IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 15281/2014

In the matter between:

SALVANATHAN NARAINSAMY First Applicant

SALVANATHAN NARAINSAMY N.O. Second Applicant

KETAN JAMNADAS SONI Third Applicant

and

LAUREN ANN NEL First Respondent

FIONA BELINDA SCOTT Second Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN Third Respondent

Coram: BEZUIDENHOUT A J

Heard: 26 November 2019

Delivered: 28 February 2020

ORDER

I therefore make the following order:

In respect of the main application:

1. It is hereby declared that the court order dated 18 May 2018 does not afford first respondent, Lauren Ann Nel, any right to take transfer of and/or occupy section 302, Wembley Square, Vredehoek, Cape Town.
2. First respondent is directed to pay first to third applicants' costs:

In respect of the counter application:

<u>Part A</u>

3. The Registrar of Deeds, Cape Town, is joined as the third respondent.

<u>Part B</u>

4. The application is dismissed with costs.

JUDGMENT

Bezuidenhout AJ

Factual Background

[1] The first applicant is Salvanathan Narainsamy. The second applicant is Salvanathan Narainsamy, acting in his capacity as duly appointed executor to the estate of his late wife Sugandhraree Narainsamy who passed away on 25 June 2013. The first applicant and his late wife were the owners of a property described as section 302, Wembley Square situated in Vredehoek, Cape Town ('the property') which is central to this litigation. The matter has a long history, but for the purpose of this judgment, I will only mention the most relevant facts.

[2] On 1 October 2012 the Narainsamys entered into a Sale Agreement with the first respondent, Lauren Ann Nel, in terms of which the property was sold by the Narainsamys to Nel for the amount of R1 600 000,00; payable upon registration of transfer into Nel's name. It was agreed that the purchase price would be transferred to the conveyancer, Fiona Scott ("Scott") – cited as the second respondent in these proceedings, upon the date of the last signature, to be held in trust pending registration of transfer.

[3] The agreement also contained a clause in terms of which occupation and possession shall be given upon registration of transfer.

[4] The Narainsamys and Nel subsequently entered into an addendum to the agreement in terms of which possession and responsibility of the property shall pass to Nel with immediate effect. Most importantly it was also agreed that Nel would not be liable to pay any occupational rent.

[5] The Narainsamys and Nel also signed a memorandum of agreement in terms of which Nel accepted liability and undertook to pay all levies and other costs due to the body corporate, from the date of registration of transfer.

[6] At the time when these parties entered into those agreements it was understood and expected that transfer would take place within six to eight weeks, as it was in essence a cash sale, the full purchase price having been paid into the trust account of Scott.

[7] Nel moved into the property during February 2013.

[8] It is common cause that transfer of the property from the Narainsamys to Nel did not take place. Whilst in the process of attempting to effect transfer, Scott was unable to secure the necessary transfer duty receipt from SARS, apparently as a result of Narainsamy owing money to SARS. Scott was issued with a so-called section 179 Notice by SARS, which she believed, rightly or wrongly, to be an impediment to effect transfer.

[9] In the aforementioned notice, dated 23 May 2013, Scott was informed that she was "legally appointed in terms of section 179 of the Tax Administration Act to withhold and immediately pay over to SARS all available funds, not exceeding R249 391.73", which was apparently Mr Narainsamy's tax liability at the time. As there was not going to be sufficient funds upon registration of the property (the Narainsamys' indebtness to Nedbank – the bondholder had to be settled), Scott could not proceed with the transfer.

[10] It is worth mentioning at this stage that the bondholder, Nedbank Limited, had obtained judgment against the Narainsamys on 22 May 2012, in the amount of R1 497 056, 32, together with interest and costs. Nedbank also obtained an order declaring the property specially executable. It is probably fair to say that the Narainsamys were in financial distress at the time of entering into the Sale Agreement.

[11] On 28 January 2014, Scott addressed a letter to Nel, requesting her to commence paying occupational rent in the amount of R20 000,00 per month, despite there being an addendum in place in terms of which no such rental would be payable. This demand was justified by referring to the long and unexpected delay in the transfer of the property, which no one had foreseen at the time of concluding the addendum. Nel did not agree to pay occupational rent of R20 000,00 or any other amount for that matter.

[12] On 28 July 2014, Scott addressed another letter to Nel wherein she purported to cancel the sale agreement. Nel was requested to immediately vacate the property.

[13] On 5 November 2014 under case number 15281/2014 Nel issued summons against Narainsamy in his personal capacity, as well as in his capacity as executor of his now late wife's estate as first and second Defendants. Scott was cited as third Defendant.

[14] In her particulars of claim, Nel claimed, inter alia, the following:

(a) An order that first and second defendants take all steps necessary to effect transfer of the property to her,

(b) An order against Scott to render a full account of all moneys received by her from Nel.

[15] The defendants filed a plea which was accompanied by a claim in reconvention which was filed on behalf of Narainsamy wherein, inter alia, the following was claimed from Nel:

(a) Payment of the sum of R140 000,00 in respect of occupational rent and/or damages for holding over.

(b) Payment of the sum of R44 489,02 in respect of levies.

(c) Payment in the sum of R88 474,24 in respect of rates.

(d) Cancellation of the agreement of sale dated 1 October 2012.

(e) Eviction of Nel, with immediate effect.

[16] The matter was set down for trial on 26 March 2018. The parties reached settlement and concluded a settlement agreement. Narainsamy was however unable and/or failed to comply with the terms of the settlement agreement with regards to the agreed time period.

[17] Nel applied to this court on 9 May 2018 for the settlement agreement to be set aside, alternatively to be extended by a further period of sixty days. On 18 May 2018 the parties reached another settlement agreement which was made an order of court. It was ordered (by consent) that:

'1) The First and Second Defendants undertake to transfer to the Plaintiff, the Sectional Title Unit Section No 302 more fully described on Sectional Plan no 55460/2005 of Wembly Square, Vredehoek, Cape Town and Parking Bay No PB35 held by notarial cession no SK1542/2000 (hereinafter referred to as "the property") contingent upon:

1.1.1 SARS agreeing to issue a tax clearance certificate necessary for the transfer of the property for which purpose the Plaintiff has agreed to pay the sum of R500 000.00 to SARS in partial payment of the outstanding tax liability of the 1st and 2nd Defendants:

1.1.2 The Plaintiff paying the purchase price of R1 600 000.00.

1.1.3 The Plaintiff paying the balance of the First and Second Defendant's liability in excess of the purchase price to Nedbank in terms of its first mortgage loan registered against the property; the current excess amount being R126 083,27.

1.1.4 The sum equal to the First and Second Defendants liability for rates outstanding on date of transfer;

2) The Defendants undertake and agree to furnish the Plaintiff with copies of the written representations which have previously been made to SARS together with a detailed breakdown of the Defendants' indebtedness to SARS, by the close of business on 23rd May 2018. The breakdown will contain sufficient particularity to enable the Plaintiff to meaningfully supplement the representation, and shall include:

2.1 Details of the capital amount(s) owed to SARS;

2.2 Details of the interest and penalty interest (if applicable) owing to SARS.

3) The Plaintiff shall be entitled to provide any written submissions to both Nedbank and SARS which written submissions shall be incorporated insofar as same may be validly incorporated in the written representations to be made by the First and Second Defendants' to SARS and Nedbank with reference to the outstanding indebtedness to SARS and Nedbank.

4) The Plaintiff's written submissions, if any, shall be forwarded to the Third Defendant within a period of thirty (30) days after the Plaintiff has received the documentation set out in paragraph 2 above. The parties specifically agree to co-operate together in order to resolve the Defendants issues with SARS. The parties' accountants will liaise with one another in order to finalise the representations to SARS.

5) In the event of the SARS not agreeing to issue the necessary tax clearance certificate after having received comprehensive representations from the Defendants and having been supplemented by the Plaintiff, and SARS having issued a ruling in this regard, then the agreement of sale will be deemed to be cancelled and the Third Defendant will forthwith repay to the Plaintiffs' attorney the sum held in her trust account in respect of the purchase price of the property and the costs of the transfer.

6) Save as expressly provided herein, none of the parties shall have any valid and enforceable claims against each other in respect of this sale transaction.

7) There shall be no order to costs.'

[18] Through all this time Nel had been in occupation of the property, without paying occupational rent, levies or rates. At some stage Scott utilized some of the funds kept by her in trust for Nel to pay arrear levies but was forced to refund Nel out of her own pocket, subsequent to a complaint laid against her by Nel with the KwaZulu-Natal Law Society.

[19] On 11 June 2018 Narainsamy sent an email to Scott wherein he inter alia informed her that "Regrettably SARS has rejected the compromise offer. Hereto is attached [an] accountant's letter marked Annexure C and the amounts owing to SARS marked Annexure D. As such in terms of the court order the agreement is hereby cancelled." Scott duly forwarded the email to Nel's attorney. Nel's attorney rejected the cancellation.

[20] A flurry of correspondence between Scott and Nel's attorney followed. From Narainsamy's SARS Statement of Account supplied to Nel, it appeared that he owed

SARS R1 295 361,56. It was also later discovered that Narainsamy was the appointed representative tax payer of a company, Radio Surveillance Security Services SA (Pty) Ltd, and according to SARS, liable for payment of R751 711 983,90. SARS apparently wanted payment of the full amount outstanding in respect of Narainsamy's "personal tax".

[21] It is clear from the papers that Narainsamy did not furnish Nel with copies of previous written representations made to SARS and that he did not make any written representations to SARS subsequent to the order being granted. Instead he went to see the officials at SARS personally and did not allow any input from Nel's side. Nel's father, who had been attending to all negotiations and interactions relating to the matter throughout, instructed a so-called tax expert to provide advice, which was contained in some of the correspondence.

[22] Narainsamy was unable to settle his liability to SARS and, according to Scott, also unable to settle the amount of R249 391,73 as reflected in the section 179 Notice. There was correspondence exchanged regarding the practical effect of the section 179 Notice but according to Scott there was going to be no excess funds on registration once payment in terms of the section 179 Notice had been made and accordingly transfer could not take place.

[23] In an email dated 3 August 2018 Scott advised Nel's attorney that his client needed to vacate at the end of August 2018 and that Narainsamy wanted to inspect the property.

[24] A long letter from Nel's attorney followed accusing Narainsamy of not complying with the court order, amongst other things.

[25] During "early" August 2018, Narainsamy received a phone call from his friend Ketan Jamnadas Soni, the third applicant, enquiring about the status of the property.

[26] According to Narainsamy, Soni knew about the property, as a number of years before, he had been interested in purchasing it, but as a result of the litigation with Nel no Sale Agreement could be successfully concluded with him. He explained

the whole "saga" of the litigation to Soni, including the fact that according to him, the destiny of the property was in the hands of Nedbank, the executive creditor, as he, Narainsamy, "could not pay."

[27] Narainsamy said the following in his affidavit at paragraph 36.5:

"I have advised him that the status was that in terms of the Settlement Agreement which had been concluded with the Respondent in respect of the High Court Proceedings dated 18 May 2018, that whilst the First and Second Applicants were at liberty to sell Section 302, Wembley Square, it was in reality, Nedbank, the bondholder at that stage, that was actively driving the process to "sell the property", not the First and Second Applicants".

[28] Narainsamy also advised Soni that the indebtedness to Nedbank was in excess of R1, 7 million and that he was phoned almost daily and requested to provide payment proposals as the property was termed "a property in distress". According to Narainsamy neither he nor the estate had the funds available to settle Nedbank.

[29] Narainsamy also advised Soni of his substantial indebtedness to SARS and that "SARS was likewise presently unwilling to compromise and/or reduce to facilitate the possible sale" of the property.

[30] Soni was also informed that Nel had been in "free" occupation of the property since October 2012 as he could not secure the funds to pay SARS.

[31] According to Narainsamy, Soni then enquired from him as to whether he could talk directly to Nedbank to "possibly do a deal" to purchase the property from Nedbank.

[32] Narainsamy and Soni thereafter concluded a Sale Agreement which was signed on 6 August 2018 – he was informed that a signed agreement of sale was necessary to allow Soni to commence discussions with Nedbank. In terms of the agreement the property was sold to Soni for the amount of R1,7 million.

[33] Soni subsequently instructed his attorney Aphsana Yusuph to deal with Nedbank. Narainsamy had no further role or involvement in the process and left it to Soni to deal with Nedbank through his attorney.

[34] Yusuph negotiated with Nedbank which culminated in a successful compromise settlement agreement. On 4 October 2018 Narainsamy and Soni signed an addendum to the sale agreement of 8 August 2018. It was now agreed that the purchaser, Soni, would also be liable for the following shortfalls, namely:

(a) Full amount outstanding on the bond.

(b) Outstanding rates up to and including the date of transfer.

(c) Legal costs.

(d) Bond cancellation costs.

It was also recorded that Soni would provide a guarantee of R1 771 823,45 to enable the property to be transferred.

[35] Yusuph was also able to successfully facilitate payment to SARS and obtain a transfer duty receipt to successfully effect transfer to Soni. Yusuph was aware of the previous issues experienced by Scott but had no similar problems. She assumed that it was as a result of no nett proceeds accruing to Narainsamy and the fact that only Nedbank, as bondholder and a secured creditor would be receiving payment.

[36] After paying the amounts outstanding to the body corporate as well as the outstanding rates and taxes, transfer was effected and registered with the Registrar of Deeds, Cape Town on 18 December 2018.

[37] Shortly thereafter Soni, as the new registered owner, instructed his attorney to advise the current occupiers that he was the new registered owner of the property and to give them notice to vacate. A letter to this effect was sent to Nel on 19 December 2018, requesting her to vacate by 31 January 2019. The letter also informed her that she would be liable for occupational rent of R20 000,00 per month from the date of receipt of the letter to the date of her vacating the property. Mention was also made of an eviction application, the costs of which she will be liable for.

[38] Needless to say, Nel's attorney immediately responded and inter alia, claimed that the previous sale was not cancelled and that any eviction proceedings would be opposed.

[39] It also now transpired that Nel was no longer in occupation of the property but was living in London. Her sister now resided in the property, with her permission, without paying occupational rent, rates and taxes or levies.

[40] When it became clear to Soni that he had gotten slightly more than what he bargained for, he approached Narainsamy and requested that he contacts his attorney, Scott "to establish what the correct factual and legal position was". According to Soni, Nel was adamant that she had lawful entitlement to purchase the property regardless of the fact that Soni was now the registered owner. Nel apparently stated that she was going to have the sale set aside by way of urgent legal proceedings.

[41] Soni in the meantime continued to pay for rates and taxes and levies as he was liable to do, whilst Nel's sister continued to reside in the property. Around May 2019 Soni's attorneys formally demanded that Narainsamy secure free and undisturbed possession for Soni. Apparently, the sole purpose of Soni purchasing the property was to provide accommodation for his son who was studying in Cape Town and who wanted to commence residing in the property in January 2019.

Current proceedings

[42] Narainsamy in his personal capacity and his representative capacity accordingly issued an application on 10 June 2019 under the same case number as the action, as first and second applicants, against Nel as respondent wherein certain declaratory relief as well as other related relief were sought:

'1.1 That the Order of Court granted by consent of the Parties to this action on 18 May 2018, annexed hereto marked "COURT ORDER" has not been complied with in respect of Clause 1.1.1, a peremptory legal requirement for the lawful entitlement of the RESPONDENT to demand the conclusion of an Agreement of Sale and pursuant thereto, transfer the First and Second Applicants;

1.2 ALTERNATIVELY, in the event that the relief sought in terms of paragraph 1.1 is not granted, declaring that the Respondent has no lawful right and entitlement with reliance on the "COURT ORDER" to demand transfer of the immovable property described as Section 302, Wembley Square from the First and Second Applicants;

1.3 That the Respondent has no lawful right to occupy, whether personally and/or through Third Parties occupying through her, Section 302, Wembley Square.

1.4 That pursuant to an Order granted in terms of paragraph 1.3, the Respondent and/or any other Third Party occupying through her be ordered to restore possession of the Section 302, Wembley Square to the First and Second Applicants within 30 (Thirty) days of the granting of the relief set forth in paragraph 1.1 or paragraph 1.2;

2. costs of suit on the Attorney and Client scale;

3. Further and/or alternative relief.'

[43] Nel filed a notice of opposition on 14 June 2019.

[44] Apart from attesting to a confirmatory affidavit in Narainsamy's application, Soni subsequently filed an application to intervene as third applicant as well as to seek an amendment to the notice of motion by the addition of a further paragraph 1.5. The following relief was sought:

'1. That in terms of Rule 12 read with Rule 6(14) of the Uniform Rules of Court, the Intervening Applicant be and is hereby given leave to intervene in the application brought by the First and Second Applicants in Case No. 15281/2014 ("the main application"), as the Third Applicant.

2. That the Notice of Motion in the main application be amended by the addition of the following paragraph after paragraph 1.4 thereof:

"1.5 Alternatively to paragraphs 1.1 and 1.2 above, that it be and is hereby declared that the Order of Court referred to in paragraph 1.1, does not afford the Plaintiff/Respondent any right to take transfer of and/or occupy Section 302, Wembley Square."

3. That the costs of this application to intervene be costs in the cause of the main application, save that in the event of any party opposing the same, it be ordered to pay the costs occasioned thereby.'

[45] The matter was to be heard on 25 July 2019. From the court order dated 25 July 2019 it is clear that Soni was given leave to intervene. (He was thereafter cited as the third applicant). It is however also clear that no order was granted in respect of the amendment sought to the notice of motion by the addition of a new paragraph

1.5 as set out in paragraph 2 of the application to intervene. In the practice note and heads of argument filed by the third applicant's counsel, reference is made to the declaratory order being sought by Soni to the effect that the order dated 18 May 2018 does not afford Nel the right to take transfer of and/or occupy the property – which is in line with the relief sought in paragraph 2 of the application to intervene. It appears as if Soni's counsel assumed the amendment had been affected whereas no such order had been granted. I will deal with this if necessary, at a later stage.

[46] On 7 August 2019 Nel filed a notice of counter application which consisted of a Part A which was set down for 19 August 2019 in terms of which an order is sought that the Registrar of Deeds, Cape Town is joined as third respondent in the current proceedings. In Part B of the notice of counter application the following relief was claimed:

'1. That the transfer of the immovable property described as:

Sectional title Unit 302

SS Wembley Square number 461/2005

Vredehoek

Cape Town

Extent: 83m²

("the immovable property")

from the first and second applicants to the third applicant is set aside.

2. The first and second applicants are ordered to take all such steps as may be necessary to effect valid transfer of ownership of the immovable property to the first respondent.

3. In the event of the first and seconds respondents' failing to comply with 2 above, the Sheriff of the above Honourable Court is empowered and directed to sign all documents as may be necessary to give effect thereto.

4. The Registrar of Deeds, Cape Town, is directed to amend its records to reflect the relief sought in 1 and 2 above.

5. The first, second and third applicants be ordered to pay first respondent's costs in respect to Part A and B of the counter-application, jointly and severally the one paying the other to be absolved.' (sic)

[47] Despite the relief in Part A being set down for 19 August 2019 it appears from the court file that on that day the matter was simply adjourned to 17 September

2019, without any relief being granted. Likewise, on 17 September 2019, the matter was adjourned to 26 November 2019 on the opposed roll with a direction for the filing of a relying affidavit. The relief in Part A was accordingly never granted.

[48] Nel's counter application was supported by an affidavit attested to by her father, Wayne Ferdinand Nel, also referred to in the papers as "Lofty" Nel. It has become clear that right from the outset he has been involved and central in all the negotiations and dealings regarding the property.

[49] Scott was cited as second respondent on the mistaken assumption that she was cited by Narainsamy in the main application for declaratory and eviction related relief. From the notice of motion of the main application it is clear that there are only three parties to that particular application, namely the Narainsamys as applicants and Nel as respondent. The heading however could lead to confusion. No more needs to be said about that.

[50] Narainsamy filed a replying affidavit in the main application and an answering affidavit in the counter application rolled into one, where after Nel's father filed a reply on her behalf.

[51] Close to 500 pages in affidavits and annexures have been filed in this matter and the most relevant facts have been set out hereinabove as gleaned from those affidavits.

[52] At the hearing of this matter all counsel appearing before me were ad idem that it would be expedient to first decide upon the relief claimed in the counter application, in particular the order claimed in paragraph 1 of Part B – namely that the transfer of the property from the Narainsamys to Soni be set aside.

[53] The crux of the matter is whether Soni acquired ownership despite the fact that a court order is in place in terms of which Nel would be able to take transfer upon certain events happening and especially in light of the resolutive condition contained in paragraph 5 of the order.

[54] Mr Singh SC, counsel for Soni, argued that Soni had taken registration of transfer pursuant to valid agreements concluded with Narainsamy - such transfer having taken place on 18 December 2018. Soni was accordingly a bona fide transferee.

[55] Reliance was placed on the decision of *Legator McKenna Inc. & another v Shea & others* 2010 (1) SA 35 (SCA) wherein Brand JA, added the Supreme Court of Appeal's "stamp of approval" to the viewpoint that the abstract theory of transfer also applies to immovable property (see paragraph 21).

[56] In terms of the abstract theory of transfer, the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction, such as the contract of sale. The requirement for the passing of ownership is delivery (which is effected by transfer) coupled with a real agreement. Brand JA said the following at paragraph 22:

'Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement.'

Brand JA continued at paragraph 23:

'In the same way as the court a quo, I also believe that McKenna - as well as the Erskines, for that matter – probably thought that the sale agreement of 22 April 2002 was valid and enforceable. And, albeit for different reasons, I also share the court a quo's view that the parties were mistaken in that belief. But I do not agree that a mistake of that kind could in itself render the real agreement void. If that were the position, we would effectively revert to the causal theory of transfer which we have jettisoned in favour of the abstract theory. I say that because I believe that very few parties (if any) to real agreements would deliberately give and receive transfer pursuant to an underlying transaction which, to their knowledge, is void. If a mistaken belief of this kind - whether unilateral or common - were therefore to render the real agreement invalid, there would not be much left of the abstract theory of transfer.'

[57] It is the case of Nel that the real agreement between Narainsamy and Soni is defective in that it is tainted by fraud and furthermore contra bonos mores.

[58] It should be noted at this point that the aspect concerning the fraud was never referred to oral evidence (in terms of the rule as set out in *Plascon-Evans Paints Ltd*

v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634) and therefor was never fully ventilated before me. I will return to this later in the judgment.

[59] In his affidavit in support of Nel's counter application, her father sets out reasons for his belief that the real agreement is tainted with fraud.

[60] He claims that the sale price of R1,7 million is "immediately suspicious" as sales and transfers of similar properties during the last two years were ranging from R3, 38 million to R3, 695 million. He however loses sight of the fact that Soni ended up paying an amount of R2 028 148,75 in total for the property and had to incur the extra costs of instructing an attorney to negotiate with Nedbank and also had to pay Nedbank's legal costs and outstanding rates and taxes.

[61] Narainsamy also stated in his replying affidavit that, at the time he sold the property to Nel in 2012, he was experiencing personal financial difficulties which resulted in a sale under financial pressure, and accordingly a lower selling price. Nel herself had only been willing to increase the amount she was willing to pay in May 2018 at the time of negotiating the settlement from R1, 6 million in 2012 to including a further payment of R126 083,27 to Nedbank, R500 000,00 as a contribution to SARS and the outstanding rates, bringing the total to approximately R2, 226 million, excluding the rates – also substantially lower than the alleged comparable values of other properties.

[62] Nel's father accordingly concludes that the transaction between Soni and Narainsamy was not an arm's length transaction and was "merely designed to defraud" Nel from transfer of the apartment.

[63] It was also argued on behalf of Nel that Soni was not simply an innocent or ignorant bystander in that he knew about the order, that he knew about the involvement of SARS and that he should have been alerted when SARS did not object to the transfer into his name.

[64] It was off course Soni's version that he was advised that the previous sale had been cancelled and that according to Narainsamy the destiny of the property

was in the hands of Nedbank, the execution creditor. It was on that basis Soni commenced negotiations with Nedbank directly, albeit through his attorney Yusuph. Nel is not in a position to dispute Soni's version.

[65] Counsel for Soni referred me to the decision of *Absa Bank Ltd v Moore & another* 2017 (1) SA 255 (CC) in which the principle that "fraud unravels all" was discussed. The following was said by Cameron J at paragraph 39:

'Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.'

[66] I was also referred to a decision of the Zimbabwean Supreme Court, namely *Madan v Macedo Heirs & another* 1991 (1) ZLR 295 (S), a judgment by Gubbay CJ. In this matter the court dealt with pre-emptive rights and made remarks regarding the doctrine of notice and also the effect of knowledge by the third party of the right being claimed. With reference to what was said in *Kazazis v Georghiades & andere* 1979 (3) SA 886 (T) at page 894D, Gubbay CJ said the following at page 304E-F:

'But to act contrary to a right known to be claimed in the genuine and reasonable belief that such right never existed, or had ceased to exist, will not make the third party purchaser vulnerable.'

[67] In as so far as the real agreement being contra bonos mores is concerned, it was argued on behalf of Nel that any contract that undermines a court order is against public policy, as it erodes the rule of law. I was referred in particular to section 165(5) of our Constitution which provides:

'An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

[68] It is now trite that an agreement which is contrary to public policy and accordingly incompatible with Constitutional principles, is void and unenforceable. The following was said in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A) at page 8 – 9:

'While mindful of the admonition of Cave J, in *Re Mirams* [1981] 1 QB 594 at 595 that "Judges are more to be trusted as interpreters of the law than as expounders of what is

called public policy", it must nevertheless be left to the courts to determine, in any given case, (apart from matters dealt with by statute), whether a contract is contrary to public policy. This is in keeping with what was said by Innes CJ, in *Eastwood v* Shepstone 1902 TS 294 {dictum at 302 appl} at 302, viz.:

"Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result."

No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands.'

On the same subject the Constitutional Court in the decision of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) said the following via Ngcobo J:

'[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

[30] In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.'

[69] The May 2018 order was contingent upon inter alia "SARS agreeing to issue a tax clearance certificate necessary for the transfer of the property." Narainsamy is adamant that SARS has refused to entertain him and has in fact rejected a compromise offer made by him. Narainsamy had been attending on SARS personally on various occasions and clearly did not follow what was agreed upon and made an order of court in May 2018. It was his belief that it would not have made a difference as he simply did not have the funds available to settle his indebtedness to SARS.

[70] As to why SARS issued a transfer duty receipt in respect of the sale agreement between Narainsamy and Soni one can only speculate. Yusuph indicated in her affidavit that it was perhaps as no nett proceeds would accrue to Narainsamy and that SARS accepted the reality that the secured creditor, Nedbank, was the only party who would receive payment. At the time Scott was dealing with the transfer in 2012/2013 the tax liability was only R249 391,73 and she was sitting with R1, 6 million in her trust account. The situation is now off course completely different. It is also a completely new transaction and in so far as Nel tries to argue that by SARS now issuing a transfer duty receipt and thereby removing any obstacles to her receiving transfer, it simply cannot be.

[71] Soni's counsel referred me to the decision of *Menezes v McGaili* 1971 (2) SA 12 (C), wherein it was decided that a transfer effected to a bona fide purchaser cannot be impugned on the basis that it was in breach of a court order. In dealing with this particular authority, Nel's counsel urged me to consider that it was decided at a time before our Constitution came into being and accordingly before decisions such as *Barkhuizen* and *Sasfin* (supra). According to him the understanding of what a transfer entailed was also not yet clear compared to what we do now know especially with regards to it being a real agreement. In reply, I was however reminded that in *Menezes*, the court found that the order itself did not prohibit transfer as is the case with the May 2018 order. Accordingly, the cases of *Barkhuizen* and *Sasfin* has no real bearing on the decision in *Menezes*.

[72] One aspect that did not enjoy enough consideration and discussion is the position of Nedbank, the execution creditor, who obtained a judgment against the Narainsamys as early as 22 May 2012 and which included an order declaring the property specially executable. In fact Nedbank was in the process of arranging a sale of execution when the sale agreement with Nel was entered into. Soni was also obliged to negotiate with Nedbank and had to revise his original offer of R1,7 million to satisfy Nedbank. Soni's counsel referred me to the decision of *Dream Supreme Properties II CC v Nedcor Bank Ltd & others* 2007 (4) SA 380 (SCA) and submitted that a sale concluded through negotiations with an execution creditor, with notice of a prior sale and who has a right to sell a property in execution, is one that falls within

what the law allows an execution creditor and the sale cannot be impugned based on the doctrine of notice. The following was said by Streicher JA at paragraph 24:

‘However, it does not follow that because an inference of fraud on the part of a second purchaser is drawn from the mere fact of knowledge of a prior sale that an inference of fraud likewise has to be drawn from such knowledge on the part of an execution creditor who attaches property which his debtor has sold in execution of a judgment.’

And at paragraph 27:

‘…I am of the view that the doctrine of notice should not be applied to the present situation and thus that knowledge on the part of the first respondent of the sale of the property to the appellant did not affect the validity of the subsequent attachment and sale in execution thereof.’

[73] It is of course so that the property was not sold at a sale in execution, but bearing in mind Narainsamy’s statement to Soni that he was phoned on an almost daily basis and that the property was termed as a “property in distress”, it is clear that it was eminent. I was also referred to the statement of account submitted to Soni by Yusuph, in terms of which an amount of R1 815,80 was included for the upliftment of an interdict – which is a reference to Nedbank’s attachment. The statement by Nel’s counsel that the property was never attached and that *Dreamworks*, supra is not applicable is simply incorrect.

[74] Should an order be granted in terms of which the transfer of the property between the Narainsamys and Soni is set aside, this will surely affect Nedbank. Soni settled Narainsamy’s indebtedness to Nedbank and will look at Nedbank for repayment of all sums paid by him. Nedbank previously had a bond registered in its favour – making it a secured creditor which would no longer be the case. Nel’s failure to join Nedbank to these proceedings in her counter application is perhaps more important than what she thought.

[75] Even if I were to find that the real agreement is contra bonos mores in light of the alleged fraud and the existence of the May 2018 order and Narainsamy’s disregard of the terms of that order, how does one “unscramble” the effect of the transfer to Soni? Nel is claiming specific performance. I was referred to the decision of *Crundall Brothers (Pvt) Ltd v Lazarus NO & another* [1992] 3 All SA 708 (ZS)

where the issue of a double sale and the effects thereof were considered, and specifically as to whether an order for specific performance would be appropriate. The following was said at page 712:

'The real issue is whether, in a case of double sale where the second purchaser takes transfer with notice of the first purchaser's rights, the Court must order specific performance in favour of the first purchaser or whether it has a discretion, or whether it is limited to an award of damages.

The two extreme cases are clear enough: When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra*, when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of practicality.' (my emphasis)

The appeal judge continued to consider a number of special circumstances which convinced it that the remedy of specific performance was not appropriate in the particular matter, inter alia, that there were no mala fides or deliberate deceit and perhaps most applicable to the present matter before me that it would be difficult if not impossible to "unscramble" the financial transactions that had taken place (it involved the right to purchase the share capital of two companies).

[76] Nel's counsel referred me to the decision of *Kootbodien & another v Mitchell's Plain Electrical Plumbing & Building CC & others* 2011 (4) SA 626 (WCC) wherein Zondi J considered the doctrine of res litigiosa, where the second sale of property occurs pendente lite, from which it would follow that the rights of the first purchaser must prevail, irrespective of whether the second purchaser acted in good or bad faith. Although the property in the present matter is clearly not res litigiosa (the May 2018 order making it res judicata) as per *Eke v Parsons* 2016 (3) SA 37 (CC) at paragraphs 31, 32 and 36, it is perhaps helpful to take note of the solution found to resolve the matter. Zondi J found that if it was an appropriate case in which specific performance should not be ordered as it was likely to cause an injustice to the third party. The applicants before him sought damages as an alternative to specific performance. He ended up ordering damages in the amount of R100 000,00 being the difference between the amounts the property was sold for at first, and then the

subsequent second transaction. It was accepted that the property was sold at a price that represented the fair market value of the property.

[77] Nel has off course not asked for damages but her counsel submitted that her damages could be calculated by taking the value of R3,5 million (based on her father's allegation that similar properties sold for between R3,3 and R3,6 million) and subtracting from that the R1,6 million as per the 2012 sale agreement, therefore arriving at the amount of damages at R1,9 million. There is unfortunately no indication that the amount suggested by counsel represents as fair market value of the property.

[78] Crucially however is the fact that Nel will not be out of pocket – she has R1,6 million that is being kept in trust and has earned significant interest over time – around R500 000,00 – on that amount and has resided rent free for almost seven years. Soni on the other hand has paid in excess of R2 million to Nedbank and continues to pay rates and levies on a monthly basis. Should the transfer of the property be reversed he would lose his property and have to pursue Nedbank for repayment of the money paid to it. He certainly cannot look to Narainsamy as his financial woes are well known. Soni will be by far the worst off should specific performance be ordered.

[79] Coming back to Nel's main argument that the real agreement is defective as it is tainted by fraud and is contra bonos mores, I cannot help but take cognisance of the submissions made by counsel for Soni, who urged me to have due regard to the *Legator McKenna* case, and in particular the warning that one should be careful not to revert back to the casual theory of transfer – which Mr Bothma - counsel for Nel – is in essence trying to achieve.

[80] I am in any event of the view that I cannot make a finding of fraud, merely based on the application papers, and as mentioned above, the matter was not fully ventilated in oral argument. I base this on *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* 2014 (5) SA 297 (SCA) at paragraphs 16 – 19. *Prinsloo* was later quoted in *Hyprop Investments Ltd & others v NSC Carriers and Forwarding CC & another* 2014 (5) SA 406 (SCA) at paragraph 19 where Lewis JA agreed with the

judgment of Brand JA in *Prinsloo* and summarised the earlier SCA judgment as follows:

'the application of issue estoppel would result in unfairness for two reasons: it was not necessary for the high court to determine the question of fraud in order to dismiss the application, and, secondly, that the disputed fraud should not have been determined in motion proceedings without the benefit of cross-examination and the discovery of documents. Brand JA considered both reasons to be sound. In essence he found that it was inappropriate to determine the question of fraud against Prinsloo on the basis of untested allegations on paper.'

Lewis JA in *Hyprop* further (at paragraph 23) sets out that the reason for this is that the evidence presented cannot be properly tested by cross examination in order to preclude whether the alleged fraud has any substance to it. It is unfair and inequitable to hold a party accountable based on findings that should be properly ventilated in another forum.

[81] Narainsamy failed to comply with the May 2018 order – Nel had remedies available to her (as per *Eke*, supra) yet did nothing from the time of becoming aware of the transfer to Soni up until Narainsamy brought the present application.

[82] In the words of Mr Alberts, counsel for Narainsamy, his client "hedged his bets" and was clearly desperate to find a solution in light of the attitude of SARS and the mounting pressure form Nedbank.

[83] The May 2018 order did not contain any terms prohibiting Narainsamy from passing transfer to Soni. It set certain conditions which were not met. I am not persuaded that Narainsamy's failure to comply with the terms of the order can be said to be contrary to public policy and that it would in turn render the real agreement defective, especially not in light of the warning sounded by Brand JA in *Legator McKenna*, supra.

[84] As mentioned hereinabove, I could not find any indication in the court file that an order was granted in terms of paragraph 1 of Part A of Nel's counter application. For the sake of completeness, I will make such an order.

[85] As regards Part B of Nel's counter application I am of the view that she has failed to make out a case for the relief sought. Part B of the counter application is accordingly dismissed.

[86] Soni has sought an order in terms of paragraph 1.5 (which was initially sought to be inserted as an additional paragraph to the notice of motion of the main application in the application to intervene). As mentioned hereinabove it appears from the court file that that order was never granted. It was in all likelihood an oversight by the author of the draft order on 25 July 2018. Despite the fact that the amendment had not been granted I am of the view that I can grant an order in those terms in light of the inclusion in the notice of motion of a paragraph for "further/and alternative relief."

[87] It was conceded that the relief sought in paragraphs 1.3 and 1.4 amounted to an eviction and instead the procedure as set out in Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 99 of 1998 (PIE) should have been followed. I trust that it will be necessary for Soni to resort to this procedure.

[88] It also goes without saying that Scott ought to immediately return to Nel all funds held by her in trust to be credit of Nel.

[89] In respect of the main application I am accordingly satisfied that a case has been made out for an order declaring that the court order dated 18 May 2018 does not afford Nel any right to take transfer of and/or occupy the property.

[90] I therefore make the following order:

In respect of the main application:

1. It is hereby declared that the court order dated 18 May 2018 does not afford first respondent, Lauren Ann Nel, any right to take transfer of and/or occupy section 302, Wembley Square, Vredehoek, Cape Town.
2. First respondent is directed to pay first to third applicants' costs:

In respect of the counter application:

<u>Part A</u>

3. The Registrar of Deed, Cape Town, is joined as the third respondent.

Part B

4. The application is dismissed with costs.

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BEZUIDENHOUT A J

DATE OF HEARING:	26 November 2019
DATE OF JUDGMENT:	28 February 2020

APPEARANCES

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