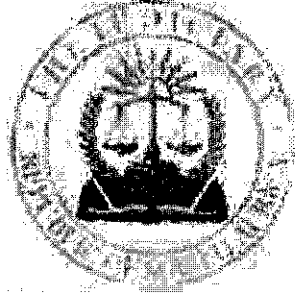
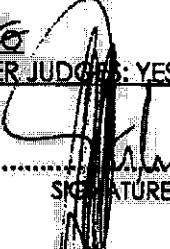


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 0551/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
6/9/2017	
DATE	SIGNATURE

In the consolidated application between:

FELICITY AUDREY STIRLING

Applicant

and

FAIRGROVE (PTY) LTD

First Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Second Respondent

JOSE LUIS CRUJELA ALVARES

Third Respondent

AND

CASE NO: 07944/2016

JOSE LUIS CRUJELA ALVARES

Applicant

and

PHUNGULA-NKOSI PROPERTIES

(Reg No: 1999/023029/23)

First Respondent

JOHN NKOSI

(Identity No: 681124 2159 081)

Second Respondent

J U D G M E N T

SENYATSI, AJ:

INTRODUCTION

[1] The main application brought under case number 0551/2016 by the applicant ("Stirling") concerns a declaratory order that the applicant is still the owner of an immovable property known as Erf 85, Hurlingham Town, Johannesburg ("*the property*") and for the expungement of two deeds of transfer in terms of which Erf 85 was first transferred to the third respondent ("Alvares"), who in turn transferred it to the first respondent ("Fairgrove").

[2] The main application is not opposed by any of the respondents. Although Fairgrove initially gave notice of opposition and filed an answering affidavit, it seeks no relief against the applicant. Alvares only opposes the counter-application of Fairgrove and his answering affidavit deals specifically with the counter-application.

[3] The counter-application brought by Fairgrove which is opposed by only the second and third respondent seeks damages occasioned by payment of R3 650 000 and R180 397 58 to Alvares and South African Revenue Service respectively. SARS was paid the transfer duty for the property ownership of which was obtained through fraud. The counter-application also seeks certain ancillary orders, inter alia, that the Public Protector, in terms of section 6(4)(a)(i)

of the Public Protector Act 23 of 1994, be directed to investigate the circumstances under which the property was transferred to Alvares, with a view to determining whether any criminal act/s was/were committed during the transfer procedures and further whether similar or such act/s was/were committed in respect of other transactions involving Alvares and/or any other parties, and to take such remedial action as the Public Prosecutor may deem fit, that the relevant centre of the South African Police Services be directed to investigate the circumstances under which the property was transferred to Alvares, also with the view to determining whether any criminal acts were committed during the transfer procedures, and further whether similar acts were committed in respect of other transactions involving Alvares and any other parties; and costs against the second and third respondents jointly and severally the one paying the other to be absolved.

[4] The third respondent Alvares, also instituted an action under case number 7994/2016 against the alleged estate agent John Nkosi("Nkosi") and Phungula-Nkosi Properties.

[5] Fairgrove brought an application to consolidate the action by Alvares to these proceedings. The application was granted on the 28th of July 2016 by this costs. As a consequence, three application will be dealt with in this judgment.

BACKGROUND

[6] Stirling, the applicant in the main application, was the lawful owner of the property since 1972. She is married to her husband out of community of property.

[7] During early 2014, Stirling and her husband returned from holidays in KwaZulu-Natal, and found that their property, had been broken into by intruders who not only stole their movables, but also vandalized it. The property was in such a state of disrepair that it was not habitable. This caused Stirling and her husband to vacate the property and live in a townhouse.

[8] Stirling's husband, on one of his visits to the property subsequently, found that their gate padlock had been replaced with a strange padlock. He learned from his neighbour that the property was on sale. Stirling was informed about the state of affairs and she instructed her legal representative to investigate the matter. She was still in possession of her original Deed of Transfer and had not given any estate agent mandate to sell her property.

[9] Upon investigation, the legal representative established that the property had been "sold" to Alvares, the third respondent, who had in turn sold it to Fairgrove. The investigations further revealed that the applicant had sold the property to Alvares for R2 790 000 who in turn sold it to Fairgrove for R3 650 000. Her signature had been forged on a deed of sale, special power of attorney to pass transfer and other relevant documents required for the registration of ownership of the property to be effected.

[10] It was furthermore, established that the power of attorney was purportedly executed in Stirling's name on 20 April 2015, authorising a certain William Roger Smith to appear before the Registrar to attend to the transfer of the property to Alvares for the sum of R2 790 000. The purported power of attorney reflected that it was prepared by a conveyancer named Choene Kekana ("*Kekana*"). There were errors in the power of attorney such as the incorrect description of the property as measuring "4245" (by incorrectly stating "*two comma zero two three five*") meters square.

[11] Kekana was not a conveyancer or attorney registered with the Law Society of the Northern Provinces. More importantly, the appearer reflected in the power of attorney, William Roger Smith, was also not an attorney or conveyancer. There was no deed of substitution of Roger William Smith by Kekana who executed the deed and as a result, Roger William Smith was supposed to have been the one appearing before the Registrar of Deeds.

[12] The transfer of the property from the applicant to Alvares was lodged with the Registrar on 29 May 2015 as per annexure "AA2" to the second respondent's answering affidavit. The transfer was rejected by the Registrar on 8 June 2015 and the reason for rejection was because the original title deed was not annexed to the application for transfer, as required under Regulation 51(1) of the Regulations promulgated in terms of the Deeds Registries Act, 47 of 1937 (the "*Regulations*" and the "*Act*" respectively).

[13] After the rejection an affidavit supporting an application, in terms of Regulation 68(1) for a duplicate Deed of Transfer, was purportedly deposed to by Stirling on 10 June 2015 (the "*Regulation 68 affidavit*"). The Regulation 68 affidavit was not signed by Stirling and her signature on the document had been forged. It reflected that the Commissioner of Oaths before whom Stirling purportedly deposed to the affidavit, was one Alan James Levy, an attorney practising as Levy and Associates and the affidavit had purportedly been prepared by Kekana, who was represented on the affidavit as being a conveyancer and stated that the circumstances under which the Deed of Transfer was lost, were "*unknown to [Stirling]*". Levy was not a practising attorney and appeared to have been a fictitious person.

[14] The transfer was re-logged with Registrar on 11 June 2015 after a duplicate deed of transfer had been issued on the strength of the false Regulation 68 affidavit. Deed of Transfer T54404/15 (transferring the property from Stirling to Alvares was executed at the Registrar's offices in Pretoria on 18 June 2015 and from that date, the title of the property was in the name of Alvares.

[15] After receiving notice of counter application by Fairgrove in the main application, Alvares issued proceedings for the recovery of R2 790 000, 00 against Phungula-Nkosi Properties and John Nkosi under case number 07944. Alvares referred in that application that Phungula-Nkosi Properties were paid R2790 000.00 for the purchase of the property.

[16] Alvares in that application seeks that the sale be set aside and that the respondent be directed to pay the costs of the application on the scale as between attorney and own client. There has not been opposition to the application by both respondents and as stated before the application, which had been stayed by this court is consolidated and being heard in these proceedings.

[17] In that application Alvares avers that he concluded a deed of sale on the 15th February 2015 with Phungula-Nkosi Properties and John Nkosi for the purchase of Erf 85 Hurlingham Township Sandton for the amount of R2 790 000, 00 and attached to his affidavit the deed of sale incorporating a power of attorney in terms of which Phungula-Nkosi and John Nkosi claim to have been given power of attorney to sell the property by Stirling.

[18] The property was transferred to Alvares on 18 June 2015 and Alvares was approached during August 2016 by one Progress Ncube of CMRE Property Marketing with an offer from a client for R3 650 000.00 for the contested property. As a consequence, he signed a deed of sale on 17 August 2016 for the sale of the property for the said amount to Fairgrove, the first respondent in the main application.

[19] It does appear that the offer was made to Alveras in August 2015 and not 2016 as he claims in his application. He claims furthermore that he learned for the first time during January 2016 through a telephone call from one Julian Scher, who acted for Stirling, that the property was not sold by the owner and

presumably that no one had the power of attorney to represent the owner of the property.

[20] He immediately contacted telephonically, John Nkosi who failed to present himself at the agreed meeting venue, time and date. He never managed to have further contacts and subsequently was served by Stirling with the main application.

[21] Alvares offers no explanation how he paid the full purchase price of R2 790 000, 00 and provides no proof of any of the payments made by way of the purported agreed instalments.

[22] The sale agreement between Alvares and the seller, suggests that the four payments of R300 000.00 each were to be made on March 2015, April 2015, May 2015, June 2015 and the balance of R1 590 000, 00 was to be made on or before 15 February 2016. No evidence has been presented showing that indeed the four payments were made as agreed and that the balance was also paid as contemplated by the agreement. For all we know, is that Alvares received registration of transfer of ownership of the property on the 18th June 2015. He does not make out a case in his papers that he performed in terms of the contract by paying as agreed and has not proffered any proof on how he made payments towards the purchase price.

[23] The Schedule to Offer to Purchase by Alvares is silent on occupational rental and states on paragraph 3.1 that:

"The Purchaser shall be entitled to occupation of the property on the date of occupation".

The Offer to Purchase on the letterhead of Phungula-Nkosi Properties, paragraph 4 thereof states that "*Occupation of the property shall be on the date of registration*", which is clearly in conflict with the schedule thereof. From both the Offer to Purchase and the Schedule thereto, no mention is made on the occupational rental. The agreement is also silent on when transfer is to pass to Alvares.

[24] What was apparent, when transfer was executed in favour of Alvares on the 18 June 2015, is that Kekana and not the appearer nominated in the power of attorney purportedly by the Stirling, appeared before the Registrar of Deeds. The deed of transfer further incorrectly states that Kekana was authorised to appear before the Registrar under the power of attorney when in fact the power of attorney authorised William Roger Smith to appear. The deed of transfer was additionally prepared by Kekana, who is reflected as the conveyancer, who signed the preparation certificate at the top right-hand corner of the first page of the deed of transfer. The deed of transfer further incorrectly the transferee on page 7 thereof not as *Jose Luis Crujela Alvares* but as "*Jinhai Zhang Jose Luis Crujela Alvares*", which suggests a different person identified in the purported power of attorney by Stirling.

[25] The deed of transfer was littered with typographical errors none of which appear in Stirling's original Deed of Transfer. Three errors included the two typographical errors in condition number 4 ("*wriing*" and "*the*" rather than

writing and *the*"); two typographical errors in condition number 5 (*yo* and *tittles* rather than *to* and *tiles*); and one typographical errors in condition number 12 (*ne* and *loacal* rather than *be* and *local*). Furthermore, there were three typographical errors in condition number 13 (*sufficiently*, *sand* and *buildings*) and a typographical error in condition number 18 (*hoardungs* rather than *hoardings*).

[26] Pursuant to the execution of Deed of Transfer T54404/15 at the Deeds Office, the transfer of the property to Alvares was registered during 18 June 2015.

[27] Fairgrove in the counter application averred through Mr Fakie that it noticed that the property was advertised for sale on the Property 24 website in July 2015. The estate agent, one Mr Progress (*Progress*) of RME Properties was approached by Mr Shauket Fakie (*Fakie*) who deposed the founding affidavit in the counter-application on behalf of Fairgrove. Progress represented Alvares to be the owner of the property. A sale agreement was concluded for the property and the purchase price agreed was R3 650 000. Makaula Zilwa Incorporated, a firm of attorneys, was asked by Fakie to assist with the transfer of the property.

[28] Payment of the purchase price was made together with the transfer costs of R180 398,58. Alvares executed a power of attorney to pass transfer on 18 August 2015. That power of attorney, unlike the first one purportedly executed by Stirling, correctly described the extent of the property and was prepared by an

admitted conveyancer, Mr Sivayile Zilwa ("Zilwa"). Furthermore, in terms of that power of attorney, Zilwa and Janine de Villiers were appointed to appear before the Registrar of Deeds as Alvares' agents. The power of attorney, however, incorrectly reflected the purchase price of the property as R2 790 000 instead of the R3 650 000. Deed of Transfer T83956/2015 transferring the property from Alvares to Fairgrove was executed at the Registration of Deeds office in Pretoria on 28 September 2015 and Fairgrove's title was noted in the property.

[29] All respondents have accepted that the transfer of property from Stirling to Alvares was tainted by fraud. It is for that reason that none of them opposed the order sought by Stirling. Mr Du Plessis submitted that the registration of ownership due to fraud stood to be cancelled. I agree with this submission and will show in the analysis of the legal principles that our law is in support of his contention.

[30] Fairgrove in its counter-application, contends that it has suffered losses in the sum of R3 650 000 00 and R180 399 58 occasioned by payment of the purchase price to Alvares and transfer duty to South Africa Revenue Services respectively. Fairgrove contended that, had the Registrar properly applied herself when she examined the deeds for execution in the first fraudulent transfer purported to be Stirling to Alvares, she would have picked up many apparent errors on the documents in support of registration of the deed of transfer and would thus have rejected same. It was submitted by Mr Albertus that had the Registrar of Deeds used the tools available to her for registration of conveyancers, the register would have shown that Kekana was a transfer not a

conveyancer and that the deed of execution would have been rejected. Mr Albertus submitted that the Registrar of Deeds was grossly negligent and in breach of her statutory duty.

[31] It was furthermore contended on behalf of Stirling by Mr Albertus that Alvares, in all probabilities, was the fraudster who facilitated the transfer. The basis of the contention is that, he purportedly purchased the property from Phungula-Nkosi Properties for the purported purchase price of R2 790 000. He did not pay the full purchase price for the property and yet was able to obtain transfer of ownership which was in conflict with the purported deed of sale annexed to his papers. Alvares was also able to obtain a forged clearance certificate from the City of Johannesburg before the fraudulent transfer and registration of ownership was effected in his favour. That all the purported conveyancers, commissioner of oaths and the attorney did not exist in the records of the law Society of the Northern provinces. These were all fictitious persons, so Mr Albertus submitted.

[32] It was contended on behalf of the Registrar by Ms Moroka that the latter took reasonable steps in discharging her statutory duty and could not have been reasonably expected to pick up errors on the deeds as they were merely typos; that the Registrar, although she does keep the register of the conveyancers, she does not do the policing thereof. She furthermore argued that all reasonable measures had been put in place to ensure that the authorized allocated firm numbers and bar codes used by conveyancers to effect the transfer and registration of ownership, were not abused or did not fall in the wrong hands. In

support of her contention, the Registrar of Deeds annexed Registrar's circulars on the allocated numbers to her answering affidavit argued Ms Moroka. As a consequence, the steps taken by the Registrar of Deeds were in line with her duties.

[33] It was contended by Ms Adams on behalf of Alvares that he was just as well a victim of fraud and that Registrar of Deeds was responsible for the situation the Stirling and the Fairgrove found themselves in. As a consequence, argued Ms Adams, the Registrar should be held liable for all the losses and costs. I specifically asked Ms Adams whether she thought it would be in the interest of justice that Alvares should keep the R3 650 000,00 received from Fairgrove to which she could not proffer a proper response. She informed this court that Alvares had been sequestrated and that his estate was in the hands of the trustees.

[34] The issue to be determined is whether transfer from Stirling was tainted with fraud. The other issue is whether or not the Registrar of deeds failed to discharge her statutory duty by negligently failing to reject the first deed of transfer in favour of Alvares. Lastly, it must be determined whether Alvares has made a case in his consolidated application against Phungula-Nkosi Properties and John Nkosi.

LEGAL PRINCIPLES

[35] It is trite law that the requirements for the transfer are two-fold: delivery effected by registration of transfer in the Deeds Office and the existence of a "real

agreement the essential elements of which are an intention on the part of the transferor to transfer the property and an intention on the part of the transferee to acquire ownership of the property.¹

[36] If there is *"any defect in the real agreement, that is the lack of intention on the part of the transferor and the transferee to transfer and acquire ownership of the property respectively, then ownership will not pass despite registration"*.² I add that the true owner is entitled to vindication of his/her property.

[37] If the agreement is tainted by fraud or obtained by some other means that vitiates consent, ownership of the property will not pass despite registration³ in the Deeds Registry Office.

[38] The statutory duty of the Registrar of Deeds ("the Registrar") is regulated by Deeds Registries Act, 47 of 1937 and the Regulations promulgated in terms thereof and the Registrar's circular that she issues to conveyancers.

[39] The objective of the Act is to *"regulate comprehensively administrative matters of registration in an orderly, clear and practical fashion and to provide landowners with the greatest possible measure of protection"*. The Registrar therefore plays a pivotal and critical role in ensuring security of title to land in the Republic.

¹ See Legator McKenna Inc v Shea and Others 2010 (1) SA 35 (SCA).

² Per Nicholls J in Radebe v Sheriff for the District of Vereeniging [2014] ZAGPJHC 228 paragraph [20].

³ See Absa Bank Ltd v Moore & Another [2016] ZACC 34; Nedbank Ltd v Mendelow and Another NNO 2013 (6) SA 130 (SCA) paras [12]-[14].

[40] Subject to specific legislative exceptions, ownership of land may be conveyed from one person to another only by means of a deed of transfer executed and attested by the Registrar.⁴

[41] The Registrar is charged with the management of the Deeds Office in terms of section 3 of the Act. As a consequence, the Office of the Registrar is "vital for the proper administration of land in the Republic of South Africa".⁵

[42] The Registrar and those employed in the Office of the Registrar, are responsible for ensuring that all the legal requirements for registration and certain formal prerequisites in respect thereof, are heeded.

[43] The duties and functions of the Registrar are set in section 3 of the Act. Section 3(1)(b) of the Act provides that the Registrar must:

"examine all deeds or other documents submitted to him for execution or registration, and after examination reject any such deed or other document the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exists."

[44] Section 3(1)(y) obliges the Registrar to:

"keep, whether by means of a computer or in any other manner or by means of a computer and in any other manner, such registers containing such particulars as are necessary for the purposes of carrying out the provision of this Act or any other law and of maintaining an efficient system of registration calculated to afford security of title and ready reference to any registered deed."

⁴ Section 16 of the Act.

⁵ See Marnewick and Others v Shabalala and Others (A5030/13) [2014] ZAGPJHC 85 at paragraph [4].

[45] It is therefore clear that the Act confers upon the Registrar significant powers and responsibilities to ensure the proper administration of the land registration system in South Africa. The Registrar occupies an important oversight role that requires her and the officials in her employment to scrutinise the documents placed before them. The Registrar and her officials "*are not passive instruments who register every deed laid before them. Together with the conveyancers they examine every deed very carefully in order to avoid incorrect registration*".⁶ As stated herein-before It is clear that protection of land owners through security of title is a critical role played by the Registrar and her staff.

[46] One critical aspect of the process of deed execution is to thoroughly examine all deeds presented before the Registrar by her staff. In *Reeskens v Registrar of Deeds*⁷ the Court described the duty to examine all deeds submitted for execution or registration, have been described as "*very considerable and onerous*". This in my view is to ensure that all formal requirements are applied with. In so doing, the Registrar relies on the conveyancers.

[47] In *Muller NO and Others v Government of the Republic of South Africa*,⁸ the Court held that the Deeds Office should be "*a byword for punctilious accuracy and scrupulous care*". That is to say in discharging her examination of deeds the Registrar must act with acceptable and reasonable care.

[48] The Registrar and her officers and employees are liable for their negligent or mala fides acts or omissions. Section 99 of the Act provides as follows:

⁶ Joubert, *The Law of South Africa* Vol 27, para 231(d).

⁷ 1964 (4) SA 369 (N) at 371B.

⁸ 1980 (3) SA 970 (T) at 971G.

"No acts or omission of any registrar or of any officer employed in a deeds registry shall render the Government or such registrar or officer liable for damages sustained by any person in consequence of such act or omission: Provided that if such act or omission is mala fide or is such registrar or officer has not exercised reasonable care or diligence in carrying out his duties in connection with such act or omission, the Government shall be liable for damages aforesaid. Provided further that the registrar or officer guilty of such act or omission shall be liable to make good any loss or damage resulting therefrom to the Government if such act or omission was mala fide."

The section subjects the Registrar and Deeds Office staff to normal standards of reasonable care and diligence and imposes liability for deviating from those standards.

[49] Conveyancers fulfil a vital role under the Act in terms of section 15 of the Act. The section provides that the Registrar may not execute a deed of transfer if it has not been prepared by a conveyancer. Section 15 provides as follows:

"15. Preparation of deeds by conveyancer. Except in so far as may be otherwise provided in any other law, no deed of transfer, mortgage bond or certificate of title or any certificate or registration of whatever nature, mentioned in this Act, shall be attested, executed or registered by a registrar unless it has been prepared by a conveyancer."

It is clear that only persons who are by law registered as conveyancers are allowed by the Act to execute the deeds.

[50] The Act and Regulations require the conveyancer to sign a certificate:

50.1 known as a "*preparation certificate*";

50.2 with regard to every deed that he or she prepares.⁹

[51] With the signing of the preparation certificate, the conveyancer accepts responsibility for the accuracy of certain facts,¹⁰ including that:

51.1 all copies of deeds or documents are correct;

51.2 all conditions of title are correctly brought forward in a deed; and

51.3 to the best of the conveyancer's knowledge and belief after due enquiry has been made, a person's details are correctly reflected in a deed.

[52] The Registrar is required to accept, when examining a deed or document in terms of section 3(1)(b) of the Act, that the facts for which the conveyancer is signing the preparation certificate takes responsibility, have been conclusively proved for the purposes of such examination.

[53] I have seen from the Registrar's answering affidavit that while the Registrar may call for proof of these facts, proof will normally not be required of facts for which the conveyancer must accept responsibility unless the deed or document is obviously faulty. It is therefore understandable that the relationship between the Registrar and conveyancer is based on trust. That trust is premised on the fact that the conveyancer is indeed registered as such in terms of the law.

⁹ Regulation 43(1).

¹⁰ Regulation 44A.

[54] The Registrar stated that there are over 2300 conveyancers who make use of the registration system with Deeds registry in Pretoria. I have also heard from the Registrar that over 2000 deeds were registered a day facilitated by over 2000 firms registered to do business in Pretoria alone. During 2015/2016 financial year over 25169 per month deed were registered in Pretoria. The process involved about 50 conveyancers per day and the Registrar maintain that she is not able to put more measures than she has to prevent fraud.

[55] Regulation 16 provides as follows to ensure that the Registrar must be satisfied that the appearer for execution of a deed is a conveyancer:

"Each Registrar shall keep a register of conveyancers and a register of persons other than conveyancers, who are authorised by any other law to prepare a deed or other document for registration or filling in a deeds registry."

[56] As clearly intended by Regulation 16, the Registrar is required to keep a register of conveyancers to verify that those who sign preparation certificates and appear at the Deeds Office to execute deeds, are indeed conveyancers. The register of conveyancers contemplated by Regulation 16 is, without doubt, one of the registers containing such particulars as are necessary for the purposes of carrying out the provision of the Act that the Registrar is obliged to keep in terms of section 3(1)(y) of the Act.

[57] To give effect to proper controls, the Registrar issues circulars whenever necessary. In one such Registrar's Circular stated that its purpose was to implement proper controls to ensure that only authorised conveyancers practise

and execute deeds within the Deeds Office, the circular required firms with the registered lodgement numbers to confirm or submit, on a six-monthly basis, names of new conveyancers authorised by the firm to execute deeds lodged by the firm. The register therefore provides the Registrar with an up-to-date record of conveyancers that may appear before her. There has not been evidence provided to demonstrate how this register is actually monitored.

[58] Section 20 of the Act regulates the process of extension of the deed of transfer by the owner of property or a conveyancer authorised by a power of attorney to act on behalf of the owner. Section 20 makes the following provision on the form and manner of execution of deeds of transfer:

"Deeds of transfer shall be prepared in the forms prescribed by law or by regulation, and, save as in this Act or any other law provided or as ordered by the court, including a court with the necessary jurisdiction established in terms of the Magistrates' Courts Act, 1944 (Act 32 of 1944), in respect of deeds of transfer executed by the registrar, shall be executed in the presence of the registrar by the owner of the land described therein, or by a conveyancer authorized by power of attorney to act on behalf of the owner, and shall be attested by the registrar."

[59] Regulation 44 requires a power of attorney (as well as every other application required for the performance of an act of registration in the Deeds Registry, which would include the Regulation 68 Affidavit) to be prepared by an attorney, notary or conveyancer, who must sign a preparation certificate on the power of attorney or other document. If the power of attorney is prepared and certified by an attorney or notary, a conveyancer must confirm that the signatory is a practising attorney or notary and must countersign the preparation certificate.

[60] It is therefore without a doubt that strict formalities are imposed in respect of the content and execution of power of attorney to ensure that, where an owner of the property does not appear personally to the registrar to execute a deed, the person who does appear, is a conveyancer who is properly authorised to do so in terms of a compliant power of attorney. In addition to the strict formalities and procedures imposed by the Regulations, the Registrar's circulars do in fact support such strict formalities and procedures.

[61] A power of attorney may provide for the substitution of the person authorised to appear on behalf of the owner of the property.

[62] A special power of attorney to transfer and deal with land must, in terms of Regulation 65, contain the following information:

62.1 A clear and sufficient description of the land or property;

62.2 The registered number of such land;

62.3 The number of deed in terms of which such land or property is held;

62.4 The date of disposal of the land.

[63] Where a power of attorney provides for the substitution of the person authorised to appear on behalf of the owner (the appearer), the substitution,

carries the inherent risk that the person who appears may not in fact be properly authorised by the power of attorney.

[64] To address the risks occasioned by substitution, the Registrar's circular 8 of 2012 dealt with such potential risks and issued the following instructions:

64.1 the original power of attorney must provide for substitution;

64.2 only a person appointed in the original power of attorney may sign a deed of substitution;

64.3 a deed of substitution cannot be issued in general terms, that is the particular transaction must be identified.

[65] The first and second power of attorney in this case, provide for power of substitution. The person authorised to appear before the Registrar under the first power of attorney was William Roger Smith. However, the person who in fact appeared was Kekana. No deed of substitution was lodged authorising Kekana to appear. On this basis alone, the Registrar should have rejected the deed as the power of attorney lodged, was not in compliance with the Registrar's circular 8 of 2012.

[66] Regulation 29 requires that, in the description of immovable property in a deed, the extent thereof must be expressed in words and figures. In the first power of attorney and deed of transfer T55404/15, the description of the extent of

the property is incorrect as the words and figures do not correlate and the words are incorrect. The deed should have been rejected on this basis as well.

[67] Regulation 24 requires deeds to state the full names, identity numbers and dates of birth of natural persons. In terms of the Chief Registrar's Circular 1 of 1961, the deeds must be rejected where any one of the following objections have been raised:

67.1 the names of the parties are wrong in any respect;

67.2 where there are errors in the descriptions of the properties.

[68] Regulation 68 provides that if the deed is lost or destroyed and copy is required, an application for a copy must be accompanied by an affidavit stating that the deed has been lost or destroyed and setting forth, where possible, the circumstances it was lost or destroyed.

[69] When consideration is given to the deficiencies in respect of the transfer of the property to Alvares, it is without a doubt, clear that those deficiencies were significant and should have been identified by the Registrar in respect of the transfer to Alvares and the deed ought to have been rejected. This did not happen and I am of the view that the registrar failed to discharge the statutory duty in the reasonable and acceptable manner and negligent.

[70] It has been contended on behalf of the Registrar by Ms Moroka that all necessary steps have been taken to ensure that the identified risks are minimised and that the processes followed to get the deed examined in this case are reasonable. As a consequence, argued Ms Moroka, any damage suffered by the first respondent could not be attributed to the Registrar.

[71] Ms Moroka submitted furthermore that the Registrar is understaffed with only 11 (eleven) assistant registrars. It was confirmed to me by Ms Moroka that the process in the examination of a deed involves three staff members, namely a junior examiner, a senior examiner and a supervisor. None of the assistant registrars are involved. I have also seen from the Registrar's supplementary affidavit that the authorised number 1945 issued to MWIM had Segida as its appointed conveyancer. On the date of execution of the deed, he was not the appearer, but Kekana was. The registrar submitted that because Segida was in good standing as a conveyancer, her staff had no reason to suspect anything into words. I do not agree with explanation. Segida was not the appearer to execute of the deed. If the staff had monitored who the authorised use of firm 1945 was, they would have detected the unauthorised use of the number.

[72] Kekana is not a conveyancer or an attorney registered with the Law Society of the Northern Provinces. This was established by the second respondent after the fact as set out in her answering affidavit. The power of attorney stipulated Roger William Smith as the appearer. This person was not from MWIM and he was not Segida. Roger William Smith had not executed the deed of substitution to Kekana in compliance with the Registrar's circular. Segida,

who was the only authorised conveyancer of MWIM, had not executed the deed of substitution on the power of attorney. Whilst I have sympathy with the volume of deeds that the Registrar deals with daily, I do not accept the fact that so much went against implementation of the process she put in place on the substitution of conveyancers on the day of fraudulent transfer.

[73] Notwithstanding the fact that Kekana is not a conveyancer, he signed preparation certificates not one but three separate documents, which were required to be certified by a conveyancer, namely the first power of attorney, the Regulation 68 affidavit and Deed of Transfer T54404/15. He also appeared before the Registrar to execute Deed of Transfer T54404/15. Since Kekana was not a registered conveyancer, he was not authorised to sign any of the documents he signed or to appear before the Registrar. That called for the rejection of the deed and which the Registrar failed to do.

[74] The clearance certificate that was filed as part of the documents to execute the deed showed Alvares as the owner of the property before the property was transferred to him. That query ought to have been identified by the three examiners of the Registrar and for that reason the deed ought to have been rejected as Alvares was not yet the registered owner and the clearance certificate could not have been issued to him.

[75] The Registrar contended that she allocated individual numbers to firms that are authorized to appear before her and execute the deeds. The purpose of the number is to enable her office to use the number for billing purposes and

enables her to track which firm was making the application so that any errors or defects can be forwarded to the relevant firm.¹¹ In the case of the first power of attorney, the Regulation 68 affidavit and Deed of Transfer T54404/15, the number 1945 appeared. That number was allocated to MWIM Attorneys.

[76] As the Registrar fulfils a critical role in the property transfer process in the Republic and given the high expectation by the public that she will not only examine the deeds presented to her for examination, but monitor that those appearing before her to execute such deeds are indeed conveyancers authorized by the firms with authorized numbers allocated by the Registrar to those firms, it is critical that the Registrar and her staff ensure that the person who signed the preparation certificates and appeared to execute the deed of transfer was indeed a conveyancer. Ms Moroka further contended that the latter could be expected to "police" the register of conveyancers in her possession. I am not persuaded by that contention given the fact that not only was the deed of transfer littered with errors that should have caused its rejection, it was presented by Kekana who had prepared the preparation certificate and was himself not a conveyancer and was not authorized by MWIM as one of its conveyancers.

[77] The machinery of the Act, Regulations and the Registrar's circulars, as submitted by Mr Albertus are clearly designed to enable the Registrar easily to verify that those who purport to be conveyancers, are in fact conveyancers and this requires of the staff of the Registrar to maintain, monitor and check the register of the conveyancers provided for by Regulation 16. This is not policing of

¹¹ Second respondent's answering affidavit page 224-225 of the record and paragraphs 32-35.

the conveyancers, but simply doing the right thing to protect the property owners in the Republic and the funders who secure themselves through mortgage bonds, general notarial covering bonds required to be noted in the deeds and other forms of securities related to properties that should be noted in the deeds. The sheer volume of deeds executed on a monthly basis cannot, in my view, be used as an excuse for inadequate and inept monitoring of the deeds themselves through a three tier examination processes by the junior examiner, senior examiner and their supervisors. The diligence must, in my view, be exercised at all times.

[78] It is clear to me that the staff of the Registrar did not check if Kekana's name was on the register of conveyancers. They did not also properly examine the deed of transfer and the preparation certificate because if they had done so, they would have identified the numerous obvious errors there and rejected the deed or even investigate whether the preparer of the preparation certificate was a qualified conveyancer.

[79] The registration process by the Registrar has been dealt with quite extensively in her answering affidavit. I have not been able to establish from her evidence on the process regarding her obligation to satisfy herself that a person who purports to be a conveyancer on a deed presented for registration, is in fact a registered conveyancer. In my judgment, the register that is kept by the Registrar regarding the names of the conveyancers, as required by Regulation 16, is in fact kept for a reason and that is to verify and check that the appearer for deeds execution is in that register and the number of the firm he uses to execute

the deed is not only valid, but that such person is indeed authorized by the firm to appear on its behalf. This as already stated, is not "policing", but simply monitoring to guard against unauthorized persons who purport to be conveyancers when they are not.

[80] The register is not kept merely for "*record keeping*" as the Registrar contends. I agree with the submission by Mr Albertus that the Registrar failed to appreciate the significance and purpose of the register of conveyancers and that she has failed to use the register for its intended purpose of verification of the identity of conveyancers who certify documents and appear at the Deeds Office to execute deeds. I am therefore satisfied that the staff of the Registrar failed to discharge their duty of verifying that Kekana was indeed a conveyancer. They failed to note that he was not the authorised number 1945 of MWIM, they failed to note that Segida was the only authorised conveyancer from that firm. They failed to identify errors on the deed and were grossly negligent.

[81] Section 99 of the Act, subjects the Registrar and her staff to normal standards of reasonable care and diligence and imposes liability for deviating from those standards.¹² I have no doubt that the inefficiencies by the Registrar's staff in dealing with the transfer of the property in contention demonstrate that her staff failed to exercise reasonable care and diligence in processing the deed of the property of Stirling.

¹² See Carey Miller and Pope: Land Title in South Africa pp 65-66.

[82] In order to succeed with its claim, Fairgrove must show that the negligence of the Registrar was casually connected to its loss suffered. In *Siman & Co (Pty) Ltd v Barclays National Bank*,¹³ Corbett JA held as follows:

"Before respondent can be held liable for ... negligence ..., the Court must be satisfied that in giving such advice Muir acted unlawfully, ie in breach of a legal duty not to give incorrect advice to the appellant's representatives..... The next question is whether Muir's negligence and unlawful misstatement caused the loss suffered ..."

The court held that a factual causation had to be established and that factual causation *"generally results in the application of the so-called 'but-for'¹⁴ test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. This test is applied by asking whether but for the wrongful act or omission of the defendant in the event giving rise to the loss sustained by the plaintiff would have occurred"*.

[83] Again, in *International Shipping Co (Pty) Ltd v Bentley*¹⁵ Corbett CJ held as follows on the factual causation:

"In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and posing of the question as to what whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would have in any event have ensued, then the wrongful conduct was not the cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this may not to be a causa sine qua non of the loss suffered, then no liability can arise. On the other hand, demonstration that the wrongful act was a

¹³ 1984 (2) SA 888 (A) at 913G-H and 914C-D

¹⁴ *Ibid* page 914H.

¹⁵ 1990 (1) SA 680 (A).

causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is a juridical problem in the solution of which considerations of policy may play a part."

[84] The legal causation principle was also applied in *Minister of Police v Skosana*;¹⁶ *Standard Bank of SA Ltd v Coetsee*;¹⁷ *S v Daniels en Ander*;¹⁸ *S v Mokgethi*.¹⁹

[85] The legal causation is said to be an "*elastic criterion which focusses on whether or not a sufficiently close connection exists between the conduct and its factual consequence, and which emphasizes policy considerations and concepts such as reasonableness, fairness and justice*".²⁰

[86] The test outlined above, provides that a wrongdoer will be held liable only for those factual consequences of his or her conduct which were reasonably foreseeable. If this link cannot be established, then the claim should fail.

[87] It is common course that transfer of a property to Alvares was done fraudulently. The Registrar as the custodian of security of title to property breached her statutory duty to reject the deed. All the facts were before her to do so, but her staff negligently failed to stop it. The subsequent transfer from Alvares to Fairgrove was procedurally effected correctly and I have not been asked to make a finding on it. The first fraudulent transfer and registration to ownership to

¹⁶ 1977 (1) SA 31 (A) at 34E-35A.

¹⁷ 1981 (1) SA 1131 (A) at 1138H-1139C.

¹⁸ 1983 (3) SA 275 (A) at 331B-332A.

¹⁹ 1990 (1) SA 32 (A).

²⁰ See Van der Walt: Principles of Delict (4ed) 176.

Alvares was direct consequence of the negligence of the Registrar. The Registrar ought to have reasonably foreseen that losses were likely to be suffered as direct consequences of her negligence. I have considered the contention on behalf of the registrar that she should not be held liable for negligence. Ms Moroka referred me to some authorities in support of her arguments. The reasons and the facts in those cases are not, in my view, applicable in the present case. The submissions are therefore rejected.

[88] The burden of proof of damages lies with Fairgrove. It is trite law that the approach in the application on notice of motion must be decided where there is a conflict of fact on affidavits. Fairgrove in my view discharged that onus. It clearly provided proof of how the funds were paid from Investec to the representative of Alvares. Alvares has not denied receipt of the funds.

[89] I now deal with the conduct of Alvares in the present case. It has been submitted by Mr Albertus that Alvares, was directly implicit in the fraud. He premised his contention on the fact that all role players in the fraud were fictitious except Alvares himself. He argued that Alvares was able to get the property transferred to him before he paid the full price

[90] The accusation was denied by Alvares who claims that he was a victim of a fraud perpetrated by Phungula-Nkosi Properties and John Nkosi ("Nkosi"). Alvares launched an application against Phungula-Nkosi Properties and Mr Nkosi. It was submitted on behalf of Fairgrove by Mr Albertus that this application by Alvares was *"nothing but a ruse and a stratagem on the part of Alvares to*

*create false impression that he was a victim of a scam*²¹. Mr Albertus submitted that the reason the purchase price by Fairgrove was understated to R2 790 000 was to defraud SARS of its transfer duty. I agree with this submission as no explanation was offered by Alvares.

[91] Ms Adams, appearing for the Alvares argued that the Registrar was to blame for allowing the scam to continue. She informed this Court that her client, had been sequestrated by a creditor and that his estate was in the hands of a trustee. She was asked whether she considered it fair that the third respondent should be allowed to keep the R3 650 000 paid to him by the Fairgrove for the property and she conceded that it was not proper.

[92] Alvares was clearly instrumental in the process of transfer of the property to himself. He was able to procure the clearance certificate from the City of Johannesburg which certificate was issued in his name long before the bogus registration of transfer of ownership of the property was effected in his name. This in my view could only have been possible, presumed, because he was likely to have been in charge and control of the process. The estate agent, if it existed, had to interfere in fast tracking transfer before full payments was done for the property.

[93] Alvares, the third respondent, in terms of the bogus deed of sale between himself and Mr Stirling, was still able to get the transfer of ownership registered to him before he paid in full the bogus purchase price of R2 790 000. He admitted

²¹ See page 90 of heads of argument for Fairgrove.

that payments were made at the tranches of R300 000 in cash but provided no proof of the source of funding and the bank account in which payments were purportedly made. His version is highly unlikely from his affidavits.

[94] In his claim against Phungula-Nkosi Properties and John Nkosi, Alvares has failed dismally to make out a case. He avers that he concluded an agreement following the Offer to Purchase which he signed with Phungula- Nkosi Properties and John Nkosi.

[95] He fails to allege and demonstrate that he either paid the four instalments of R300 000, 00 each as provided for in the Schedule attached to the Offer to Purchase. He provides no proof on how and when were these payments made and fails to demonstrate by providing proof that the balance of the purchase price was paid and when and how it was paid. He therefore fails to make averments which establish a *prima facie* case and require to be rebutted by Phungula-Nkosi Properties and John Nkosi.

[96] Strange as his case is, he still managed to have transfer and registration of the full title of ownership to the property to himself. His claim against Phungula-Nkosi and John Nkosi fails to pass the test of establishing a *prima facie* case.

[97] His counsel was not able to provide answer from the bar as to how it came about that transfer and registration of ownership was effected without proof of payment of the full purchase price of R2 790 000 (two million seven hundred and ninety thousand rand). The Offer to Purchase and the Schedule attached to it

offered no assistance as to when transfer to Alvares had to take place. I am of the view therefore that this Offer to Purchase was a lie and that it never existed in reality.

[98] The application by Alvares on its own, cannot pass the test of making out a prima facie case unopposed as it is against the respondents stated there in.

ORDER

[99] The following order is made:

99.1 The applicant, Felicity Audrey Stirling, is hereby declared as the lawful and rightful owner of Erf 85 Hurlingham Township and is entitled to the sole possession and occupation thereof.

99.2 The second respondent, the Registrar of Deeds, Pretoria is hereby ordered to cancel the duplicate title deed issued by her under number VA 04559/15 in respect of Erf 85 Hurlingham Township.

99.3 The second respondent is hereby ordered to cancel and remove from her records the Deed of Transfer number T54404/2015 issued by her on 18 June 2015 in respect of Erf 85 Hurlingham Township.

99.4 The second respondent is ordered to cancel and remove from his records the Deed of Transfer under number T83956/2015 issued by

the second respondent on 28 September 2015 in respect of Erf 85 Hurlingham Township.

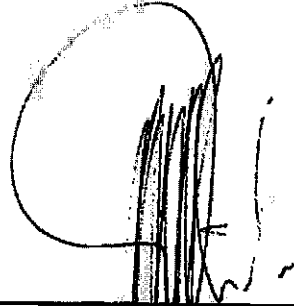
- 99.5 No costs order in the main application due to non-opposition.
- 99.6 With respect to the counterclaim by the first respondent, Fairgrove, the second and third respondents are directed to pay to the first respondent, jointly and severally, the one paying the other to be absolved, the sum of R3 830 397,58 (three million eight hundred and thirty thousand three hundred and ninety seven rand and fifty eight cents) together with interest on the aforesaid sum, calculated at the rate prescribed by law on the sum of R3 650 000,00 (three million six hundred and fifty thousand rand) as from 28 September 2015, and on the sum of R180 397,58 (one hundred and eighty thousand three hundred and ninety seven rand and fifty eight cents) as from 8 September 2015, until settlement of the entire aforesaid sum with interest thereon.
- 99.7 The Public Prosecutor is directed in terms of section 6(4)(a)(i) of the Public Protector Act 23 of 1994 to investigate the circumstances under which Erf 85 Hurlingham Township was transferred by the Registrar of Deeds, Pretoria to the third respondent, Jose Luis Crujela Alvares, with a view to determining whether any criminal acts were committed during the transfer procedures and whether

similar such acts was/were committed in respect of other transactions involving Alvares and/or

99.8 The relevant service centre of the South African Police Service is hereby directed to investigate the circumstances under which Erf 85 Hurlingham Township owned by the applicant, was transferred by the Registrar of Deeds, Pretoria to the third respondent, Jose Luis Crujela Alvares with the view to determining whether any criminal act/s was/were committed during the transfer procedures, and further whether similar such act/s was/were committed of other transactions involving Alvares, and/or any other party.

99.9 The costs of the counter-application are to be paid jointly and severally the one paying, the other to be absolved, by the second and third respondents and that such costs shall include the costs of two counsel.

99.10. With respect to the consolidated counter-application by the third respondent, Alvares against Phungula-Nkosi Properties and John Nkosi under case number 07944/2016, the unopposed claim is dismissed. No order as to costs is made.



M SENYATSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 07 AUGUST 2017

DATE OF JUDGMENT:

COUNSEL FOR THE APPLICANT: LM du PLESSIS

INSTRUCTED BY: STRAUSS SCHER INC

COUNSEL FOR THE FIRST RESPONDENT: T ALBERTUS SC

COUNSEL FOR THE SECOND RESPONDENT: KD MOROKA SC

COUNSEL FOR THE SECOND RESPONDENT: F RAWAT

COUNSEL FOR THE THIRD RESPONDENT: K van ZYL

INSTRUCTED BY: AV DAWSON 7 CO; FOR THE FIRST RESPONDENT

THE STATE ATTORNEY FOR THE SECOND RESPONDENT KHOZA

ATTORNEYS FOR THE THIRD RESPONDENT