller, purchaser acquires ownership thereof irrespective of whether the deal of sale is valid or not – abstract theory applies – delivery passing transfer and real intention to pass transfer of ownership and acquire ownership, necessary -

In casual system of transfer, a valid *causa* for transfer of ownership is a *sine quo non* – real intention of parties required to pass ownership.

**PRINCIPLE:** a manifest defect in the Power of Attorney e.g. fraud forgery cannot pass a valid transfer of ownership –

Furthermore, a vindicatory claim based on ownership of a thing, not a debt within the meaning of the Prescription Act, 1969.

In *casu*, applicant's claim, not a "debt" and cannot become Prescribed. Held, application for re-registration and re-transfer of the property succeeds with costs.

**M.G PHATUDI J:****[1] INTRODUCTION:**

This application is one in which the Applicant seeks a declaratory order in the following terms:

- 1.1. An Order declaring the registration of transfer of the immovable property more fully described as Erf 6474KS Piet Potgietersrus (Mokopane) Limpopo ("the property") in the name of the First Respondent on 21 April 1998, to be declared null and void, ab initio;
- 1.2. That, on the granting of the order , the First to Fourth Respondents be ordered to sign all necessary documents and take such steps as are required in giving the return and re-transfer of the property into the Applicant's name;
- 1.3. That the Sheriff of the High Court (with jurisdiction) be authorized and empowered to sign such documents and take such steps on the parties' stead, in giving effect to 1.2 above, in the event of the Respondents failing to comply with the order as set out in 1.2 above;
- 1.4. Further that, the costs be awarded in Applicant's favour should it be successful. The application is opposed by the First Respondent only,

with the Second, Third and fourth Respondents not having filed opposing papers.

**FACTUAL BACKGROUND:**

- [2] In or during the year 1996, the Applicant went through financial distress. He owed various creditors including his brother Ismael Essop Bhyat, the past director and shareholder of the First Respondent, an amount of roughly Seven Hundred Thousand Rand (R700 000.00). The various debts were however, considerably reduced and finally settled, during 1997 with the first Respondent being the remaining creditor. His brother Ishmael Essop Bhyat had since died in 2006. The applicant had been indebted to his late brother since 1997 in the amount of Seven Hundred Thousand Rand (R700 000.00).
- [3] It appears that the Applicant together with three (3) other co-tenants, presently occupy a portion of certain commercial property for trading purposes. The property depicts registration in the First Respondent's name which registration was apparently effected on 21 April 1998<sup>1</sup>. This property better known as Erf 6474KS, Limpopo, is held under Deed of transfer T77169 of 1998 under the First Respondent's name according to the windeed attached to Applicant's founding affidavit ("FA"). The property was purchased on 28 November 1998 for an amount of Four Hundred Thousand Rand (R 400 000.00).

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<sup>1</sup> Annexure "FA<sup>3</sup>" Bundle 1, Pleading Index, P25 "FA"



- [4] The Applicant in 1996 on account of his indebtedness to his late brother, (Ismael Essop) handed his original title deed in respect of the said commercial property to him for safe keeping. The understanding according to the parties' verbal agreement was that he would collect all rentals due by the tenants on the property until his indebtedness to him became extinguished, alternatively or that he is fully paid, where after he would restore possession of the original title deed to Applicant. Part of the rental collected would be used to defray municipal services costs rendered to the property and set-off the difference collected from rental proceeds towards reduction of the debt due by him. This arrangement had been in place since 1996 where the first Respondent collected about R9 500.00 monthly rentals.
- [5] On making inquiry as to the extent of his current indebtedness to him during 2004, regard being had to the capital debt that has already been liquidated and reduced to approximately R300 000.00 in addition to the collected rental, it appears that no straight figures were provided to the Applicant, thus leaving him at sixes and sevens.
- [6] Upon his brother's death in 2006, the Applicant approached the deceased's son Ashraf with similar inquiries, but to no avail. Ashraf had since undertook to investigate the matter and furnish a report to the Applicant which he failed to do.
- [7] On further investigation, the Applicant in May 2013, first became aware or acquired knowledge that the property was transferred and registered into the name of the First Respondent. As already indicated, the actual transfer and registration thereof was effected on 21 April 1998.

- [8] The investigation further revealed that the only documents in custody of the Fourth Respondent were a copy of the title deed referred to, and a Power of Attorney to pass transfer in favour of one Heinrich Reinecke dated 16 January 1998. In terms of this instrument, it was signed by the Applicant authorizing transfer of the property in favour of the First Respondent, for a purchase price of R400 000.00. Copies of the relevant documents are annexed to the "FA"<sup>2</sup>.
- [9] The Applicant denies having signed the alleged Power of Attorney to pas transfer. His denial is, in the main, that he did not sign the alleged power of attorney authorizing transfer. Applicant contended that the Power of Attorney referred to was fraudulently authorized as it had no signature of his. The signature on the document purporting to be his signature is fraudulent. These facts were drawn to Ashraf's attention in order to persuade him to restore ownership of the property.
- [10] In order to strengthen his case, the Applicant on 25 May 2013 employed the services of a forensic hand-writing Expert to make its findings on the geniuness or otherwise of his original signature in various documents, including the controversial Power of Attorney, for comparison purposes.
- [11] According to the hand-writing Expert's report dated 29 May 2013, the conclusion was that there were dissimilarities in individual characteristics quiet significant, and that the signature on the document was not that of the Applicant.

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<sup>2</sup> Annexure "FA"<sup>4</sup> and "FA"<sup>5</sup>, Pleading Index, PP 29 -34 , "FA"

[12] It was this alleged fraudulent transaction that actuated the Applicant's attorneys in a letter dated 14 April 2016, addressed to the directors of the First Respondent, to seek restoration of transfer and ultimately re-possession of the property in the Applicant's name. In response thereto through its Attorney's letter dated 20 April 2016, the First Respondent merely denied any alleged fraud in respect of the transferred property without providing further details. This, in Applicants' view, constituted a bare denial.

[13] For the reasons stated above, the Applicant proceeded to launch the present application.

[14] The question that calls for determination really is whether the Applicant intended to effect transfer and registration of ownership of the property into the First Respondent's name.

[15] In order to adopt a lucid approach for proper adjudication in this matter, I consider it appropriate to set out briefly the common cause facts, namely :-

15.1. The Applicant is Bhyas Investments (Pty) Ltd, duly represented by Mr A.S Bhayet ("Abdool") as its co-director and shareholder;

- 15.2. The First Respondent is I.E Bhyat Property Holdings Co. Ltd. Abdul's brother (Ismael now deceased) was the erstwhile director and shareholder of the First Respondent
- 15.3. During 1996, Abdool was trading under insolvent circumstances owing several creditors, including the late Ishmael in the region of R700 000.00.
- 15.4. Prior to his technical insolvency, Abdool owned a certain immovable property better described as Erf 6474 KS, Limpopo registration division, Mokopane. ('the property').
- 15.5. As part of a repayment plan, the parties agreed and arranged orally as to how to restructure a way to reduce and finally settle the principal debt in question. In addition, Abdool handed the original title deed of his property to Ismael. Ismael passed on in 2006 while the debt was still due, owing and payable to him.
- 15.6. In or during May 2013, the Applicant first acquired knowledge of the alleged illicit transfer of his property in the First Respondent's name. The property was however, actually transferred in the Fourth Respondent's office (deeds office) on 21 April 1998.
- 15.7. On discovering the transfer and on enquiry at the deeds' office, the only paper trail traced was a copy of the title deed No.: T4/665/89 as well as a



Power of Attorney to convey transfer dated 16 January 1998, purportedly signed by Abdool on behalf of the Applicant for the purchase price of R400 000.00

15.8 The First Respondent does not deny emphatically the alleged fraud or forgery on the alleged document, the purported Power of attorney in its answering affidavit as disputed by the Applicant.<sup>3</sup> ("AA")

15.9 Furthermore, there is no denial that the Applicant never appointed any conveyancer to initiate transfer of the property into the name of the First Respondent.

[16] The First Respondent in resisting the application raised primarily two issues, namely, material factual dispute on ownership and extinctive prescription of the claim since transfer. I shall proceed to deal with the issues separately as I consider the applicable legal framework on the matter. First, I focus attention on the possible defences raised by the First Respondent.

[17] It was submitted on behalf of the First Respondent that because of the foreseeable disputes of facts, application proceedings were inappropriate. At the hard core of the dispute, was the alleged fraud on the Power of Attorney authorizing transfer. It was further contended that fraud to sustain, it must have been established with certainty. Furthermore, even if the signature affixed on the Power of Attorney was not

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<sup>3</sup> Paginated page Index Pleadings, P60, Para: 16 and 16, and 38.18 P98, Para: 38,23, "AA"

authorized, that fact alone does not import the existence of fraud, so the submission went.

[18] I find myself at variance with these submissions. For a proper transfer of an immovable to take place, certain pertinent requirements must first be met *inter alia* the following:

18.1. The parties or their duly authorized agents must have entered into a written deed of purchase and sale, signed by them or their duly authorized representatives. It is trite that every contract in order to be lawful, binding and enforceable, requires the requisite intention of the parties to contract, both by the seller and purchaser.

In *casu*, it is not in dispute that the property had been “ sold by PRIVATE TREATY on the 28 November 1997, for the sum of R400 000.00<sup>4</sup>” which has been duly secured.

[19] The Applicant, disputed the signature on the Power of Attorney to pass transfer.

[20] Absent a written memorial of the contract between the parties, which in transactions involving the purchase and sale of immovable property is a pre-requisite, the First Respondent cannot, in my view, be heard or argue that there exists a lawful contract to convey transfer and registration in favour of the First Respondent.

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<sup>4</sup> Annexure “FA5”, P33 “FA”- Power of attorney to transfer”

- [21] A duly authorized conveyancer would on receipt of a written deed of sale, where necessary, accompanied by a Power of Attorney to pass transfer, attend to effect the desired transfer and registration in the office of the Fourth Respondent.
- [22] Where the property is transferred to the purchaser based on a valid Power of Attorney from the seller, the purchaser acquires lawful ownership of the property irrespective of whether the deed of sale is valid and endorsable or not.
- [23] The aforementioned proposition derives from the common law **abstract theory** of passing of ownership in respect of immovable assets. In terms of the abstract theory, the essential elements for passing ownership are two –fold, namely;
- 23.1 Delivery by way of registration of transfer;
- 23.2 A real agreement, the intention of which transfer has to pass ownership and, correspondingly, the transferee's intention to acquire ownership occurs.
- [24] As regards the **casual system of transfer**, a legitimate *causa* (: *iusta causa*) giving rise to the intended transfer, is a *sine quo non* for completion of a valid transfer of ownership. By necessary implication, it follows therefore that where the underlying *causa* is legally turpitude, the intended transfer of ownership will similarly be void.

- [25] Under the **abstract** theory, there is therefore no requirement for a formally valid underlying transaction except that the parties have a union of the minds regarding the passing of ownership.<sup>5</sup>
- [26] Counsel for the First Respondent submitted that in this instance, the essential requirements of the **abstract theory** are present in that there was in fact registration of transfer on 21 April 1998. On its version the First Respondent in essence contended that there was a **real agreement** to allow transfer, and so was the presence of intention both on the part of the transfer and transferor to pass ownership.
- [27] I am, unable to subscribe to this submission. Although *ex facie* the documents in possession of the Fourth Respondent a copy of the title deed evincing the questioned transfer obtains, the Applicant disavowed the signature on the Power of Attorney professing to pass transfer of ownership to the First Respondent. In fact, it was contended that Abdool's signature has been fraudulently placed on that instrument effectively implying he could reasonably not have had the required intention as the transferor to pass ownership to the "purchaser" (First Respondent).
- [28] For the abstract theory to hold firmly in this regard, the delivery of conveyancing paper trail must have been plainly valid. Absent a legitimate Power of Attorney to pass transfer, one cannot say that there was a **real agreement** between the

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<sup>5</sup> Mentjies N.O v Coetzer and Others 2010 (5) SA 186 (SCA)



transferor and transferee the intention common to the parties of which was to pass ownership.<sup>6</sup>

- [29] Whether the Power of Attorney contain a fraudulent or forged signature is to my mind, an immaterial consideration for present purposes. What is crucial is whether both parties had a legitimate or real agreement to pass transfer. In the premise, I hold that the abstract theory version contended for by the First Respondent Counsel falls by the wayside and cannot be supported.
- [30] In consequence, where there is a manifest defect in the real agreement, if there was in this instance, ownership arising from a defective real agreement shall not validly pass even where transfer and registration took place (See, *Preller v Jordaan* <sup>7</sup>)
- [31] In the present instance, I take the view that because of manifest defect in the Power of Attorney which would naturally represent the real agreement, no valid transfer and registration could have been properly effected in the title deed purporting to convey ownership in favour of the First Respondent. This patent defect is common cause between the parties. Whether Abdool's signature has been fraudulently placed on that document or merely forged cannot, in my view constitute a factual dispute to impede the matter from being decided on paper.
- [32] Conversely, a mere existence of fraud or forgery as understood in criminal law would invariably render the Power of Attorney *per se* invalid if not unlawful, with the result

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<sup>6</sup> Air - Kel (Edms) Bpk h/a Marked Motors v Bodenstein 1980 (3) SA 917.(AD)

<sup>7</sup> 1956 (1) SA 483 (A) at 496.

that no transfer would have validly taken place from inception. In the result, I find that no delivery or valid transfer of ownership took place in favour of the First Respondent with the inescapable conclusion remaining that the Applicant retains original ownership of the property in question.

[33] I now turn to consider the second leg of the First Respondent's contention, namely, the issue of extinctive prescription. It was submitted that as the claim was not one of vindication (*res vindicatio*) but relief to procure declaratory order, then prescription is another impediment that confronts the Applicant. It is actually said that the claim as it derives from declaratory relief as well as mandatory interdict to enforce certain remedial steps, has become prescribed in law. This is allegedly because it is not a claim that has no origin in *res vindicatio*.

[34] This vexed legal issue occupied the Supreme Court of Appeal's attention in **Absa Bank v Keet**.<sup>8</sup> The crisp issue analogous to the present application, was "whether the appellant's claim (Absa bank's claim) for repossession of its vehicle is a debt" which for purposes of the Prescription Act prescribes after three years"(at 474, E- F, para 9).

[35] Counsel for the appellant (Absa) submitted that a vindicatory claim is clearly a claim based in ownership of a thing and that it cannot be described as a claim for satisfaction of a debt. He argued that the court *a quo* (Fabricius J) erred in holding

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<sup>8</sup> 2015 (4) SA 473 (SCA)

that the *actio rei vindicatio* becomes prescribed after three years by virtue of the provisions of Section 10 of the Prescription Act, 1969.<sup>9</sup>

In doing so, the learned judge rejected the view of Blignault J in **Staegeman v Langenhoven**<sup>10</sup> and **Others** in holding that such a claim is not a debt for purposes of Chapter III of the said Act, and can accordingly not be defeated by a plea of extinctive prescription.

[36] Counsel for the Respondent, (introduced as *amicus curia* by the court in the proceedings) submitted that the period of prescription in respect of vindicatory claim, for which both the 1943 and 1969 Acts are silent, it could have done so and allowed vindicatory claim to be decided on a case-by-case basis.

[37] The court in **Keet's case supra**, after reviewing old authorities on the subject expressed the view in Para: 20 that:

“In my view there is merit in the argument that a vindicatory claim, because it is claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The High Court in **Staegemann** ( para 16) was correct to say that the solution to the problem of prescription is to be found in the basic distinction in our law between a real right (*ius in re*) and a personal right (*ius in personam*). Real rights are primarily concerned with the relationship between a

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<sup>9</sup> Act 68 of 1969, as amended

<sup>10</sup> 2011 (5) SA 648 (WCC)



person and a thing, and personal rights are concerned with a relationship between two persons.....”

[38] The foregoing *dictum* per Zondi JA, in Keet’s case correctly summed up the legal principle on the vexing issue which was often differently decided in various Divisions of the High Court. I am bound to follow this principle.


[39] The submission by the First Respondent, and for the principle outlined, given the vindicatory nature of the Applicant’s claim, is clearly predicated on incorrect premise. The vindicatory claim Applicant made against the First Respondent is not a “debt” and can therefore, not become prescribed within the meaning of the Prescription Act after effluxion of three years from the time when the relief was sought by the Applicant. Accordingly, there is no valid reason as to why the claim for vindication of its property should not succeed.

[40] I accordingly make an Order as follows:

- a. An order is granted declaring the registration of transfer of the immovable property more fully described as Erf 6474 KS Piet Potgietersrus (Mokopane) Limpopo, into the First Respondent on 21 April 1998, null and void;
- b. That, the First to Fourth Respondents are ordered to sign all necessary documents and take such steps as are required in giving effect to the return and re-registration of the said property into the Applicant’s name.



- c. That, the Sheriff of the High Court be and is hereby authorized and empowered to sign such documents and take such steps on behalf of the parties, in giving effect to (b) above, in the event of the Respondents failing to comply with the order as set out in (b) above.
  
- d. Further that, the First Respondent is ordered to pay the costs of application, which include the costs of employment of counsel,


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**M.G PHATUDI**  
**JUDGE OF THE HIGH COURT**  
**LIMPOPO DIVISION**

**REPRESENTATION:**

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| <b>1. Counsel for the Applicant</b>    | <b>:</b> | <b>Adv A.B Rossouw SC</b>          |
| <b>Instructed by</b>                   | <b>:</b> | <b>Afzal Lahree Attorneys</b>      |
|  |          | <b>Kelvin, SANDTON</b>             |
| <b>2. Counsel for First Respondent</b> | <b>:</b> | <b>Adv MP van der Merwe SC</b>     |
| <b>Instructed by</b>                   | <b>:</b> | <b>Borman Snyman &amp; Barnard</b> |
|  |          | <b>MOKOPANE</b>                    |
| <b>3. Date heard</b>                   | <b>:</b> | <b>07 NOVEMBER 2017</b>            |
| <b>4. Date delivered</b>               | <b>:</b> | <b>07 FEBRUARY 2018</b>            |