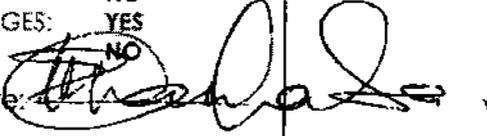




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, NO JOHANNESBURG

REPORTABLE:	NO
OF INTEREST TO OTHER JUDGES:	YES
REVISED:	NO
Date: 20/12/2021	Signature: 

CASE NO: 20/9529

In the matter between:

AMEDEE OMER RENE ARCENS

Applicant

and

FIDELE NTSISS AND OTHERS

First Respondent

THE REGISTRAR OF DEEDS

Second Respondent

Coram: MACHABA AJ
Heard on: 25 AUGUST 2021
Delivered: 20 DECEMBER 2021

Summary: *Rei vindicatio and filing of affidavits out of acceptable sequence. Rules and requirements thereof. Applicant's counter-application in a main application, without withdrawing the main application. Permissibility and desirability thereof.*

Practice: *The Applicant provided the bare minimum facts in support of the main application. Upon the First Respondent filing his answering papers and a counter application, the Applicant ditched the main application and launched a so-called counter-application and now sought to make a new case. Applicant did not withdraw his main application. Applicant did not support his so-called counter application with a notice of motion.*

Practice: *In rei vindicatio cases where the purchaser of a property is aware of the dispute between the parties and proceeds to acquire the said property, his ownership thereof is wobbly and susceptible to being reversed to the previous owner. The First Respondent obtained a provisional sentence order against the Applicant. The Applicant was then evicted from that property. Applicant filed leave to appeal which was dismissed for being late. Five months later he successfully petitioned the Supreme Court of Appeal for leave to appeal. On the hearing of the appeal, the parties reached a settlement agreement which, inter alia, sets aside the provisional sentence order, the sale in execution of the property. In between the dismissal of his leave to appeal and petition, the First Respondent had caused the property to be sold in execution, competed in an auction and purchased to property. It had also been registered in his name.*

Practice: *As a result of the five months delay in petitioning the SCA, the First Respondent contended that he is the owner of the property and rei vindicatio is no longer available to the Applicant. The Applicant contends, on the other hand, that he had made the First Respondent aware of the difficulties he had in petitioning the SCA. These were not argued in court. Accordingly, the First Respondent's ownership of the property is tainted and the property must be retransferred to him.*

Held: *In view of all the facts of this case, the Court is not satisfied that the Applicant was permitted by the rules of Court to file the affidavits he filed out of sequence without the court's leave. Court is not satisfied that the Applicant could abandon the main application mid-stream and commence a counter application in his own main application. That indicated that he*

was aware that he has not made out a case in the main application and sought to do so in the new so-called counter-application. Even then he now sought to pursue a new case not made out in the main application.

Held: *On the above bases, the main and counter application fall to be dismissed.*

Held: *On the analysis of abstract theory and application thereof on the facts in casu, there is no evidence that the First Respondent was alerted to the Applicant's difficulties when he could not timeously petition the SCA that he intended to proceed with his litigation. In that five (5) months gap, the First Respondent could not be expected to know that the Applicant was still intent on petitioning the SCA. The First Respondent waited for the normal 15 days after the dismissal of the Applicant's leave to appeal before he purchased the property at the auction and registering it into his name. The First Respondent was found to have been a bona fide purchaser of the property at the auction, to register same in his name, and is entitled to sell the property. The said underlying transactions are valid and lawful.*

ORDER

1. The Applicant's application and so-called counter-application are dismissed;
2. The First Respondent's counter application succeeds and is here by granted;
3. In particular, the Court declares that the First Respondent is a *bona fide* purchaser of the property, and that he is entitled to sell the said property;
4. The Applicant is ordered to pay the costs of this application; and
5. Mrs Mageza Attorneys is liable to pay the costs of the failed application for postponement of this application.

JUDGMENT

MACHABA AJ

*"[1] It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs."*¹

INTRODUCTION

- [1] Every now and again, there will be those litigants who seek by their founding actions to test waters by providing minimum bare facts and assess whether or not the other side will oppose their initiatives. Once that is done, the said applicants will recant and try to make their cases in reply to complete the picture, or as the Applicant did in this case, take an incredibly odd step of leaving out a replying affidavit completely and instead file a counter-application in his own live main application. The First Respondent who filed an answering affidavit to a flimsy founding affidavit is now forced to file another affidavit in answer to the strange counter-application to which the Applicant will then file a replying affidavit. This strange and distortions of the sequence and number of affidavits that ought to be filed in Court in terms of the Uniform Rules of Court results in an unmanageable application, clutter of facts and paper, and a copious number of repeated facts. It is a legal nightmare.
- [2] As we all know, it is trite law that the applicant must make his or her case in a founding affidavit and not in a replying affidavit.

¹ Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others [2021] ZACC 18.

- [3] The Applicant in this case has always been aware of this trite principle. Notwithstanding this knowledge, he proceeded to gamble with his case in the manner set out above. The results played themselves in the facts of this application to which this Court advert to.

FACTS AND BACKGROUND

- [4] In this application, the Applicant instituted an application against the First Respondent seeking that an immovable property described as Erf 2157 Bryanston, Registration Division I R, in the Province of Gauteng, measuring 3788 square meters held by Deed of Transfer T56817.2011 (hereinafter to be referred to as "the property") which is currently registered in the name of the First Respondent be transferred back to his name. He also seeks that First Respondent be compelled to do whatever is necessary to have the property be registered in his name within ninety (90) days. Failing which the sheriff of this Court should be ordered to effect the said transfer. I hasten to note that the Sheriff was not cited and served with these papers.
- [5] The matter has a history that really is chequered and messy, so to speak, in that it is an old dispute revolving around the same residential property. I seek to unpack this history, which will lead to the order of this Court.
- [6] On 28 July 2015 a provisional sentence judgment/order, launched by the First Respondent, was granted against the Applicant. This resulted from an Acknowledgment of Debt that the Applicant was found by a Court to have executed in favour of the First Respondent. I shall name this "the first order."
- [7] After the provisional sentence judgment/order, the Applicant appealed against the first order. The court *a quo* refused him with the said leave to appeal. After five (5) months of silence, the Applicant successfully petitioned the Supreme Court of Appeal (hereinafter "the SCA") for a leave to appeal which directed the Full Bench to hear the appeal. It appears that during the hearing of the said appeal on 9 March 2020 but before the appeal Court could hand down its judgment, the parties reached some sort of settlement order which resulted in an order that the first order and some other inter-linked judgments/orders that had

been handed down as against the parties, be set aside, and the auction where the property was sold and its processes be set aside. I mention the auction because in the afore-mentioned five (5) months that the Applicant took to petition the SCA, the First Respondent had in the meantime caused the property to be specially executable and sold in an auction (of 13 December 2016) in satisfaction of the first order. He purchased the property at that auction and the property was subsequently registered in his name on 27 January 2017. I shall call this the "reversal order".

[8] During 7 May 2018, the First Respondent successfully evicted the Applicant from the property.

[9] The exact mechanism of the reversal order was that:

9.1. the order of Burochowitz J dated 26 April 2016 was set aside;

9.2. the order of Mahalelo J dated 28 July 2015 was rescinded;

9.3. the execution application was dismissed, and

9.4. the warrant of execution dated 27 August 2015 and the execution order of Burochowitz J above were null and void.

[10] The effect of the above Draft Order was that the Applicant was to enter his defence in the provisions sentence proceedings launched on 30 June 2015.

[11] As stated and in the meantime, the First Respondent had caused the property to be sold at an auction and through his representatives in South Africa – Johannesburg, purchased the said property and same was eventually registered in his name.

[12] The parties now seem to be fighting about whether the reversal order could also include or extend to the re-registration of the property in the Applicant's name. In other words, the question is whether because of the reversal order, the registration of the property falls to be undone and the property be re-transferred back to the Applicant's name. The Applicant believes that the reversal order

“unscrambled the egg” – so to speak meaning that he still retained ownership of the property and that there ought to be an automatic retransfer of the property back to him. The First Respondent denies this and argues that the reversal order could not be interpreted to undo the registration of the property in his name.

[13] The above dispute gave birth to the current proceedings.

[14] This was the sum total of the Applicant's case.

[15] The First Respondent denies this contention. In his answering affidavit, he submits that he lives in Gabon and that he is currently the owner of the property.

[16] He contends that in 2009 – 2011 he paid money to the Applicant. It appears that the two men intended to purchase the property jointly for purpose of running a guest house. In breach of this agreement, the Applicant received the First Respondent's money, acquired the property but registered same in his name alone.

[17] Discontent with this, the First Respondent commenced Provisional Sentence proceedings which the Applicant failed, despite notice, to oppose in Court. The Order was made final. Then on 15 October 2015, he then instituted proceedings to have the property declared executable to satisfy the Provisional Sentence Order.

[18] On 11 November 2015, the Applicant applied for the rescission of the Provisional Sentence Order. He used that application as a defence to the First Respondent's application to have the property declared executable. Despite he being the applicant therein, it appears that on 8 April 2016, he was compelled by the Court to file his heads of argument. On the same date, his attorneys withdrew as his attorneys of record.

[19] As a result of the above, and on the hearing date, the Applicant appeared without an attorney. He used this lack of representation as a reason to ask that the matter be postponed. From the narration of the sequence of events, the First Respondent must have argued that the above incidences were evidence of delay

tactics employee by the Applicant because the application for postponement was refused and a Provisional Sentence Order was entered against the Applicant.

- [20] The Applicant sought to appeal the Provisional Sentence Order. That process was heard on 27 September 2016 and dismissed because he was late.
- [21] Five (5) months later and on 2 March 2017, the Applicant launched a petition to the SCA for leave to appeal to the Full Bench of this division. On 16 July 2017 the SCA granted the Applicant leave to appeal. It is at this hearing that the parties reached a settlement that resulted in the reversal order.
- [22] In between the process, and given the fact that the Applicant took five (5) months before petitioning the SCA, the First Respondent had by then completed the execution, acquisition and registration of the property in his name. The First Respondent submits that he had to wait the normal period (which is 15 days) after the appeal was dismissed for the Applicant to petition a further superior Court before he could proceed with the sale in execution and registration of the property in his name.
- [23] The First Respondent submits that after the lapse of the said period (the normal fifteen (15) days after a dismissal of one's application for leave to appeal), he did not know that the Applicant still intended to take his matter further. He states that notice of auction was given to the Applicant in November 2016 and the auction was held in December 2016. Registration of the property took place in January 2017.
- [24] The First Respondent submits that reversal order did not unscramble anything. If anything, it simply meant that the Applicant was allowed to oppose the initial Provisional Sentence action. He contends further that he is a *bona fide* purchaser of the property when same was sold at an auction, and he did so in order to satisfy a debt. Also, as stated, he contends that he was not aware that the Applicant intended to proceed with his litigation relating to the AOD and now involving the property. He argues that he held reasonable belief that the Applicant had finalised his litigation proceedings.

- [25] In a counter application, the First Respondent stated that he had a potential buyer of the property and wished to sell same. He fears that the Applicant might interdict the said sale.
- [26] First Respondent further claims that the Applicant has or would have a potential claim in monetary form should he be successful in his quest to have the entire processes set aside. He states that he has the means to meet the said claim should it arise. He argues that he lives in Gabon and cannot keep the property forever when it is not being looked after.
- [27] In a fit of rarity, the Applicant filed a document styled: "*Answering Affidavit to the First Respondent's Counter-Application and Founding Affidavit to the Second Counter-Application*". He failed or neglected to file a replying affidavit to numerous material disputes that the First Respondent raised in his Answering Affidavit but instead elected to file the aforesaid document and proceeded to deal therewith in that strange manner.
- [28] In the first part, which appears to be a founding affidavit to his counter-application, the Applicant presents the history of the matter, various stages and applications, and in the process, completely changed his case contending, by and large, that the First Respondent was not a bona fide purchaser of the property. He presented similar cases as the First Respondent did in his answering affidavit and sort of answers those. In it he contends, for the first time, that he is entitled to the return of the property, or in the alternative, he is entitled to the payment of an amount of R10.5 million being the market value of the property.
- [29] In the second part which he places under the heading "Response to the counter application" he then deals, ad seriatim, with the allegations made by the First Respondent in the counter-application before he concluded. This means that a large part of the document was his founding affidavit in his so-called counter-application which in effect is a changed application to the main application. Is this permissible though?

- [30] In the said answer to the counter-application, the Applicant continues to argue that the Provisional Sentence Order was rescinded and the execution order declared null and void. He says the underlying *causa* for the attachment, sale in execution and the sale of the property has fallen away. The Applicant contends that the fact that his time to petition was over did not mean that he had given up the right. He contended further he needed funds for his litigation and the First Respondent was aware of this.
- [31] The Applicant accepts that the law protects a *bona fide* purchaser. He however accuses the First Respondent of not being an innocent (*bona fide*) buyer because the latter was a judgment-creditor imbedded in the dispute between the parties. He contends that the First Respondent took a risk in purchasing that property. Well, he may have taken a risk, but was it a risk that the Applicant refers to. I do not think so.
- [32] If the Court finds, on the facts of this case, that the First Respondent was not a *bona fide* purchaser of the property, then the Applicant's claim must prevail. The corollary must be true for the First Respondent.
- [33] The Applicant argues that his *rei vindicatio* claim would not depend on whether the First Respondent would have received his title to the property in *fraudulem*.
- [34] The Applicant further sought to blame the First Respondent for lack of notification of the auction, and the processes of how the sale and registration of the property unfolded. He contends, in the alternative, that the Sheriff did not have the authority to transfer the property to the First Respondent. Further alternatively, the ownership did not pass to the First Respondent. In light of the findings I make herein, these contentions have no bases, and are not supported by anything in the record. Furthermore, given the Applicant's failure to reply to the First Respondent's Answering Affidavit in the main application, this Court finds that those criticisms are without merits. The Court cannot find that these criticisms are serious and/or valid.
- [35] The Applicant argued that the fact that the First Respondent purchased a property worth R10,5 million for R7,5 million demonstrated that the First

Respondent was *mala fide*. This is hard to understand as auction prices are usually determined at the fall of the auctioneer's hammer and after a competitive bidding process.

[36] The Applicant further disclosed to Court that the First Respondent applied for his eviction whilst the leave to appeal to the Full Bench was pending. I shall assume in his favour that all the facts of this matter and alluded to above must have been placed before my brother Makume J who, after argument and notwithstanding the Applicant's contentions, found that the First Respondent had made out a case for the eviction of the Applicant.

[37] The Applicant contended in conclusion that he is entitled to payment of R10.5 million which he argues is the market value of the property as at December 2020, alternatively, the market value determined by an independent valuator. He denied that he owes the First Respondent any money.

[38] To all the above, the First Respondent was also forced to file a certain document called a Reply to Counter-Application and Answer to Applicant's Counter-Application. In it, he confirms that he is a *bona fide* purchaser and that Makume J was entitled to rule as he did in the eviction application.

[39] The First Respondent then disclosed that, in fact, the Applicant had previously attempted to launch an application to set aside the sale in execution of the property but that the said application was never persisted with when he opposed same. If this be true, this would indeed be troubling.

[40] The First Respondent states that the second counter-application by the Applicant is nothing but an attempt by the Applicant to place material before Court that he should have placed in the Founding Affidavit. He denies that the Applicant is entitled to bring a counter-application. It could in fact be that this counter-application is a disguised replying affidavit or a cover up for his defective Founding Affidavit. This Court agrees with the First Respondent that the Applicant could not simply bring such an application while his other application remained live on the roll. In fact, as the First Respondent argues, the said

counter-application is a new application and the Applicant should have withdrawn his old application. This Court agrees with this contention too.

[41] The First Respondent is also correct that the Applicant's counter-application was not supported by a notice of motion. Other than that, the only thing the Applicant could possibly do to perfect the metamorphosis of his main application was to apply to file a supplementary affidavit with an amended notice of motion. He would, however, have had to make out a case for such an application.

[42] This is a comedy of affidavits that this Court referred to above.

[43] The First Respondent argues that the property is now in his name and he is the owner thereof. Accordingly, so goes his argument, *rei vindicatio* is not available to the Applicant. The First Respondent challenged the Applicant to prove that he was *mala fide*. I suppose the First Respondent's argument would hold water if there is a finding by this Court of whether or not the sale and registration of the property was *bona fide*.

[44] Just like this Court did, the First Respondent complained that the Court is now faced with shambled set of affidavits and no one other than the Applicant can make a sense of all of those. The Court takes note of the fact that the Applicant has, as a matter of fact, neglected or failed to file a replying affidavit to the First Respondent's answering affidavit in the main application. Instead, an unknown creature known as a second counter application surfaced.

[45] Expectedly, the First Respondent complains that he is prejudiced by the fact that it is difficult to disentangle the facts in order to reply to the answering affidavit of the counter-application he brought. He complains that he now has to deal with multitudes of facts in the so-called second counter-application. It is correct, as the First Respondent contends, that the case he has been called to meet in the Founding Affidavit has now mutated. He complains that the Applicant did all these without any amendment, or Supplementary Affidavit to his main application, but through some impermissible machinations of the Applicant seeking to hide the defective nature of his Founding Affidavit and amending his case through the back door. This Court pointed out in the opening paragraphs of

this judgment that the consequences of that impermissible machinations would manifest themselves later in the day. Indeed, here they are.

[46] The First Respondent contends that the Applicant cannot claim to be owed any money based on an independent market value of the property. He contends that there are dispute of facts there about and this Court cannot decide this issue on the papers. In fact, the First Respondent denies that the property is worth the R10.5 million contended for by the Applicant.

[47] The First Respondent further denies that the Provisional Sentence Order was wrongly sought and granted and he contends that the Draft Order in the appeal Court did not provide so. He also submits that Applicant's attack on the auction processes has nothing to do with him and such are misdirected. He could only explain why in his view the property was registered in his name in the short time that it took. He explains that because it is a cash sale, the registration would progress much quicker than a normal loan sale. He further contends that the fact that he purchased the property for a low price is irrelevant for purposes of determining whether or not he was a *bona fide* purchaser.

[48] The Applicant, in a further set of affidavit, contends that the appeal order was like a rear-view mirror of a vehicle and it looks back and undoes everything that has been done. He says the appeal Court declared all the prior processes null and void and thus covers even the re-transfer of the property from the First Respondent to the Applicant. His counsel argued further that the First Respondent always knew of the fact that his ownership of the property was wobbly. This, of course, is denied by the First Respondent who argued that the appeal Court's Order was crafted as a result of a settlement agreement between the parties and could not be stretched to cover the re-transfer of the property.

[49] The Applicant's counsel correctly conceded that the affidavits filed, particularly his client were not a model for clarity. This is amid a query whether or not the Applicant filed a replying affidavit wherein the issue of *rei vindicatio* was raised for the first time. In answer, the said counsel conceded that there was none. He argued that the filing of the said affidavit was discretionary and that the only consideration was whether or not a case has been made out. He argued that one

does not need to use the word "*rei vindicatio*" where a case therefor has been made out in the papers. This Court is inclined to agree with this submission. It would not agree to be bogged down by terminologies instead of substance. Having agreed therewith, the fundamental question that remains herein is whether or not the Applicant has, as a matter of fact, made out a case for the relief sought in his main Notice of Motion.

[50] Furthermore, the Applicant's counsel conceded that there was a five (5) months delay before the Applicant petitioned the SCA, and he correctly submitted that that delay could not be wished away. He however argued that this Court may express its displeasure therefor with an appropriate order of costs.

[51] The First Respondent's counsel correctly acceded to the fact that there is no need to utter the words "*rei vindicatio*" if one has made out such a case in his or her papers. He argues that however, one needs to satisfy the elements thereof. This must be common cause.

[52] The First Respondent contends that there is nowhere in the Applicant's affidavit where he argues that he was entitled to ownership of the property. He contends that the said case was only arose in the replying affidavit (he actually means the founding affidavit in his counter-application). He argues that the application he was called to meet was not that of *rei vindicatio*. The reply (or affidavit) to which this new case is made is not even accompanied by a Notice of Motion. He persists that the said affidavit, is replete with new material that should have been included in the founding affidavit. He complains that the prejudice is inevitable because there is no explanation why those were not in the founding papers. He contends that this is impermissible and that the said application must be dismissed on this ground alone.

[53] The First Respondent further contends that the principle of *res judicata* prevents this Court from differing with my Brother Makume J when the correctness of his judgment has not been appealed against. In any event, he continues, the Applicant has failed to state which facts from the said judgment supported the finding that the auction sale was flawed.

- [54] In fact, so the First Respondent contends, when Makume J ordered the eviction of the Applicant from the property, the Applicant unsuccessfully sought to appeal the said judgment, and the SCA dismissed his petition against the said judgment. This Court, he argued, cannot now differ with Makume J's Order.
- [55] Furthermore, the First Respondent submits that on 3 May 2017, the Applicant sought to set aside the sale and transfer of the same property and the said application dissipated into thin air as soon as he instructed his attorneys to oppose same. The said application has never been withdrawn. Accordingly, the present application raises issues of *lis pendens*. From a simple perusal of the papers, this contention seems to be supported. If indeed, it is correct, and there is no counter thereto, it would indeed constitute a further ground for the dismissal of the Applicant's claim.
- [56] The First Respondent argues further that he could not wait forever for the Applicant to institute appeals and petitions. He is now the owner of the property, and he now faces a risk of the Applicant interdicting the sale thereof to further purchasers.
- [57] The First Respondent then wrapped up his argument by contending that in the event that this Court makes a declaratory that he is a *bona fide* purchaser, then there would be a need to also make the second order that he is entitled to sell the property. But if the Court finds that he is entitled to sell the property, then Court does not need to order the declaratory relief sought i.e. that he is a *bona fide* purchaser.
- [58] In reply, the Applicant contends that in granting him a petition for leave to appeal, the SCA condoned the five (5) month delay that was complained of. This is correct. The issue does not need to detain us here. What the Applicant appears to be missing is that the SCA directed the matter to be heard by the Full Bench of this Division and at which the parties concluded the settlement agreement *cum* reversal order. Furthermore, in between that delay, certain legally valid transactions took place. Can those be undone?

- [59] The Applicant asks this Court to interpret what the said reversal agreement means. To him it means that the parties agreed as if nothing had happened. The Applicant relies on a case of *Gibson v Iscor* at para 28 thereof and contends that the First Respondent agreed to the above reversal order because he was aware that his sale and transfer of the property was wobbly. He argues that any order that declared the First Respondent to be a *bona fide* purchaser was, by agreement, set aside.
- [60] On *lis pendens*, the Applicant argued that that is not an absolute bar. This Court can, notwithstanding the fact that there is a similar case, which has not been withdrawn, decide that the *lis pendence* is not an absolute bar to these proceedings. This was contention was not supported by any reference to the authorities. I shall also not deal therewith much.
- [61] Now, during the hearing of the matter, some strange application surfaced which should not have detained this judgment all but which must be referred to. The said application was for postponement by an erstwhile attorney of the Applicant Mrs Mageza Attorneys. For convenience purposes only, I shall refer to this attorney as the "old attorney(s)".
- [62] This side show application appears to be based on a clash of mandates between the Applicant's old and new attorneys, and a possible breach of an agreement pertaining to fees between the Applicant and this attorney.
- [63] Mrs Mageza Attorneys, the papers reveal, applied successfully to be joined in the matter. Despite being joined, this attorney neglected to file his heads of argument in this matter. An application was brought and granted by Fisher J to file its Heads of Argument. The said Order was made over six (6) months ago. To date, the said attorney has not done so. Instead, and when this application was about to be heard, it filed an application for the postponement of the entire matter and by that, I mean the dispute between the Applicant and the First Respondent. This matter has nothing to do with him.
- [64] The Applicant's current attorneys argue that Mrs Mageza Attorneys has always known of the hearing date of this matter and should have long applied for

postponement thereof. They argue that the said attorney's purpose with his belated application for postponement was to disrupt these proceedings.

[65] The Applicant informed this Court that Mrs Mageza Attorneys had previously launched a rule 30 application against the Applicant's new attorneys pertaining to a notice of withdrawal or removal of Mrs Mageza Attorneys as the Applicant's attorneys of record. It appears that Mrs Mageza Attorneys was unceremoniously removed from the matter. The old attorney now seeks to unseat this new appointment and to obtain some relief relating to the fee agreement he concluded with the Applicant whom he refers to as a liar in some of the affidavits failed of record.

[66] Mrs Mageza's application for postponement of this hearing was opposed by both parties.

[67] On the hearing of the matter, Mrs Mageza Attorneys did not appear before Court and offered no reason for its non-appearance. This conduct was discourteous, disturbing and disrespectful of this Court. There being no appearance to move the said application, the Court considered the papers and the arguments presented by the litigants herein against the said application and dismissed same with costs. Later and by email, Mr Mageza sought to proffer some reasons why his firm was not represented.

[68] The Applicant sought costs of the said application at a punitive scale. Using its discretion, this Court will keep the costs as between party and party. Mrs Mageza Attorneys was, in any event, not warned of the need for punitive costs.

[69] I now turn to the law.

THE LEGAL FRAMEWORK AND EVALUATION:

[70] This case deals, in part and essentially, with an impermissible filing of affidavits. The Applicant has initially brought an application for the re-transfer of the property in to his name and provided this Court with the barest minimum facts in support thereof. When the First Respondent filed his comprehensive affidavit

opposing the relief sought by the Applicant including launching a counter-application, the latter, realising the defective nature of his application and being acutely aware of the fact that he cannot make out his case in the Replying Affidavit, executed a very strange and impermissible step. Instead of filing a Replying Affidavit and deal, as best as he could, with the Answering Affidavit and the Founding Application in the first counter-application, he launched a second counter-application seeking a relief different from the one he sought in his main application. It is not clear whether the said Founding Affidavit was a replying or an answer to the first counter application.

[71] The said second counter-application raised new issues that the First Respondent complained about and resulted in the papers filed of record being in a state of chaos. It is not even supported by a Notice of Motion to set out what relief the Applicant seeks from this Court.

[72] The reason this Court finds this conduct by the Applicant impermissible is because of some known trite principles. The principles applicable in instances where a party seeks leave to file further affidavits or to supplement original affidavits can be said to be trite.

[73] The starting point is that as a rule, three (3) sets of affidavits in motion proceedings are allowed, namely: founding/supporting affidavits, answering affidavits, and replying affidavits.

[74] There are normally three (3) sets of affidavits in motion proceedings. The Court exercises its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. However, a party cannot take it upon herself/himself to simply file further affidavits without having obtained the leave of the Court to do so. It has been held that where further affidavits are filed without leave of the Court, the Court can regard such affidavits as *pro non scripto*.

[75] While the general rules regarding the number of sets and proper sequence of affidavits should ordinarily be observed, some flexibility must necessarily also be permitted. ***It is only in exceptional circumstances that a fourth set of***

affidavits will be received. Special circumstances may exist where something unexpected or new emerged from the applicant's replying affidavit.² [Emphasis added]

[76] It is further trite that an applicant must stand or fall by his/her founding affidavit.³ In the founding affidavit, it is thus expected of the applicant to accordingly disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet.⁴ Thus, the filing of further affidavits in motion proceedings **is permitted only with the indulgence of the Court**, which has the sole discretion whether or not to allow such affidavits. Where there are no reasons placed before the Court for requesting it to permit the filing of further affidavits, any such application ought to be refused.

[77] The rule was succinctly explained in the Supreme Court of Appeal judgment in ***Hano Trading CC v J R 209 Investments (Pty) Ltd***⁵ as follows:

"[1] A litigant in civil proceedings has the option of approaching a court for relief on application as opposed to an action. Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rules of Court applies. This rule sets out the sequence and timing for the filing of the affidavits by the respective parties. An advantage inherent to application proceedings, even if opposed, is that it can lead to a speedy and efficient adjudication and resolution of the disputes between parties.

Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets. It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit

² See Erasmus: Superior Court Practice Vol 2 pages DI-67 - 01-68 and the cases quoted therein.

³ ***Mashamaite and others v Mogalakwena Local Municipality and others, Member of the Executive Council Coghsta, Limpopo and another v Kekana and others*** **[2017] ZASCA 43; [2017] 2 All SA 740** (SCA) at para 21.

⁴ See ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*** **1999 (2) SA 279** (T); ***Juta & Co Ltd v De Koker*** **1994 (3) SA 499** (T) at 508 B-D.

⁵ *Infra*.

is filed. It is therefore not surprising that the rule 6(5)(e) provides that further affidavits may only be allowed at the discretion of the court."

[78] The SCA proceeded to find in ***Hano Trading CC v JR 209 Investments (Pty) Ltd 2013 (1) SA 161 (SCA); James Brown & Hammer (Pty)(Previously named Gilbert Hamer & Co Ltd) Ltd v Simmons, NO 1963 (4) (SA) 656 at 660E-G*** that:

*"It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly observed: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, **the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.**" [Emphasis added]*

[79] Flowing from the above and other authorities, the legal position can therefore be summarised as follows:

- (i) Allowing the filing of further affidavits ***is not a right that a party has, but an indulgence from a Court in the exercise of its discretion;***
- (ii) Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A Court, as arbiter, has the sole discretion whether to allow the affidavits or not. A Court will only exercise its discretion in this regard where there is good reason for doing so.
- (iii) The material sought to be raised in the supplementary affidavit must be relevant to the issues for determination of the main claim or application;

- (iv) In exercising its discretion, the Court will do so with a measure of flexibility, taking into account all the facts of the case and in further consideration of what is fair to the parties.
- (v) Leave to file further affidavits, out of sequence, may be allowed, for example, where there was something unexpected in the applicant's replying affidavits or where a new matter was raised, or where the information/evidence was not available to the respondent (or could not be made available) when the founding affidavits were filed and before the answering affidavits could be filed. Even then however, the party seeking to supplement his affidavit must give a satisfactory explanation which negatives *mala fides* or culpable remissness as to why the information/evidence could not be put before the Court at an earlier stage.
- (vi) In ***Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA & Others Case NO: JR2296/12*** at para [5], Lagrange J held that:

"Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party's case is canvassed. In the case of the review application an applicant has the added advantage that a weak founding affidavit can be completely replaced or augmented by a supplementary affidavit. It is at that point of the applicant's preparation of the application that it must focus its mind on the merits of its case. It should not regard the supplementary affidavit as merely a preliminary exploration of issues to be more fully developed when heads of argument are prepared. Still less should it consider the supplementary affidavit as anything less than its final statement of its grounds of review. There may be exceptional circumstances where issues come to light that a party exercising reasonable diligence in the preparation of their case could not have been aware of, or where there is some other justifiable reason why a material issue is omitted..." and

- (vii) When considering whether to allow the filing of further affidavits, ***prejudice is not the test, and it is incumbent on the applicant to establish***

exceptional circumstances which render it fair to permit the filing of the additional affidavit.⁶

[80] The Applicant in this case faces certain insurmountable hurdles with this application for a variety of reasons including the following:

- (i) Unlike the above cases considered by this Court, the Applicant took the law into his own hands and simply filed that second counter-application and its founding affidavit in the midst of the permissible first batch of affidavits.
- (ii) This Court was expecting to see a Replying Affidavit to the First Respondent's answer in the main application, from the Applicant. However, even in filing whatever he filed, he violated the sequence of the filing as discussed above, he did not seek this Court's leave to file the so-called [second] counter-application. Indeed, it is not even clear whether this affidavit is a replying affidavit, or an answering affidavit to the first counter-application;
- (iii) he did not explain himself as to why the said application was necessary, and what was or is to happen to the main application;
- (iv) he did not place before Court special or exceptional circumstances that would entitle him to conduct himself in the manner that he did;
- (v) even if he seeks to argue that he did not supplement his affidavit or his main application, or that he simply filed a 'counter-application', it is evident that by so doing, he sought to bypass all these processes including to explain his conduct to the Court.
- (vi) Evidently, the case that the First Respondent was asked to answer to has evolved into something new with the introduction of the so-called counter-application by the Applicant.

⁶ Impala Platinum Ltd v Monageng Mothiba N.O. and Others (JR2567/13) [2016] ZALCJHB 475 (10 June 2016).

- (vii) In ***Standard Bank of SA Ltd v Sewpersadh & Another***⁷ it was held that –

"[13] Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto."

- (viii) Furthermore, and ordinarily, as was held in ***Sealed Africa (Pty) Ltd v Kelly & Another***⁸-

*"[4] The filing of further affidavits after the replying affidavit has been filed is a matter for the discretion of the court. In the absence of leave being granted by the court for the filing of such affidavits, parties are not entitled to simply, by their own arrangement, file as many affidavits as they wish."*⁹

- (ix) It is furthermore unheard of for the applicant, in live motion proceedings, to bring a counter-application. This is bizarre in the extreme. What the Applicant sought to do was to change the character of his case mid-stream without withdrawing the first application. This is totally unacceptable conduct bordering on the abuse of Court process. The prejudice to the First Respondent and the inconvenience to the Court are just too apparent for all to see.

[81] The Applicant's conduct is thus in violation of the rules of Court. It is not permissible and such affidavit, which in any event is not supported by a Notice of Motion, is hereby regarded as *pro non scripto*.

[82] Even if this Court is wrong and the Applicant contends that his was not an additional affidavit but a counter-application, then such application is, for these

⁷ 2005 (4) SA 148 (C) para [13].

⁸ (3957/04) [2005] ZAGPHC 69 (6 July 2005) para 4.

⁹ See *Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd & Another* 2001 (4) SA 842 (W).

few reasons, improper and must still fail. The so-called counter-application seeks, in the main, to change the Applicant's case midstream and this is impermissible. It seeks to supplement the Applicant's case through the backdoor; and is not supported by a Notice of Motion to inform the First Respondent what he must expect.

[83] Finally, by changing his application midstream, the Applicant concedes, directly and indirectly, that his main application is flawed and cannot carry him to where he wishes to go. Accordingly, and for these many reasons, the two applications must fail.

[84] With the so-called counter-application out of the way, the Court must then focus on the main application with its papers as set out in the founding papers and as answered by the First Respondent including his counter-application. Unfortunately, despite it being set aside, the Court would have to deal with some of the arguments put forward by the Applicant. This is how this case is chaotic.

[85] As stated, the Applicant brought an application for the re-transfer of the property into his name and called the First Respondent to answer that case. This was done. Having realised the defective nature of his application and the fact that it has failed to set out a case for the relief sought in his Notice of Motion, he sought to impermissibly change tack and introduce a new case, by way of a counter application, without withdrawing his defective application. That conduct can only demonstrate that the Applicant is aware of the insufficient evidence he placed before Court to support his claim. He knew and realised that he needed to do something to rescue his defective application. It is upon this sword that his application(s) must fall.

[86] It is on these bases that this Court finds that the Applicant's application must be dismissed with costs.

[87] However, there is a further ground that the Applicant's application falls to be dismissed on. That relates to his contention by the Applicant that the First Respondent was not a *bona fide* purchaser of the property when he purchased the said property from the above-mentioned auction.

[88] I now focus on this topic.

[89] I note that the Applicant has not contended that the sale in execution of the property and the subsequent transfer thereto in the First Respondent's name was invalid because (i) there was no compliance with any provision of the Act, The Deeds Registries Act, Act No. 47 of 1937 or Alienation of Land Act, Act No. 68 of 1981; or (ii) that the First Respondent obtained the property by fraudulent means whether through a falsified process or documentation. Accordingly, those are not applicable herein.

[90] The issue is simply whether or not (i) [the First Respondent] by being aware of a dispute between the parties involving an order of Court regarding a provisional sentence order based on an Acknowledgment of Debt executed in favour of the First Respondent, (ii) which order was effectively appealed long after the First Respondent had caused the property sold in execution [in an auction] and later transferred into his name, makes him *bona fide* purchaser thereof.

[91] In deciding the above issue, this Court will consider two things being (i) the meaning of a *bona fide* purchaser and (ii) the theories of transfer/delivery of property/ immovable property in SA.

Bona Fide Purchaser

[92] A ***bona fide purchaser (BFP)*** – referred to more completely as a ***bona fide purchaser for value without notice*** – is a term used predominantly in common law jurisdictions in the law of real property and personal property to refer to an innocent party who purchases property without notice of any other party's claim to the title of that property. A BFP must purchase for value, meaning that he or she must pay for the property rather than simply be the beneficiary of a gift. Even when a party fraudulently conveys property to a BFP (for example, by selling to the BFP property that has already been conveyed to someone else), that BFP will, depending on the laws of the relevant jurisdiction, take good (valid) title to the property despite the competing claims of the other party. As such, an owner publicly recording their own interests (which in some types of property must be on a court-recognised Register) protects himself or herself from

losing those to an indirect buyer, such as a qualifying buyer from a thief, who qualifies as a BFP. Moreover, so-called "race-notice" jurisdictions require the BFP himself or herself to record (depending on the type of property by public notice or applying for registration) to enforce their rights. In any case, parties with a claim to ownership in the property will retain a cause of action (a right to sue) against the party who made the fraudulent conveyance.

[93] In England and Wales and in other jurisdictions following the 20th century oft-repeated precedent, the BFP will not be bound by equitable interests of which he/she does not have actual, constructive, or imputed notice, as long as he/she has made "*such inspections as ought reasonably to have been made*".¹⁰

[94] This Court is indebted to the analysis of case law conducted by Van der Merwe AJ in *Knox v Mofokeng and Others (2011/33437) [2012] ZAGPJHC 23, 2013 (4) SA 46 (GSJ)*. The judge made numerous helpful remarks which accords with the facts of this case.

[95] As a start, a basic common-law principle is that an individual cannot pass a better title than she has, and a buyer can acquire no better title than that of the seller. A thief does not have title in stolen goods, so a person who purchases from the thief does not acquire title.

[96] A *bona fide* purchaser is an individual who has bought property for value with no notice of any defects in the seller's title. If a seller indicates to a buyer that she has ownership or the authority to sell a particular item, the seller is prevented (estopped) from denying such representations if the buyer resells the property to a *bona fide* purchaser for value without notice of the true owner's rights.

[97] Van Der Merwe AJ held that:

"[A] bona fide purchaser would under appropriate circumstances be protected by the doctrine of estoppel where the owner knowingly did not correct erroneous entries in the deeds register. Thus, it was held

¹⁰ Kingsnorth Finance Trust Co Ltd v Tizard [1986] 1 WLR 783.

in Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC that an owner was estopped from vindicating his property when he was aware of the fraudulent transfer of his property to another and failed to take urgent action to rectify the entries in the deeds register. The court held at paragraphs 13 and 28 of the judgement that, although the effect of registration is not the guarantee of any right, the public is entitled to rely on the correctness of entries in the deeds office. The bona fide purchaser who is prejudiced by the vindicatory action of the owner may in theory be able to recover the purchase price paid from the seller or may have a claim for damages against the judgement creditor (who proceeded with the sale in execution in disregard of the statutory prohibition in section 30 of the Administration of Estates Act, 66 of 1965) on the grounds of breach of a duty of care. The bona fide purchaser may also have a claim for enrichment against the applicant in appropriate circumstances. The potential causes of action referred to above are not intended to be exhaustive. I also express no opinion on the prospects of success of such actions, but mention them in order to demonstrate that the bona fide purchaser (such as the first respondent) or any other bona fide party (such as Standard Bank) are not necessarily without a remedy even where the sale in execution was a nullity. In the present matter, none of the respondents raised the defence of estoppel, the issue of enrichment or any of the other potential claims in response to the relief sought by the applicant. Standard Bank opposed the application exclusively on the basis that the first respondent was the registered owner of the property.”¹¹

¹¹ Knox v Mofokeng and Others (2011/33437) [2012] ZAGPJHC 23; 2013 (4) SA 46 (GSJ) (30 January 2012).

[98] The Court further stated that where the sale in execution has been perfected by registration of transfer of immovable property to a *bona fide* purchaser who had no knowledge of the judgment debtor's proceedings for the rescission of the judgment or where transfer of ownership has been effected prior to the institution of the rescission proceedings, the judgment debtor is not entitled to recover possession of the property in question, unless it can be established that the judgment and /or the sale in execution constituted a nullity (my emphasis).

[99] In this case, the First Respondent argued that he could not have been aware after waiting for the lapse of the mandatory fifteen (15) days after the dismissal of the Applicant's leave to appeal, that the Applicant who petitioned the SCA five (5) months later, was still intent on pursuing the appeal process. By then, the sale in execution and transfer of the property into his name had already been perfected.

[100] The Court further held that:

"It has been accepted in the case law that where a judgement is rescinded after a sale in execution had taken place but before transfer of the property to the purchaser had taken place, the owner of the property is entitled to seek an order setting the sale in execution aside and interdicting the transfer of the property to the purchaser at the sale in execution. See eg Vosal Investments (Pty) Ltd V City of Johannesburg 2010 (1) SA 595 (GSJ); Jubb v Sheriff, Magistrate's Court, Inanda District; Gottschalk v Sheriff, Magistrate's Court, Inanda District 1999 (4) SA 596 (D) at 605F-G. In the Vosal Investments-judgement (above, at paragraph 16), the South Gauteng full bench accepted the statement in the Jubb-judgement (above, at 606F-G), with reference to the judgement by McCall AJ in Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd 1992 (2) SA 665 (N), that the owner of an immovable property is entitled to restoration of his property from a bona fide purchaser at a sale in execution, "where a sale of property not followed by transfer is rendered a nullity by reason of the rescission of the judgement which alone gave it validity." It was also accepted by the South Gauteng full bench in Vosal Investments (above, at paragraph 16) that where the purchaser of the property at the sale in execution

*became aware of the claims of the owner (because he was aware of the owner's application for rescission of the judgement) prior to registration of transfer having been effected, such purchaser is also obliged to restore possession to the owner, once the judgement has been rescinded. This approach was based on the conclusion that the purchaser was aware of the attack on the judgement by the owner and on the consequent sale in execution and had knowledge that some risk might attach to his rights as buyer of the property."*¹²

[101] Again, in *casu*, the First Respondent argued that the Applicant took five (5) months before petitioning the SCA. By then, the sale in execution and transfer of the property into his name had already been perfected. He even disclosed that he gave notice of both the sale in execution and the transfer of the property to the Applicant and that at some point, the Applicant sought to have these set aside however, such an application collapsed when he gave notice of his intention to oppose same. Evidently, the Applicant was aware of these processes and elected to go-slow in seeking to assert his rights.

[102] The Court further held:

*"[I]t has further also been accepted in the case law that where a default judgement has been rescinded subsequent to the sale in execution, both the default judgement and the warrant of execution issued in terms of the judgement become null and void and of no effect, as between the judgement creditor and the judgement debtor. In such event, the judgement debtor is entitled to have the status quo ante restored as against the judgement creditor. The warrant of execution and the sale of execution were all dependent on the existence of the default judgement. Once the default judgement had been rescinded the warrant of execution and the sale in execution has no legal basis as between the parties to the litigation. See Lottering v SA Motor Acceptance Corporation Ltd 1962 (4) SA 1 (E) at 3H-4B; Jasmat v Bhana 1951 (2) SA 496 (D); Maisels v Camberleigh Court (Pty) Ltd 1953 (4) SA 371 (C)."*¹³

¹² Para 2.

¹³ Para 3.

[103] Quiet correctly, Van der Merwe AJ held that:

“It appears from the analysis of the case law and the relevant common law principles dealt with below that the judgement debtor's entitlement to claim restoration of the property once the judgement, in terms whereof the property had been sold in execution, has been rescinded, depends on the factual circumstances present at the time of rescission. At least three factual scenarios can in general be envisaged, although other factual permutations are possible. The first scenario is where the sale in execution had not been perfected by delivery in the case of movables and registration of transfer in the case of immovables. As indicated above, in such event, the owner is in principle entitled to claim recovery of the property in question following the rescission of the judgement. See Vosal Investments (Pty) Ltd v City of Johannesburg 2010 (1) SA 595 (GSJ); Jubb v Sheriff, 4 Magistrate's Court, Inanda District; Gottschalk v Sheriff, Magistrate's Court, Inanda District 1999 (4) SA 596 (D) at 605F-G. The second scenario is where the sale in execution had been perfected by delivery in the case of movables or registration of transfer in the case of immovables, but the purchaser had knowledge of the proceedings instituted by the judgement debtor for the rescission of the judgement in question prior to delivery or registration of transfer. In such event, the owner is also in principle entitled to recovery of the property in question, even where transfer had already been effected. See the Vosal Investments judgement, above, at paragraph 16. The third scenario is where the sale in execution has been perfected by delivery in the case of movables or by registration of transfer in the case of immovables to a bona fide purchaser who had no knowledge of the judgement debtor's proceedings for the rescission of the judgement or where transfer of ownership has been effected prior to the institution of the rescission proceedings. The conclusion reached in the analysis below is that where transfer of ownership had been effected pursuant to the sale in execution by the time the judgement has been rescinded, the judgement debtor is not entitled to recover possession of the property in question, unless it can be established that the judgement and/or the sale in execution constituted a nullity. This conclusion is dictated and explained, in my view, by the application of the abstract theory for the transfer of ownership,

which will be dealt with in greater detail elsewhere in this judgement."¹⁴
[Emphasis mine]

[104] In *casu*, the facts as accepted by this Court are that the Applicant failed for five (5) months to petition the SCA following the dismissal of his application for leave to appeal the decision of the high Court. He has also failed to demonstrate to this Court, where and when, in the intervening period, did he alert the First Respondent of his intention to continue with his appeal processes beyond the mandatory fifteen (15) days after the dismissal of his application for leave to appeal.

[105] On the other hand, the First Respondent contends that the Applicant has not alerted him of his problems, if there were any, which delayed him in petitioning the SCA. He contends that he waited for the lapse of the mandatory fifteen (15) days after the dismissal of the Applicant's application for leave to appeal before he could proceed with the sale in execution and transfer of the property into his name. He asserts he could not wait forever.

[106] This Court is inclined to accept the First Respondent's version. This is mainly because there is no evidence of the Applicant alerting the First Respondent of his ailment of financial situation during the five (5) months lull before he petitioned the SCA.

[107] The Court in the *Knox* matter held that:

"[T]he Supreme Court of Appeal accepted that the transfer of immovable property could validly be effected notwithstanding the invalidity of the underlying obligation-creating agreement. Other recent judgements where these implications of the abstract theory for the passing of ownership were expressly accepted by the Supreme Court Of Appeal are Du Plessis v Prophitus 2010 (1) SA 49 (SCA) and Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC 2011 (2) SA 508 (SCA). In paragraph 12 of the judgement in Oriental

¹⁴ See para 5.

Products (Pty) Ltd v Pegma 178 Investments Trading CC (above) Shongwe JA held as follows:

*"It is trite that our law has adopted the abstract system of transfer as opposed to the causal system of transfer. Under the causal system of transfer, a valid cause (iusta causa) giving rise to the transfer is a sine qua non for the transfer of ownership. In other words, if the cause is invalid, e.g. non-compliance with formal requirements, the transfer of ownership will also be void -See Carey Miller 'Transfer of Ownership' in Feenstra & Zimmerman Das Römisch-Holländische Recht 537; 'Transfer of Ownership' in Zimmerman & Visser Southern Cross: Civil Law and Common Law in South Africa 727 at 735-9. Under the abstract system the most important point is that there is no need for a formally valid underlying transaction, provided that the parties are ad idem regarding the passing of ownership: Meintjes NO v Coetzer 2010 (5) SA 186 (SCA)."*¹⁵

[108] That Court accepted the argument, which this Court also finds compelling that:

"Mr Vorster contends, correctly in my view, that immovable property validly sold in execution at judicial sales cannot, as a general rule, after registration of transfer be vindicated from a bona fide purchaser. Thus it was held by Van den Heever JA in Sookdeyi v Sahadeo 1952 (4) SA 568 (A) at 571G - 572B that it was a principle of the common law that a perfected sale in execution should after transfer or delivery of the subject matter not be lightly impugned and that the reluctance to rescind perfected sales in execution has been received in our case law. The remainder of the contentions advanced by Mr Vorster on behalf of the third respondent disregards, however, the common law authorities and case law where it was held that vindicatory proceedings are not excluded in respect of property sold in execution where the essential formalities and statutory requirements for a sale in execution had not been complied with, resulting in a nullity. The common law principles in this regard have been examined by McCall AJ in Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd 1992 (2) SA 665 (N), where it was held that the owner of property, which had been transferred pursuant to a sale in execution to a bona

¹⁵ See para 15.

bona fide third party, can recover such property from the purchaser under circumstances where the sale in execution was a nullity for non-compliance with the peremptory provisions of High Court rule 46(3) regarding notice in writing by the Sheriff to the owner of the property. See also, regarding the common law principles, the judgement by Cloete JA in *Menqa v Markom* 2008 (2) SA 120 (SCA) at paragraph 31-42, especially at paragraph 30. Other judgements where the same approach was applied include *Van der Walt v Kollektor (Edms) Bpk* 1989 (4) SA 690 (T) at 696BH; *Jones v Trust Bank of Africa Ltd* 1993 (4) SA 415 (C); *Kaleni v Transkei Development Corporation* 1997 (4) SA 789 (TkS) and *Absa Bank v Van Eeden* 2011 (4) SA 430 (GSJ).” [Emphasis ours]

[109] It held that: “common law principles are also reflected in *Badenhorst, Pienaar & Mostert* (5th edition) *Silberberg and Schoeman’s the Law of Property* 261 in the following terms, with reference to the relevant common law authority:

“Property sold at judicial sales cannot, after delivery in the case of movables or registration in the case of immovables, be vindicated from a bona fide purchaser. Even when an article is sold by mistake as belonging to a judgment debtor, the true owner cannot vindicate it from a bona fide purchaser (though *Matthaeus* states that he or she can do so on refunding the purchase price to the purchaser). Thus, section 70 of the Magistrates' Courts Act provides that the sale in execution by the Sheriff of the court will not, in the case of movable things after delivery thereof or in the case of immovable things after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.”

[110] The Court noted that “[I]n footnote 192 on the same page, the authors qualify the general statement by stating that: “[t]he sale, however, has to be a valid sale complying with the applicable rules of court and statutory measures: see *Van der Walt v Kolektor (Edms) Bpk* 1989 (4) SA 690 (T); *Joosub v JI Case SA (Pty) Ltd* 1992 (2) SA 665 (N) at 679B.” It follows that the first common law principle to be applied in the present instance is that, as a general rule, property sold at a sale in execution in terms of a valid, existing judgement cannot be vindicated from a bona fide purchaser once the property had been transferred to the purchaser,

provided the sale in execution was not a nullity. This implies that even where a valid judgement has been rescinded after the sale in execution had taken place, the property cannot be vindicated from a bona fide purchaser who had taken transfer of the property, merely on the ground that the judgement had been rescinded. The second relevant common law principle is that the first principle only applies where a valid judgement was in existence at the time of the execution sale and where a valid execution sale complying with the essential applicable rules of court and statutory measures had taken place. Where there was no judgement or where the judgement was void ab initio or where the essential statutory formalities pertaining to the sale of an immovable property had not been complied with, the immovable property in question can in principle be vindicated, even from a bona fide purchaser who had taken transfer of the property. The reason for the second rule is that where the sale in execution was invalid, the Sheriff had no authority to conduct the sale and to transfer the property to the purchaser. The result is not only that the underlying sale agreement concluded at the sale in execution is invalid but also that the real agreement is defective, since the Sheriff does not have authority to transfer the property to the purchaser. The Sheriff only has such authority where a valid sale in execution had taken place.”

[111]The principles of the common-law pertaining to the abstract theory for the passing of ownership have been stated as follows by Brand JA in Legator McKenna Inc v Shea (above) at paragraph 22 (and referred to with approval by Shongwe JA in Meintjes NO v Coetzer (above) at paragraph 8):

“In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or ‘saaklike ooreenkoms’. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. ... Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass - despite

registration of transfer - if there is a defect in the real agreement.” This implies that the transferor must be legally competent to transfer the property, the transferee must be legally competent to acquire the property and that the golden rule of the law of property that no one can transfer more rights than he himself has also apply to the real agreement. See Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman’s the Law of Property 73 20.” [My emphasis]

[112] Van Der Merwe AJ held that: “[W]hen these basic principles of the common-law are applied to the cases of *Menqa v Markom* (above), *Campbell v Botha* (above), *Legator McKenna Inc v Shea* (above) and *Meintjes NO v Coetzer* (above), it is evident that there is no conflict between them and that the implications of the abstract system for the transfer of ownership have been adhered to in all these judgements, even though there was no express reference to the abstract theory of transfer in the earlier judgements in *Menqa v Markom* and *Campbell v Botha*. In the case of *Menqa v Markom* the sale in execution was void because the warrant of execution was issued without the required judicial oversight. Since the sale in execution was void the Sheriff had no authority to transfer the property in terms of the real agreement with the bona fide purchaser. Since the real agreement was defective, the property could be vindicated in principle from the bona fide purchaser. Thus, in *Menqa v Markom* (above, at paragraph 24) Van Heerden JA stated as follows:

“The Sheriff derives his or her duty and authority to transfer ownership pursuant to a sale in execution of immovable property from rule 43(13) of the Magistrates’ Courts rules. If the sale in execution is null and void because it violates the principle of legality, as in the present case, then the Sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property in his or her name.”

*It is accordingly evident that the judgement in *Menqa v Markom* is consistent with the abstract theory for the passing of ownership, although no express reference was made to the abstract theory. In *Campbell v Botha* (above) the sale in execution was void because neither the warrant nor the notice of attachment was*

served on the judgement debtor. Since the sale in execution was void, the Sheriff had no authority to transfer the property in terms of the real agreement with the bona fide purchaser. Since the real agreement was defective, the property could be vindicated in principle from the bona fide purchaser. Again, the judgement is consistent with the abstract theory of transfer of ownership, although no express reference was made to the abstract theory. In *Legator McKenna Inc v Shea* (above), the underlying agreement was invalid, inter alia for non-compliance with the formalities required by section 2(1) of the Alienation of Land Act, 68 of 1981 and because the curator bonis of a person who had suffered brain injuries entered into an agreement for the sale of an immovable property, prior to his letters of curatorship having been issued by the master in terms of section 72(1)(d) of the Administration of Estates Act, 66 of 1965. By the time transfer of the property had been effected, however, the curator bonis had received his letters of curatorship. Consequently, by the time the real agreement was entered into, the curator bonis was properly authorised to enter into the real agreement. Since the real agreement was valid the property could not be vindicated from the bona fide purchaser. (See paragraph 25 of the judgement.) In *Meintjes NO v Coetzer* (above) the sale agreement as well as the transfer documentation had been falsified. Consequently, both the underlying agreement of sale as well as the real agreement was invalid and the property could be vindicated from the purchasers.”

[113] I agree with Van Der Merwe AJ that: “[I]t is accordingly evident that the principles of the abstract theory of transfer have been applied consistently in the case law referred to above. Immovable property which had been transferred to a bona fide purchaser could, notwithstanding registration in the name of the purchaser, be vindicated from the purchaser where the real agreement was defective, irrespective of the validity of the underlying transaction. Where the requirements for a valid real agreement were present the transfer of ownership to a bona fide purchaser was valid and the property could not be vindicated. See also in this regard *Du Plessis v Prophitius* 2010 (1) SA 49 (SCA) and *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 (2) SA 508 (SCA), where the same principles were applied. Whilst the purpose of the abstract theory of transfer of ownership is to introduce greater certainty regarding the ownership of

property than the causal system, the abstract theory does not and cannot serve as a guarantee of ownership.” [My emphasis]

A bona fide purchaser would under appropriate circumstances be protected by the doctrine of estoppel where the owner knowingly did not correct erroneous entries in the deeds register. Thus, it was held in Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC that an owner was estopped from vindicating his property when he was aware of the fraudulent transfer of his property to another and failed to take urgent action to rectify the entries in the deeds register. The court held at paragraphs 13 and 28 of the judgement that, although the effect of registration is not the guarantee of any right, the public is entitled to rely on the correctness of entries in the deeds office. The bona fide purchaser who is prejudiced by the vindicatory action of the owner may in theory be able to recover the purchase price paid from the seller or may have a claim for damages against the judgement creditor (who proceeded with the sale in execution in disregard of the statutory prohibition in section 30 of the Administration of Estates Act, 66 of 1965) on the grounds of breach of a duty of care. The bona fide purchaser may also have a claim for enrichment against the applicant in appropriate circumstances. The potential causes of action referred to above are not intended to be exhaustive. I also express no opinion on the prospects of success of such actions, but mention them in order to demonstrate that the bona fide purchaser (such as the first respondent) or any other bona fide party (such as Standard Bank) are not necessarily without a remedy even where the sale in execution was a nullity.¹⁶ [My emphasis]

SUMMATION AND CONCLUSION

[114] The question that this Court must ask itself is whether the First Respondent was *mala fide* [not *bona fide*] purchaser when he purchased the property at the auction?

¹⁶ See para 30.

[115] On the totality of the facts of this case, this Court could not think of any reason for a positive response to the above question. The Applicant has also failed to point to instances that would lead to a positive answer to the said question.

[116] Despite the numerous facts of this case, it is this Court's view that in order to answer the above question, one needs to start when the property was purchased and then transferred to the First Respondent's name. This is because, it is common cause between the parties that the Applicant's leave to appeal was dismissed on 27 September 2016 and he took five (5) months to petition the SCA. In between those periods, certain things that have valid, separate and legal consequences had happened.

[117] The First Respondent waited, like any litigant would be advised, for the normal fifteen (15) day period to pass before the Applicant could decide whether or not he would petition the SCA for leave to appeal. Once those fifteen (15) days lapsed, the victor was entitled to proceed and implement the Order. Short of what the Applicant contends i.e. that the First Respondent was aware of his ailment and financial shortcomings all of which this Court is not privy to, there can be no criticism that can be levelled against the First Respondent's conduct.

[118] Furthermore, the Court finds that when he purchased the property, the First Respondent could not have been aware that the litigation still subsists. In fact, no evidence was placed before Court to suggest so. The First Respondent also bemoaned this lack of evidence in his Answering Affidavit against the so-called second counter-application.

[119] Accordingly, this Court finds that in purchasing the property, the First Respondent acted *bona fide*. This Court finds that the First Respondent's conduct was reasonable and valid. He cannot be faulted. When the time became right, he proceeded to have the property sold in execution. He was entitled to purchase same as there were no further legal impediments that could prevent him from doing so. After the sale of that property, registration thereof into the new owner's name took place. Again, there was nothing in law to preclude him from doing so.

[120] It is even troubling that the First Respondent alleges that he notified the Applicant of these processes as they took place and the latter did not even try to stop any of them. He only sought to do so after the registration process was completed and even then, he stopped when that process was opposed.

[121] This Court finds that the Applicant has failed to provide serious and valid challenges to the auction process and the subsequent processes that resulted in the registration of the property in the First Respondent's name. Accordingly, and in compliance with the abstract theory, the requirements of a valid underlying sale transaction existed between the auctioneer and the First Respondent for buying and selling of the property. Thereafter there existed another valid process the registration of the property into the First Respondent's name. Those processes have never been challenged and/or set aside.

[122] This Court accordingly, comes to the conclusion that the Applicant failed to establish that the First Respondent was not *bona fide* when he purchased the property from the auction. Once he failed at that stage, he could not successfully challenge the registration thereof into the First Respondent's name.

[123] This Court thus finds that, for the many reasons set out above, the Applicant's application must fail. On the other hand, the Court finds that the First Respondent has made out a case for an order set out in his counter-application which order is hereby granted.

[124] Accordingly, this Court makes the following order:

- (1) The Applicant's application and so-called counter-application are dismissed;
- (2) The First Respondent's counter application succeeds and is hereby granted;
- (3) In particular, the Court declares that the First Respondent is a *bona fide* purchaser of the property, and that he is entitled to sell the said property;
- (4) The Applicant is liable to pay the costs of this application; and

(5) Mrs Mageza Attorneys is liable to pay the costs of the failed application for postponement of this application.

By Order,

A handwritten signature in black ink, appearing to read 'T J Machaba', with a horizontal line underneath it.

T J MACHABA

Acting Judge

Gauteng Local Division

Delivered: This judgment was handed down electronically by circulation to the parties and or their legal representatives via email and uploaded to Caseline and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 December 2021.

APPEARANCES:

HEARD ON: 23 AUGUST 2021

DELIVERED ON: 20 DECEMBER 2021

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