IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 3133/2015

DATE: 6 DECEMBER 2016

In the matter between:

VERONICA LORRAINE DE VOS	Applicant
and	
LINDSAY GRAEME ADAMS	1st Respondent
ABSA BANK LIMITED	2nd Respondent
JACOBA M DU PLESSIS	3rd Respondent
ANDRE MULLER	4th Respondent
REGISTRAR OF DEEDS, CAPE TOWN	5th Respondent

J U D G M E N T

DAVIS, J:

INTRODUCTION:

During 2003 the applicant ("De Vos") and her late husband, who were married in community of property, purchased a property known as Erf 1704, Blue Downs ("the property") in terms of a written deed of sale. On 6 June 2003 the property was transferred in the joint names of De Vos and her late

husband. During June 2008 first respondent ("Adams") was approached by one Francis Rose regarding what was referred to in the papers "as an investment proposal".

Adams provided the terms and conditions of the investment proposal in papers which are before this Court. Without going into a detailed description thereof, it appears that Rose had a number of clients. Adams was advised that the De Vos's were two of these clients. Rose claimed that they were in financial difficulty and that Adams' intervention was required in terms of the scheme which Rose had developed in order to mitigate the financial difficulties that his clients encountered.

Adams sets out in his papers the following: in or about 2001, 2002 he met Rose at Perm / Old Mutual Bank in Plumstead where he was offered services as a financial advisor and he became a client of Rose. Through the course of the business dealings he was contacted by Rose who advised him that he had taken up employment at Bond Bashada in Cape Town.

In 2008 Rose contacted him again and advised him that he wished to arrange a meeting in respect of an investment proposal. This meeting took place during June 2008 at offices situated at the Convention Centre in Cape Town. Rose advised Adams of an investment scheme which involved a

number of Rose's clients which included the De Vos's. Rose told Adams that his clients were willing to transfer their properties into Adams' name for a period of 9 months to a year to allow them to "find their feet financially".

The clients would fund the costs involved in the transfers. Adams was advised, according to his version, that after 9 months to a year the properties would be transferred back to his clients at their cost. Adams was told that he would be compensated for his efforts and that the client would make payment of some 10% on the value of the property together with a further discretionary payment when the property was transferred back into their names.

Adams was advised by Rose that the investment scheme was legitimate and that an attorney would oversee the entire process. Adams met Rose at the offices of Du Plessis and Partners (the third respondent) where he was handed a bundle of documents by attorney Du Plessis and requested to sign and various indicated processes.

Adams handed over a copy of his identity document and utility bills as requested by attorney Du Plessis. Adams noted that there were signatures on the documents which he believed to be those of the De Vos's. He signed the documents on his

view because he believed that the sellers were willing participants in the scheme as advised by Rose and Du Plessis.

The property was transferred into the name of Adams, a mortgage bond was duly registered with second respondent in the amount of R342 000.00 which was paid to the bond registration attorneys on 29 December 2008. According to Adams he received none of the proceeds thereof. No payments were made in terms of the mortgage loan agreement and eventually it appears that the property was sold in execution of the mortgage debt. To this point I shall return later.

In her application before this Court De Vos, in her personal capacity, seeks an order setting aside the sale in execution of the property declaring that she, together with her late husband, were the owners of the property, that the subsequent transfer to fourth respondent pursuant to the sale in execution was to be declared null and void and the Registrar of Deeds be directed to amend the records accordingly.

The dispute which confronts this Court with respect to the relief sought by the applicant turns on a series of arguments which had been raised by the fourth respondent. It was the fourth respondent who had bought the property on 8 April 2014

at a sale in execution held by the Sheriff of the High Court pursuant to the order declaring the property executable in the matter of Absa Bank ("second respondent") and Adams.

There is no dispute that fourth respondent was a bone fide purchaser of the property, that fourth respondent had no knowledge of any claims by the applicant at the time of transfer of the property into the name of applicant. For these reasons the fourth respondent has approached this Court in opposition to the relief sought by the applicant based essentially on two grounds namely objections which relate to the application of the *rei vindicatio* and a defence of prescription. The other respondents abide the decision of the Court.

Mr Du Preez, who appeared on behalf of the fourth respondent, submitted that immovable property validly sold in execution of judicial sale cannot, as a general rule, after registration of the property, be vindicated in terms of the *rei vindicatio* from a *bona fide* purchaser. He referred, for example, to the judgment in Oriental Products (Pty) Limited v Pegma 178 Investment Trading CC 2011 (2) SA 508 (SCA) in which Shongwe, JA held at para 12:

"It is trite that our law has adopted the abstract system of

transfer as opposed to the casual system of transfer. Under the casual system of transfer a valid cause (*iusta causa*) giving rise to the transfer is a *sine qua non* for the transfer of ownership. In other words if the cause is invalid e.g. non-compliance with former requirements the transfer ownership will be void ... under the abstract system the most important point is that there is no need for a formerly valid transaction provided that the parties are ad idem regarding the passing of ownership."

See however the majority judgment of Harms DP at (illegible).

The issue benefit from further elucidation in Solberger and Schoeman, the Law of Property (5th Edition) 261:

"Property sold in judicial sales cannot after delivery in the case of movables or registration in the case of immovable be vindicated from a *bona fide* purchaser. Even when an article is sold by mistake as belonging to a judgment debtor, the true owner cannot vindicate it from a *bona fide* purchaser. Though Matthaeus states that he or she can do so on refunding the purchase price to the purchaser. The section 70 of the Magistrate's Court Act provides that a sale in execution by the Sheriff of the Court will not in the case of movable things after delivery

thereof or in the case of immovable things after registration or transfer, be liable to be impeached as against the purchaser in good faith and without notice of any defect."

Turning specifically to the *rei vindicatio* it is clear that there are three requirements which the owner must prove on a balance of probabilities, in order to succeed with the particular action. Firstly, the applicant must show his or her ownership in the property. In the case of immovable property it is sufficient as a rule to show the title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the property at the moment that the action is instituted.

Significant the authority show that the view that the *rei vindicatio* can be instituted against a person who alienated property fraudulently (conscious of the owner's claim is unacceptable since it is ignores the boundaries between the *rei vindicito* and the *acgio ad exhibendum*. See Wille's, Principles of South African Law (9th Ed) at 540.

In the present case a fourth respondent's states:

"I bought the immovable property on 8 April 2014 in the sale in execution held by the Sheriff of the High Court pursuant to an order declaring the property executable in the matter of Absa Bank Limited and Mr L G Adams ... the judgment obtained by Absa Bank under case number: 13613/2010 has not been rescinded and no application of rescission has been launched and accordingly the order declaring the property executable and the execution sale stands unchallenged."

Applicant can show that ownership of the property certainly vested in her in this sense that if the entire transaction was a fraud (as appears to be common cause), ownership may well still vest. See also Harms DP in Oriental Products at paras 26-27. Secondly, the property is identifiable. The difficulty as Mr Du Preez submitted correctly is that the applicant is still in possession of the property and the vindicatory action does not appear to be available to a person who is in possession of the property.

Mr Du Preez submitted that the abstract theory of transfer works in this case against the applicant. As Brand, JA said in Legato McKenna v Sheo 2010 (1) SA 35 (SCA) at para 22:

"In accordance with the abstract theory the requirements

for the passing of ownership are two-fold namely delivery – which in the case of immovable property is affected by registration of transfer in the Deeds Office – coupled with a so-called real agreement or "*saaklike ooreenkoms*". Essential elements of the real agreement or an intention on the part of the transfer to transfer ownership and the intention in the transferee to become the owner of the property .. 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 e.g. sale, ownership will not pass – despite registration of the transfer – if there is a defect in the real agreement."

This matter has less to do with the (illegible) theory of transfer and with the non fulfilment of all the requirements for the ... This therefore brings us to the second point which is raised, namely that of prescription. The crisp question arises whether the applicant can apply for the cancellation of the transfer of the immovable property and the simultaneous registration of the property back into his name.

According to Mr Du Preez thi would have been possible but for prescription. Indeed the analysis set out above supports this conclusion. Prescription is applicable in this case. It is

correct that in Absa Bank Limited v Keet [2015] 4 All SA 1 (SCA) the Supreme Court of Appeal held that a vindicatory claim because it was a claim based on ownership of a thing cannot be described as a debt as envisaged by the Prescription Act. In this case if, as I have held, there is no vindicatory action because of the inability of the applicant to meet all the requirements thereof.

The question of prescription thus becomes critical to the resolution of the case and as to whether in fact any of the relief sought by the applicant can be granted in this matter.

Applicant contends that on the available evidence, the applicant only became aware of the fraud during 2014 and not earlier. The fact that she received a municipal account to which I shall make reference presently, did not warrant a conclusion that she was aware of the fact that her property was transferred. She never took part in action disposing of property so she had no reason to even consider the possibility that the immovable property was no longer registered in her name.

The applicant makes it clear that she always accepted that the incorrect description of the first respondent's name on the municipal accounts must have been a mistake. According to

the applicant she only was possessed of all the facts during 2014 when her attorney of record presented her with the product of an investigation. Therefore, according to Mr Montzinger, who appeared on behalf of the applicant, the applicant was only possessed of all the facts from which the debt arose during 2014.

By contrast, Mr Du Preez contested this particular version relying, for example, on Rens v Standard Bank of South Africa and Others [2015] ZAECPHEC 12 (17 March 2015) at para 12:

> "On the facts before me the applicant knew of the fraud in 2008. Someone else ... had become the owner of the property which he had inherited. This occurred because the seventh respondent who had no entitlement to the property had sold it. There was no legal basis on which the seventh respondent could have lawfully concluded an agreement of sale of the property since she was not the owner of the property nor a beneficiary of the will and nor was she the surviving spouse as she had misrepresented to the Master. The letter of authority was attached to the agreement of sale. The applicant therefore became aware of the fraud and the identity of the debtor and the facts from which the debt arose at the end of 2008. The fact that applicant visited the office of the sixth

respondent to find out what was happening with the matter does not assist her. She ought to have enforced her claim much sooner. It is improbable that she did not know of her rights or she is naive in the extreme in which case such knowledge can be imputed to her."

THE LAW

The relevant section of the Prescription Act, namely section 12 reads thus:

"When prescription begins to run:

(1) Subject to the provisions of subsections (2), (3) and (4) prescription shall commence to run as soon as a debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) The debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by

exercising reasonable care."

Mr Du Preez submitted that a simple visit to an attorney would have enabled the applicant to enforce her rights against Adams and or the attorney (third respondent) who acted for Rose. There could be no logical explanation for the property to be transferred, on the applicant's own version, and hence she has shown an unreasonable reluctance to take action resulted in the prescription of the claim.

This dispute requires a more detailed account of applicant's explanation which appears in the founding affidavit:

> "During December 2009 I received a municipal account from the City of Cape Town which reflected the details of the immovable property were addressed to a certain Mr L G Adams. I later learned that Mr L G Adams is the same person as the first respondent as cited in this application .. I was certain that the City had made a mistake as I have heard on numerous occasions in the news and/or from other residents that these kinds of mistakes are not uncommon and that the City of Cape Town sometimes guilty of such honest mistakes. I did not make much of it and accepted that it was just a mistake. Phillip de Vos, (her brother-in-law), did however attend the City

Municipal Offices on my behalf in an effort to determine why my municipal account was in the name of the first respondent. The municipality could be of no assistance to Phillip and referred him to the Deeds Office (sic). Phillip then attended to the Deeds Office and was advised that the property had been transferred on 22 December 2008 in the name of first respondent. This was extremely surprising news as I had never been involved in the transfer of my property to the first respondent. The transfer of the immovable property to the name of the first respondent also seemed to be a mistake and I did not understand what it meant or what to do with the information. In my mind I was however satisfied that neither my late husband nor me has ever sold the property and that it must be a mistake. Phillip also determined the second respondent has registered a mortgage bond over the property simultaneously with the registration of the transfer of the immovable property into the name of first respondent. Phillip then attended various branches of the second respondent as well as its head office in an attempt to determine how it came to be that my property was transferred out of our name without our knowledge and consent. Phillip has received little or no assistance from the second respondent ...

I pause to mention that I have never met or spoken to the

first respondent, I did not have any idea what he looks like and is in no way related to him. The first respondent has also never at any stage occupied the property. Phillip also made use of the assistance of a certain Mr Shakier Lewin of African Consumers Solutions in an attempt to get to the bottom of what we all believed up until that stage to have been a mistake. Lewis addressed at least two letters to the second respondent during August 2012. The letters addressed to the second respondent at least seemed to have stayed the sale of execution at the time. I am not currently in possession of these letters at the time I am deposing to this affidavit ... What is significant though is the attorneys of the second respondent Fourie, Basson, Veldtman Attorneys only responded to these letters during on 6 January 2014 (sic) .. it was therefore apparent that as late as January 2014 the second respondent according to the investigation could not find any irregularities in the process of the transfer of the property to the first respondent."

Applicant concludes:

"It was only during the course of 2014 after all the information gathered my attorney of record it became apparent to me that I have been the victim of a clear

fraud."

By contrast fourth respondent says:

"Applicant became aware that the property was transferred to a third party L G in 2009 ... it is important to note that notwithstanding the fact that applicant has known since approximately 2009 that the immovable property has been transferred in the name of L G Adams, she certainly did nothing about the situation. The applicant has waited for approximately 6 years to challenge the transfer of the immovable property in question into the name of L G Adams. At no cost to the applicant she would have been able to report the alleged fraud to the SAPS which she has for more than approximately 6 years failed to do."

Lawsa, Volume 21, paragraph 125, (illegible) that the proviso of the section 12(3) of the Prescription Act (to which I have made reference) provides that a creditor will be deemed to have knowledge of the identity of the debtor and of the facts from which the debt arose if he or she could have acquired it by exercising reasonable care. The author then says it is essential for a debtor to allege and proof that the creditor had or ought to have had the requisite knowledge on the particular

date if such a debtor wishes to proceed in proving in a particular case the date on which he or she contends prescription began to run. Fourth respondent alleges that the applicant had knowledge from 2009 when she received the municipal account.

For some 5 years thereafter little happened in respect of the possession of the property. There was no interference with the enjoyment of her property, no communication of any kind was granted to the applicant insofar as developments of transfer were concerned and it was only in 2014, according to her version, that she clearly gained the knowledge that she had been the subject of a fraud.

The question therefore arises to what is meant by the test of reasonable care. I have serious doubts that the test for reasonable care in these circumstances, which can be attributed to an elderly pensioner living in Eerste River, is the same as that based on a man or woman driving a BMW on Bishop's Court roads.

I have to take cognisance of the fact that we live in a diverse society with litigants having very different knowledge of the law. I also need to take account of how alien legal and bureaucratic procedures are for the vast majority of the

population in our country. Of course, the applicant could, in 2009, have pursued further enquiries. But it does appear that whilst enquiries were pursued they amounted to naught and no disturbance of the possession of the property put her on her guard. In my view, it was only in 2014 that it can confidently be said that applicant finally came to be possessed of the requisite knowledge, to enable her to deal with the problem.

This is a difficult case because the fourth respondent was a *bona fide* possessor and he, too, is a victim of the same fraud which has engulfed applicant.

I do not consider however that fourth respondent is without a remedy. Although third respondent deposed to an affidavit, she made no appearance in this Court. If the balance of the papers are read as a whole, it appears to be common cause amongst all the other parties (including Mr Adams who was either extremely naive or alternatively part of the fraud) that Mr Rose and third respondent were involved in a fraudulent scheme which gave rise, inter alia, to the facts from which this particular application is predicated.

It is clear from the version as alleged, that Rose and the third respondent contrived to dispossess innocent people of their property for financial advantages which was to be gained by

either or both of Rose and third respondent and/or Adams. I am sending a copy of this judgment to the Law Society of the Western Cape for immediate action to be taken as to enquire into the role of third respondent in this case. I am also referring this case to the National Director of Public Prosecutions with the view that a proper investigation take place into what appears to be a fraudulent scheme. In my view on these facts, fourth respondent has a substantial claim which it can lodge against third respondent if these averments are proved.

For the following reasons the order which is made is the following:

1. **THE SALE IN EXECUTION OF THE PROPERTY KNOWN AS ERF 1704, BLUE DOWNS, IN THE CITY OF CAPE TOWN, DIVISION STELLENBOSCH, WESTERN CAPE PROVINCE, SITUATED AT 40 PAROW STREET, MALIBU VILLAGE, EERSTE RIVER (THE IMMOVABLE PROPERTY) PREVIOUSLY HELD UNDER THE TITLE DEED NUMBER: T81368/08 ...(INDISTINCT) SOLD IN EXECUTION ON 8 APRIL 2014 IN KUILSRIVIER IS SET ASIDE AND ALL SUBSEQUENT SALES OF THE PROPERTY THEREAFTER IS DECLARED TO BE NULL AND VOID.**

2. **THE APPLICANT AND THE LATE CECIL CHARLES DE VOS ARE DECLARED TO BE THE RIGHTFUL OWNERS OF THE IMMOVABLE PROPERTY DESCRIBED AS ERF 1704, BLUE DOWNS, IN THE CITY OF CAPE TOWN, DIVISION STELLENBOSCH, WESTERN CAPE PROVINCE, SITUATED AT 40 PAROW STREET, MALIBU VILLAGE, EERSTE RIVER.**

3. **THE TRANSFER OF THE SAID PROPERTY FROM THE APPLICANT AND THE LATE CECIL CHARLES DE VOS TO THE FIRST RESPONDENT THEREAFTER THE FOURTH RESPONDENT AND REGISTERED BY FIFTH RESPONDENT DECLARED NULL AND VOID AND SET ASIDE.**

4. **FIFTH RESPONDENT IS DIRECTED TO MEND THE RECORDS OF THE DEEDS REGISTRY TO GIVE EFFECT TO THE ORDERS IN PARAGRAPH 2 AND 3 ABOVE AND PARTICULAR FOR THE RECORDS IN THE DEEDS REGISTRY TO REFLECT THE APPLICANT AND THE LATE CECIL CHARLES DE VOS AS THE OWNERS OF ONE UNDIVIDED HALF SHARE EACH OF THE SAID IMMOVABLE PROPERTY AND EXPUNGING FROM THE RECORDS AT THE DEEDS REGISTRY ANY REFERENCE OF THE FIRST AND FOURTH RESPONDENTS AS REGISTERED OWNERS OF THE SAID IMMOVABLE PROPERTY AS WELL AS THE CANCELLATION OF THE**

MORTGAGE BOND REGISTERED IN FAVOUR OF THE SECOND RESPONDENT.

5. **IN MY VIEW IN THE LIGHT OF THE DEVELOPMENT IN THE CASE AND THE NON-OPPOSITION, THIRD RESPONDENT IS DIRECTED TO PAY THE COSTS FOR THIS APPLICATION.**

_____

DAVIS, J

FOR THE APPLICANT	:	**ADV A MONTZINGER**
INSTRUCTED BY	:	**RILEY INCORPORATED**
FOR THE FIRST RESPONDENT	:	**ADV M GARCES**
INSTRUCTED BY	:	**PARKER ATTORNEYS**
FOR THE SECOND RESPONDENT	:	**ADV. L WESSELS**
INSTRUCTED BY	:	**FOURIE BASSON & VELDTMAN**
FOR THE FOURTH RESPONDENT	:	**ADV. T DU PREEZ**
INSTRUCTED BY	:	**FPS ATTORNEYS**
DATE OF HEARINGS	:	**01 DECEMBER 2016**
DATE OF JUDGMENT	:	**06 DECEMBER 2016**