

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2018/03453

In the matter between:

FARIDA SATAR

PLAINTIFF

and

NICOLENE SU ALLEN CLAYTON

FIRST DEFENDANT

NEDBANK NAMIBIA LTD

SECOND DEFENDANT

ABDOOL SATAR

THIRD DEFENDANT

THE REGISTRAR OF DEEDS

FOURTH DEFENDANT

BEATE KAREN LOCH

FIFTH DEFENDANT

Neutral citation: *Satar v Clayton* (HC-MD-CIV-ACT-DEL-2018/03453) [2023]
NAHCMD 263 (12 May 2023)

Coram: UEITELE J

Heard: 15 November 2021, 17 February 2021, 30 August 2022 and 6
October 2022

Delivered: 12 May 2023

Flynote: Sale of land – Abstract system of transfer of ownership – Underlying agreement and real agreement – Defect in one agreement not rendering contract

void – Owner must have clear intention to pass transfer – However, transaction induced by fraud could render real agreement void.

Summary: Mr Abdool and Ms Satar were married to each other on 22 April 1971, in Durban, Republic of South Africa. They did not conclude an Ante-nuptial contract when they married each other. It thus follows that their marriage was in community of property. On 28 June 1992, Mr Abdool and Ms Satar purchased a property known as Erf 1011, Narraville and on 11 November 1992 the property was registered in their names. Ms Satar and Mr Abdool have been estranged for a period exceeding 15 years, with Mr Abdool cohabiting with another woman in the northern Town of Ondangwa. Ms Satar, her son, Mr Zaher Satar, and Ms Clayton (Zaher Satar's wife or life partner) reside in Walvis Bay at the property. On 2 March 2017, the deputy sheriff for the District of Walvis Bay served a copy of combined summons in a matter between *Nedbank Namibia Limited v Nicolene Su Allen Clayton* (Nedbank) on Ms Satar and requested her to hand over the summons to Ms Clayton. It is only during March 2017 that Ms Satar became aware of the fact that the property was, without her knowledge or consent, sold and transferred to Ms Clayton. She made the discovery after Ms Clayton defaulted on her loan repayments to Nedbank and Nedbank instituted proceedings to call up the bond and served the summons in that respect on Ms Satar at the property. After making the discovery, Ms Satar instituted these proceedings.

Held that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer.

Held that where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect.

Held further that the abstract theory of transfer of ownership applies to immovable property and if there is any defect in what is termed the 'real agreement' — that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively — then ownership will not pass despite registration. Thus, while a valid underlying agreement to pass ownership, such as a

sale or donation, is not required, there must, nonetheless, be a genuine intention to transfer ownership.

Held further that it is common cause that Mr Abdool forged his estranged wife's signature on the deed of sale, the power of attorney and all other documents that were required to pass transfer and register the property in Ms Clayton's name. In the result, the sale transaction of immovable property purportedly entered into between Abdool Satar and Farida Satar (as sellers) and Nicolene Su-Allen Clayton (as purchaser) is declared invalid and set aside.

ORDER

1. The sale transaction of immovable property referred to as:

CERTAIN: Erf 1011 Narraville

SITUATE: In the Municipality of Walvis Bay
Registration Division "F"
Erongo Region

MEASURING: 955 (Nine Five Fiive) square meters

HELD BY: Deed of Transfer No T. T 72159/92
(the property)

purportedly entered into between Abdool Satar and Farida Satar (as sellers) and Nicolene Su-Allen Clayton (as purchaser) is declared invalid and set aside.

2. The registration of the property in the name of Nicolene Su-Allen Clayton and the registration of Mortgage Bond no. B 548/2012 over the property in favour of Nedbank Namibia (Pty) Ltd by the Registrar of Deeds is invalid and set aside.

3. It is declared that Abdool Satar and Farida Satar are the joint owners of the property in equal undivided shares.
4. The Registrar of Deeds must cancel and expunge from the records in the Deeds Registry at Windhoek Deed of Transfer No. T 400/2012 and Mortgage Bond No B 548/2012 both dated 10 February 2012 relating to the property and re-register the property into the names of Abdool Satar and Farida Satar.
5. The first defendant, Ms Nicolene Su-Allen Clayton, must pay the plaintiff's costs of suit.
6. The matter is finalised and removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] The plaintiff is Farida Satar, a female pensioner, who is the mother-in-law of the first defendant, Ms Nicolene Su Allen Clayton. The second defendant is Nedbank Namibia Ltd, a public company carrying on business as a registered bank duly registered and incorporated according to the laws of the Republic of Namibia. The third defendant is Abdool Satar, a male pensioner, who is the estranged husband of the plaintiff. The fourth defendant is the registrar of Deeds who is cited merely for the interest it may have in these proceedings. The fifth defendant is a certain Ms Beate Karen Loch a conveyancer who practices in partnership under the name and style of Koep & Partners in Windhoek, Namibia, she is also cited simply for the interests she may have in these proceedings.

[2] I will, for ease of reference, refer to the plaintiff as Ms Satar, the first defendant as Ms Clayton, the second defendant as Nedbank, the third defendant as Mr Abdool and the fourth defendant as the Registrar. The second, third, fourth and

fifth defendant did not participate in these proceedings and I will therefore not make any reference to them, except where it is necessary.

[3] On 18 August 2018, Ms Satar commenced proceedings by causing summons to be issued out of this court against the five defendants referred to earlier. In the action Ms Satar claimed the following relief:

‘1. An order declaring that the plaintiff and the third defendant are the joint registered owners of Erf 1011 Narraville ("the property") in equal undivided shares by virtue of deed of transfer T 72159/92.

2. An order empowering, authorising and directing the fourth defendant to cancel and expunge from the records in the Deeds Registry at Windhoek deed of transfer T400/2012 and mortgage bond B 548/2012 both dated 10 February 2012 relating to the property.

3. An order ordering the first and third defendants to pay the plaintiff's party-and party costs of suit jointly and severally, the one paying the other to be absolved.

4. An order ordering any person or persons other than the first and third defendants defending the action to pay the plaintiff's party-and-party costs of suit jointly and severally, the one paying the others to be absolved.

5. An order ordering the third defendant to pay, in addition to the costs mentioned in prayer 3 above, the adverse difference between the plaintiff's attorney-and client costs and the costs mentioned in prayer 3 above.’

Background

[4] The brief background facts which led the plaintiff to commence these proceedings as I have referred to in the preceding paragraph are briefly these: on 22 April 1971 at Durban, Republic of South Africa, Mr Abdool married Ms Satar, which marriage still subsist, but the parties have not lived together as husband and wife for a period exceeding 15 years. At the time of the marriage Mr Abdool was domiciled in Durban, South Africa.

[5] The marriage certificate (which was tendered into evidence as an exhibit) which was issued to the parties on the date of their marriage provides that the parties were married without an “ANC (ante nuptial contract)” and that:

‘Marriage according to Moslem Rite Registered at Durban on the Twenty Second Day of April 1971 at Durban. In terms of Act 22 of 1914 as Amended.’

[6] On 28 June 1992, Mr Abdool and Ms Satar purchased a property known as Erf 1011 Narraville (I will in this judgment refer to this Erf as ‘the property’). On 11 November 1992 the property was, by Deed of Transfer No. T 72159/92, transferred and registered in the names of Ms Satar and Mr Abdool (this deed of transfer was also tendered into evidence as an exhibit).

[7] From the evidence presented during the trial it appears that Mr Abdool deserted his wife (Ms Satar) and children either during 1998 or during 2008. On 21 October , Mr Abdool and Ms Satar allegedly concluded an agreement to sell the property to Ms Clayton. I use the term ‘allegedly’ because Ms Satar denies having signed any deed of sale or any power of attorney to transfer the property to Ms Clayton. The property was registered in Ms Clayton’s name on 10 February 2012. Ms Clayton purchased the property for the amount of N\$580 000, which was financed with a loan obtained from Nedbank and as security for the loan, Nedbank registered a mortgage bond over the property.

[8] Ms Satar, her son, a certain Mr Zaher Satar, have, ever since Mr Abdool deserted them (Ms Satar and her children), resided in the property. Ms Satar testified that it is only during March 2017 that she became aware of the fact that the property was, without her knowledge or consent, sold and transferred to Ms Clayton. She testified that she made the discovery after Ms Clayton defaulted on her loan repayments to Nedbank and Nedbank instituted proceedings to call up the bond and served the summons in that respect on Ms Satar at the property. After making the discovery, Ms Satar instituted these proceedings.

Facts that are common cause or not in dispute

[9] At the trial of this matter, Ms Satar testified in support of her claim and called two other persons of whom one was Dr Ludik, a forensic expert and the other was a certain Ms Isaacs, who commissioned the affidavit with respect to the marriage between Ms Satar and Mr Abdool, allegedly deposed to by them. Ms Clayton on the other hand also testified in her own defense and also called her husband, Mr Zaher Satar, to testify in support of her defence. The evidence that was presented at the hearing of this matter was not seriously disputed by the parties. I will therefore, not summarise the evidence presented but simply highlight or set out the facts that were accepted by the parties or which cannot be disputed by either party.

[10] The undisputed facts are these: Mr Abdool and Ms Satar were married to each other on 22 April 1971, in Durban, Republic of South Africa. They did not conclude an Ante-nuptial contract when they married each other. It thus follows that their marriage was in community of property. On 28 June 1992, Mr Abdool and Ms Satar purchased the property and on 11 November 1992, the property was registered in their names. Ms Satar and Mr Abdool have been estranged for a period exceeding 15 years, with Mr Abdool cohabiting with another woman in the northern town of Ondangwa.

[11] Ms Satar, her son, Mr Zaher Satar, and Ms Clayton (Zaher Satar's wife or life partner) resides in Walvis Bay at the property. The relationship between Ms Satar on the one hand and her son and his wife on the other hand was not very good. On 2 March 2017, the deputy sheriff for the District of Walvis Bay served a copy of combined summons in a matter between *Nedbank Namibia Limited v Nicolene Su Allen Clayton* (Nedbank) on Ms Satar and requested her to hand over the summons to Ms Clayton.

[12] From the Nedbank summons, Ms Satar testified that she determined that:

(a) She and her estranged husband, Mr Abdool, allegedly sold the property to Ms Clayton on 21 October 2011.

(b) The property was transferred and registered into Ms Clayton's name and a mortgage bond registered in favour of Nedbank on 10 February 2012.

(c) Nedbank claimed an amount of N\$563 450,41 from Ms Clayton, being the outstanding balance due and payable to Nedbank in respect of moneys lent and advanced to Ms Clayton on a residential home loan account no. 131200... and;

(d) Nedbank, in its summons, prayed for an order that the property be declared executable in terms of a mortgage bond registered against the property in favour of Nedbank.

[13] The signatures purporting to be that of Ms Satar, which appeared on the deed of sale (dated 11 October 2011 and allegedly signed at Windhoek), on the power of attorney to pass transfer (dated 1 December 2011 and allegedly signed at Ondangwa) and other documents in support of the transfer of the property to Ms Clayton were in fact and truth not the signatures of Ms Satar, but were forged signatures. The property was thus, during the year 2011, fraudulently sold by Mr Abdool to Ms Clayton.

[14] From the evidence that was presented at the trial, I furthermore find and accept that Ms Clayton did not know about the forgery or participate in forging Ms Satar's signatures.

Discussion

[15] The question central to this dispute appears to be whether or not the transfer of the property to Ms Clayton must be regarded as a nullity. Put in another way, did the registration of the transfer of the property to Ms Clayton effectively transfer *dominium* in the property to her?

[16] What was, in principle, necessary in order that *dominium* should pass? Badenhorst and others¹ discuss and deal with this matter. They argue that one of the requirements is that the parties to an agreement to pass ownership in a thing must

¹ PJ Badenhorst, MJ Pienaar and H Mostert *Silberberg and Schoeman's The law of Property* 5 ed.

be in a position to pass and acquire ownership, which means normally that the transferor must be the owner or authorised by the owner. Another requirement listed by the learned authors is that the parties must be legally competent to give and receive ownership. And the third requirement is that the parties must intend the passing of ownership.² In this regard, the learned authors deal with the difference between the 'abstract' and the 'causal' approach to the transfer of *dominium*.

[17] The learned authors reasoned that:

'If a legal system makes transfer of a real right dependent on a valid underlying agreement it is said to adhere to the causal theory, while the opposite approach is based on the so called abstract theory. The causal theory lays down that, if the cause for the transfer of a real right is defective, the real right will not pass, notwithstanding that there has been delivery or registration of the thing. In terms of the abstract theory, provided that the agreement to transfer a real right (the real agreement) is valid, the real right will, in general, pass in pursuance and on implementation thereof, notwithstanding that the cause (underlying contract) is defective.'

[18] In *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others*³ this Court held that the land registration system in Namibia is an abstract system. Professor van der Merwe⁴ argues that:

'Under an abstract system of passing of ownership the mere intention of the parties to pass ownership is sufficient without reference to the underlying causa for the transfer. This principle originated in Roman law and was developed further by natural lawyers of the seventeenth century and *pandectists* and accepted in modern law. The abstract principle guarantees certainty in that it disallows the invalidity of an underlying causa to affect the existence or validity of a transfer. The real agreement to pass ownership is treated in *abstracto*, that is, totally independently from the contractual agreement which provides the causa for the transfer. Although the abstract system simplifies matters for the transferee it does not leave the transferor who has transferred an object by virtue of an invalid causa without a remedy. Since ownership passes to the transferee, the transferor is deprived of his *rei vindicatio*. However, he may still claim by way of *condictio* on the ground of unjust enrichment.

² Ibid at 72-73.

³ *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232 (HC).

⁴ Joubert (ed) *The Law of South Africa* (2 ed) vol 27 at 110 para 203.

The abstract principle is by no means absolute and several exceptions exist: first, certain forms of invalidity of the contractual agreement are considered so material that they affect the real agreement also as, for example, where recognition of the validity of the transfer will conflict with an absolute statutory prohibition. Second, it seems possible for parties to the contractual agreement to provide that the transfer of ownership will only be valid if the *causa* for the transfer is valid. Such a term can also be implied from the circumstances of the case.'

[19] The learned professor further discusses the effect of the abstract system on land registration and what the requirements are and states the following:⁵

'In terms of an abstract system of the transfer, the passing of ownership is wholly abstracted from the agreement giving rise to the transfer and is not made dependent on such an agreement. It is immaterial whether such an agreement is void, voidable, putative or fictional. The puristically minded do not even talk in terms of a *causa* giving rise to the obligation to transfer but only require a serious intention on the part of the parties to transfer ownership. In terms of the abstract system a clear distinction is thus drawn between the agreement giving rise to the transfer (*verbintenisskeppende ooreenkoms*) and the real agreement (*saaklike ooreenkoms*) in which the parties agree to pass ownership. Emphasis is placed on the real agreement which exists independently of the agreement giving rise to the transfer. The invalidity of the latter agreement has no influence on the validity of the real agreement. If there is a serious intention to transfer ownership, ownership passes to the transferee, who can in turn validly pass transfer to a third party. The original owner in such a case loses ownership of his thing and he has in appropriate circumstances only a personal action, namely the *condictio* based on unjust enrichment on the ground of the loss suffered by him.'

[20] The learned professor describes the real agreement as follows:⁶

'Under the abstract system a real agreement, namely an agreement to transfer and accept ownership, is required for transfer of ownership. In every instance it must consequently be determined factually whether a real agreement had indeed been reached. If the real agreement is merely voidable, for example as a result of undue influence, ownership will pass if the agreement had not been vitiated before transfer. If, however, the real agreement is void, having been induced by the fraudulent misrepresentations or by mistake ownership will not pass.' (own emphasis)

⁵ Ibid para 363 at 296.

⁶ Supra para 365 at 300.

[21] Having set out some of the legal principles, I will proceed to deal with the controversy of whether there was a real intention to transfer the property to Ms Clayton. It is now well established in our law that fraud has far-reaching effects on legal transactions. In the Australian case of *Farley (Aust) Pty Ltd v JR Alexander & Sons (Qld) Pty Ltd*⁷ the High Court of Australia, Williams J said:

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

[22] In *Lazarus Estates Ltd v Beasley*⁸ Lord Denning said:

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

[23] I echo the words of Molahlehi J who remarked that the ‘insidious effect of fraud permeates the entire legal system. It renders contracts voidable. It is one of the elements of delictual liability. It constitutes a crime. Fraud excludes the effect of an ouster clause in legislation.’⁹

[24] In the present matter, it is common cause that Mr Abdool forged his estranged wife’s signature on the deed of sale, the power of attorney and all other documents that were required to pass transfer and register the property in Ms Clayton’s name. It is well established in our law, as I pointed out above, that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer.

⁷ *Farley (Aust) Pty Ltd v JR Alexander & Sons (Qld) Pty Ltd* [1946] HCA 29; (1946) 75 CLR 487.

⁸ *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712.

⁹ *Mohali v Mohali and Others* (39683/2019) [2023] ZAGPJHC 44 (24 January 2023) para 19.

[25] This court has reaffirmed the principle that where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any other real right, such as a mortgage bond) has no effect.¹⁰ The court further affirmed that the abstract theory of transfer of ownership applies to immovable property, and, second, that if there is any defect in what is termed the 'real agreement' — that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively — then ownership will not pass despite registration. Thus, while a valid underlying agreement to pass ownership, such as a sale or donation, is not required, there must nonetheless be a genuine intention to transfer ownership.¹¹

[26] It thus follows that, if the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass.¹² It is therefore clear that when Mr Abdool forged his wife's signature on the deed of sale of the property and on the power of attorney to pass transfer, Ms Satar did not intend to transfer ownership of the property to Ms Clayton. It further follows that the mortgage bond registered in favour of Nedbank was not valid. Ms Clayton was not the owner of the property mortgaged. Ms Satar is thus entitled to reregistration of the property in the joint estate of her and her estranged husband.

[27] With regard to costs, costs must follow the result.

[28] In the result, I make the following order:

1. The sale transaction of immovable property referred to as:

CERTAIN: Erf 1011 Narraville

SITUATE: In the Municipality of Walvis Bay
Registration Division "F"
Erongo Region

¹⁰ In *Oshakati Tower (Pty) Ltd* supra footnote 3.

¹¹ Also see *Lema Enterprises CC v Orban Investments Three Seven Five (Pty) Ltd* (I 1085/2012) [2014] NAHCMD 324 (19 September 2014).

¹² *Preller and Others v Jordaan* 1956 (1) SA 483 (A).

MEASURING: 955 (Nine Five Fiive) square meters

HELD BY: Deed of Transfer No T. T 72159/92.
(the property)

purportedly entered into between Abdool Satar and Farida Satar (as sellers) and Nicolene Su-Allen Clayton (as purchaser) is declared invalid and set aside.

2. The registration of the property in the name of Nicolene Su-Allen Clayton and the registration of Mortgage Bond no. B 548/2012 over the property in favour of Nedbank Namibia (Pty) Ltd by the Registrar of Deeds is invalid and set aside.
3. It is declared that Abdool Satar and Farida Satar are the joint owners of the property in equal undivided shares.
4. The Registrar of Deeds must cancel and expunge from the records in the Deeds Registry at Windhoek Deed of Transfer No. T 400/2012 and Mortgage Bond No B 548/2012 both dated 10 February 2012 relating to the property and re-register the property into the names of Abdool Satar and Farida Satar.
5. The first defendant, Ms Nicolene Su-Allen Clayton, must pay the plaintiff's costs of suit.
6. The matter is finalised and removed from the roll.

S F I Ueitele
Judge

APPEARANCES:

PLAINTIFF: I Hohne
Of Hohne & Co., Windhoek

FIRST DEFENDANT: B Cupido
Of Hanmer & Associates Incorporated, Windhoek

SECOND DEFENDANT: R Linde
Theunissen, Louw & Partners, Windhoek