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REAL ESTATE ALERT



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Fraud unravels all subsequent transactions

In *Moseia and Others v Master of the High Court: Pretoria and Others* (36201/2018) [2021] ZAGPPHC 37, the court reaffirmed the principle that fraud renders the so-called real agreement between parties defective, with the consequence that ownership of immovable property did not pass from a fraudulent transferor to *bona fide* transferees.

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South African law, as provided for in *Legator Mckenna Inc and another v Shea and others 2010 (1) SA 35 (SCA)*, has adopted the abstract theory in respect of the passing of ownership of immovable and movable property. Muller, Brits, Pienaar and Boggenpoel's *Silberberg and Schoeman "The Law of Property"* 6th edition (2019), highlights that there are two requirements that must be met for ownership to pass from one person to another. Firstly, there must be a real agreement between the parties and essential elements of this agreement are the intention to pass transfer and the intention to receive transfer. The transferor must be legally competent to transfer the property and can only transfer property that he or she owns. Thus, if a person sells property in his personal capacity, which he does not own, he will first have to acquire the property to pass transfer to another. Secondly, the property must be delivered to the transferee, which, in the case of immovable property, is effected by registration in the Deeds Office. Consequently, even if the underlying agreement, such as a sale agreement or agreement of donation, is defective or invalid, if the real agreement is valid and the transferor has delivered the property to the transferee by way of registration, ownership will have passed to the transferee.

In the *Moseia* case, the legal question was whether the real agreement was defective because of the fraud committed by the transferor. The facts were that the second respondent had misled the Master of the High Court by falsely misrepresenting that he was the son of the deceased and that she had died intestate. As a result of the misrepresentation, the Master issued letters of authority in favour of the second respondent, who subsequently transferred the deceased's property to himself, whereafter he sold and transferred the property to the third and fourth respondent. The first applicant, who had been the nominated executrix and rightful heir in terms of the deceased's will, became aware of the second respondent's fraud and approached the court for an order to declare both transfers null and void.

In support of their contention that the second respondent's transfer to them was valid, the third and fourth respondents relied on *Quatermark Investments Proprietary Limited v Mkwanzani and Another 2014 (3) SA 96 SCA*, where the Supreme Court of Appeal stated, "the validity of the transfer is not dependent upon the validity of the underlying transaction.....". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transfer to become owner of the property. They submitted that as the executor of the deceased's estate, the second respondent had in both transfers of the property the intention, first to himself and then later to the third and fourth respondents, to pass transfer and that the third and fourth respondents had the intention to receive transfer of the property. As such, they submitted, the two

Fraud unravels all subsequent transactions...continued

The judgment follows previous case law and it serves as a reminder that fraud or misrepresentation will render the real agreement – one of the essential requirements for ownership to pass – defective.

requirements for the passing of ownership were met as there was a real agreement (the intention to pass and receive transfer) and delivery, in the form of registration in the Deeds Office. The court disagreed and held with reference to *Nedbank Limited v Mendelow No (686/12) [2013] ZASCA 98*, that the second respondent, due to his fraud and misrepresentation in attaining letters of authority, was not the authorised executor of the estate. The court clarified that only a true representative or executrix of the deceased estate could form an intention to transfer and "*in the result there was no real agreement to transfer and the transfer is void ab initio*".

This entailed that although the third and fourth respondents were *bona fide* purchasers, the transfer of the property by the second respondent to them was also void *ab initio*, since the second

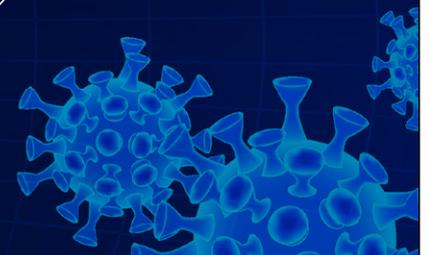
respondent had never become the owner of the property and subsequently could not have passed ownership to the third and fourth respondents. The court reiterated that "*fraud unravels all subsequent transactions, even, as in this instance, a subsequent sale to bona fide purchasers*" and granted the order sought by the first applicant.

The judgment follows previous case law and it serves as a reminder that fraud or misrepresentation will render the real agreement – one of the essential requirements for ownership to pass – defective. The result is that the transfer of property to *bona fide* purchasers can be set aside by a court order.

Arnold Saungweme
Overseen by Janke Strydom

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OUR TEAM

For more information about our Real Estate practice and services, please contact:



Muhammad Gattoo
National Practice Head
Director
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Bronwyn Brown
Director
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Nayna Cara
Director
T +27 (0)11 562 1701
E nayna.cara@cdhlegal.com



Mike Collins
Director
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Werner de Waal
Director
T +27 (0)21 481 6435
E werner.dewaal@cdhlegal.com



Lucia Erasmus
Director
T +27 (0)11 562 1082
E lucia.erasmus@cdhlegal.com



Simone Franks
Director
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Daniel Fyfer
Director
T +27 (0)21 405 6084
E daniel.fyfer@cdhlegal.com



Fatima Gattoo
Director
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Andrew Heiberg
Director
T +27 (0)21 481 6317
E andrew.heiberg@cdhlegal.com



Simone Immelman
Director
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



William Midgley
Director
T +27 (0)11 562 1390
E william.midgley@cdhlegal.com



Muriel Serfontein
Director
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



John Webber
Director
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Kelsey Biddulph
Senior Associate
T +27 (0)11 562 1417
E kelsey.biddulph@cdhlegal.com



Natasha Fletcher
Senior Associate
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



Robyn Geswindt
Senior Associate
T +27 (0)21 481 6382
E robyn.geswindt@cdhlegal.com



Marlene Heppes
Senior Associate
T +27 (0)11 562 1580
E marlene.heppes@cdhlegal.com



Samantha Kelly
Senior Associate
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com



Janke Strydom
Senior Associate
T +27 (0)11 562 1613
E janke.strydom@cdhlegal.com

Joloudi Badenhorst
Associate
T +27 (0)11 562 1272
E joloudi.badenhorst@cdhlegal.com

Nabeela Edris
Associate
T +27 (0)11 562 1740
E nabeela.edris@cdhlegal.com

Shanita Goven
Associate
T +27 (0)11 562 1586
E shanita.goven@cdhlegal.com

Lutfiyya Kara
Associate
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com

Sune Kruger
Associate
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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