

DESPERATE TIMES, DESPERATE MEASURES FAIL

Motsima and Another v Kopa and Others (2122/2019) [2021] ZAFSHC 21 (8 February 2021)

A cash-strapped homeowner, fearing the bank will repossess his property, searched on Google for assistance. He found the assistance by way of the offer of a sale of his property and then a re-purchase thereof, within a certain period. But the plans went awry and, after losing his home, the erstwhile owner cried foul. The court highlighted the requirements for a valid transfer of ownership, and applied these to the facts of the matter to ascertain whether the transfer to the new owners could be declared void.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Motsima bought a vacant site for R400,000. They put down a R100,000 deposit and obtained mortgage financing for the remaining R300,000. After transfer and registration of the bond, the Motsimas commenced to build on the vacant site and later applied for further financing from the bank.

Shortly thereafter Mr Motsima lost his employment and was no longer able to pay back his debts which, at that time, had escalated to some R1,5 million.

Fearing that they might lose their house, the Motsimas turned to the internet to look for entities that might help them with financing in order to avoid the bank calling up its bond. They came across C & D Investment Trust ("CDI"). CDI informed them that they could sell the property to it (CDI), and at the same time conclude a lease agreement which provided an option in their favour to buy it back for a pre-determined price within 12 months.

Mr Motsima signed the documents and transfer was registered. The purchase price was R1.5 million (although Mr Motsima alleged the market value was more), being the total indebtedness of the Motsimas to their creditors.

Before the period within which to exercise the option expired, the Motsimas approached Mr and Mrs Kopa to purchase the property from CDI. The Kopas, after the Motsimas had authorised CDI to sell the property to them (the Kopas), bought and took transfer of the property.

The Motsimas then sought to impeach the sale agreement and transfer to CDI, as well as the subsequent sale and transfer to the Kopas. They alleged that it was a so-called "Brusson scam". (Named after a case in which Brusson Finance was involved. There were simulated transactions in terms of which Brusson, in partnership or association with so-called investors, lent money to borrowers (sellers in distress). Brusson guaranteed the obligations of the distressed sellers to their creditors and in effect bore the eventual risk of default on the part of the borrowers (sellers). In return, Brusson obtained effective control of the whole transaction and, in the (likely) event of default, became entitled to obtain and retain ownership of the property. In Brusson, the agreement or the transaction underlying the transfer was between three people, viz, the broker, Brusson, the investor and the victim. The scheme was unlawful. The victims were misled into selling their property to a so-called 'investor' while the property ended up being owned by Brusson. It was a promise of easy cash for blacklisted homeowners: but instead of getting 'loans' as they thought, they were actually signing away their houses to Brusson's 'investors', who 'bought' them.)

HELD

- The requirements for the transfer of immovable property are twofold: (i) delivery (effected by registration of transfer in the Deeds Office) and (ii) the existence of a 'real agreement' (an intention on the part of the

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transferor and transferee to pass and acquire ownership of the property respectively).

- If there is any defect in the real agreement, then ownership will not pass despite registration. So, too, if the agreement is tainted by fraud or obtained by some other means that vitiates consent.
- The present case is quite different from the make-up of the Brusson scheme. There was no allegation of fraud on the side of CDI or the Kopas, and the agreements reflected the intention of the parties at all times.

CONCLUSION

The application accordingly failed.