THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 126/2010

In the matter between:

ORIENTAL PRODUCTS (PTY) LIMITED	**Appellant**

and

PEGMA 178 INVESTMENTS TRADING CC	**First Respondent**
SHIELD HOMES (EASTERN CAPE) (PTY) LIMITED	**Second Respondent**
HONG WEI QU	**Third Respondent**
THE REGISTRAR OF DEEDS FOR KWAZULU-NATAL	**Fourth Respondent**

Neutral citation: ORIENTAL PRODUCTS v PEGMA 178 (126/10) [2010] ZASCA 166 (1 December 2010)

Coram: HARMS DP, LEWIS, MAYA, SHONGWE JJA and R PILLAY AJA

Heard: **12 NOVEMBER 2010**

Delivered: **1 DECEMBER 2010**

SUMMARY: Sale of immovable property – whether transfer and registration of ownership is valid where the intention to transfer is absent – Vindication – Power of Attorney to sell fraudulently obtained – Estoppel – whether original owner is estopped from claiming retransfer – requirements for estoppel to succeed

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ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Jappie J sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs.

JUDGMENT

SHONGWE JA:

[1] This appeal is against the order of the KwaZulu-Natal High Court, Pietermaritzburg (Jappie J) dismissing the appellant's application to vindicate the immovable property described as Lot 117 Clansthal, situated in the development area of Clansthal, Province of KwaZulu-Natal and 4047 square metres in extent (the property) which is registered in the name of the first respondent and also for an order against the fourth respondent, (the Registrar of Deeds for KwaZulu-Natal), to register the transfer of the said property in the name of the appellant. The appeal is with leave of the court a quo.

[2] The appellant's case in the court a quo, as well as before us, is that it was, at all material times, the lawful registered owner of the property and that its property was fraudulently transferred, first to the second respondent and thereafter to the first respondent, without the appellant's knowledge or authority. The third respondent is alleged to have purported to represent the appellant in passing transfer of the property to the second respondent. In truth, he had never been authorized to do so. The second and third respondents, who took part in the proceedings below, have filed notices to abide the decision of this court. The Registrar did not participate at all in these proceedings.

[3] The factual background is as follows: A Mr Kuk Siu Wah, a businessman and a Chinese national resident in Hong Kong, visited South Africa in or about 1990. He then bought inter alia the following companies, Oriental Products (Pty) Ltd, the appellant company and Galaxy Minerals (Pty) Ltd. He, together with his daughter, Ms Cook Yin Ping, who is for convenience referred to as Ms Cook, were the only two directors of the appellant. The third respondent, Mr Hong Wei Qu, also a Chinese national, came to South Africa in 2001 to work as manager of Mr Kuk's companies Galaxy Minerals (Pty) Limited and Flourishing Trading (Pty) Limited in Mtubatuba, KwaZulu-Natal.

[4] The third respondent refers to Mr Kuk as his grandfather. On 18 December 2006, Mr Kuk discovered that the property in question was no longer registered in the name of the appellant. This he discovered after instructing attorneys in Johannesburg to do a property search at the deeds office. After numerous letters between his Hong Kong attorneys and Johannesburg attorneys it transpired that the property in question had indeed been sold and transferred to the second respondent, who in turn sold and transferred it to the first respondent.

[5] The appellant, represented by Mr Kuk, instructed his attorneys to launch the application to recover the property. This happened in January 2008

[6] It transpired that the third respondent was indeed responsible for the sale and transfer of the property. His version was that he was authorised by Mr Kuk to look for a buyer and sell the property. He alleges Mr Kuk provided him with a special power of attorney dated 4 May 2005 authorizing him to proceed with the transaction. Mr Kuk vehemently denied that he authorized the third respondent to sell and transfer the property. He alleged that the signatures appearing on all the documents used to sell and transfer the property were not his. Even Ms Cook disavowed any knowledge of any authority given to the third respondent.

[7] As a result of these material disputes of fact on the papers, the application was referred to oral evidence on the following issues:

(a) Whether the third respondent was authorized expressly, implicitly or tacitly by or on behalf of the appellant to transfer the said property to the second respondent;
(b) Whether the appellant is estopped from challenging the first respondent's title by bringing these proceedings in the time and in the circumstances in which it did;
(c) Whether the appellant is estopped from denying the authority of the third respondent to transfer the said property to the second respondent;
(d) Whether the appellant has established a right to vindicate the immovable property, and;
(e) Whether the first respondent has a claim for compensation for improvements to the said property and the quantum thereof;
(f) Whether the first respondent has a right of retention or lien in its favour over the property;
(g) Whether the second respondent has any claim for improvements to the property and the quantum thereof.

[8] Several witnesses testified on behalf of the appellant. The first respondent and the second respondent called only one witness each and the third respondent testified and called a handwriting expert, Mr Irving.

[9] The court a quo found that the third respondent was not properly authorized to pass transfer of the property to the second respondent, therefore the transfer was void as it lacked the prerequisite to effect registration of transfer, being that the transferor (in this case the appellant), must intend to transfer and the transferee (in this case the second respondent) must intend to take transfer (*Trust Bank van Afrika v Western Bank & andere* 1978 (4) SA 281 (A) at 302 A-F referring with approval to *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 397-398. See also *Wille's Principles of South African Law* 9 ed (2007) at 520-521.)

[10] The above conclusion, which I respectfully agree with, answers the first question referred to oral evidence. Considering the evidence as a whole and taking into account that the credibility of the third respondent was at stake, the court a quo rightly rejected the evidence of the third respondent that he had any authority to pass transfer of the property.

[11] Before us neither of the parties contest the lack of authority of the third respondent which resulted in both transfers, ie the transfer to the second respondent as well as the transfer to the first respondent, being void.

[12] 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, eg non compliance with formal requirements, the transfer of ownership will also be void – see Carey Miller 'Transfer of Ownership' in Feenstra & Zimmermann *Das Römisch-Hollandische Recht* 537; 'Transfer of Ownership' in Zimmerman & Visser *Southern Cross* 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: *Meintjies NO v Coetzer & others* 2010 (5) SA 186 (SCA).

[13] It is correct that registration of title in terms of the Deeds Registries Act 47 of 1937 is a brilliant system of public access to the register of owners of property and the registration of other protected rights such as servitudes. What is even more important is the correctness of the contents of the register. It is said that '[w]hen the Dutch settled in the Cape Colony they brought over from Holland this system of registration, and the titles to land granted by the governors were registered before the Commissioners of the Court of Justice. No sales of this land and no servitudes imposed thereon were recognised, unless these were registered against the title before the Commissioners'. The purpose is to publicise to the world and for the protection of registered owners – *Houtpoort Mining and Estate Syndicate Ltd v Jacobs* 1904 TS 105 and *Hollins v Registrar of Deeds* 1904 TS 603 and the cases cited therein. Even though there is no guarantee of title, the record needs to be accurate, though subject to correction. The record provides proof of the present registered owner of the property or right.

[14] Most cases deal with transfer of ownership of movables, however, there is no reason in principle why an abstract system of transfer should not be applied to immovables as well (*Klerck NO v Van Zyl and Maritz NNO* 1989 (4) SA 263 (SE) at

273). See also D L Carey Miller with Anne Pope in *Land Title in South Africa* 51; *Apostoliese Geloofsending van S A (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C). Recently this court in *Legator Mckenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) para 21 Brand JA stated that 'time has come for this court to add its stamp of approval to the view point that the abstract theory of transfer applies to immovable property as well'. I agree with the sentiment expressed by him and wish to add that in effect the result is the same whether one deals with movable or immovable property. See also *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) and the cases cited therein.

[15] The next question is whether the appellant is estopped from challenging the first respondent's title by bringing these proceedings at the time and in the circumstances in which it did. Perhaps it would be appropriate at this stage to give a brief background of the circumstances and the time in which the initial application was launched. It is common cause that the third respondent held a responsible position in running the affairs of Mr Kuk and the applicant. He became privy to transactions which were initiated by Mr Kuk, for instance he knew of the intended sale of the very property, which fell through, although he was not directly involved. He was thereafter contacted telephonically by Mr Kuk to procure a new purchaser for the property. Ms Cook also confirmed that the third respondent was required to perform various administrative duties in connection with certain other properties owned by the group of companies.

[16] Ms Cook in her founding affidavit states that 'at about the end of 2006 and for reasons not relevant for present purposes, Mr Qu ceased his aforesaid employment and Mr Kuk and I lost track of him'. It is common cause that the property was transferred to the second respondent on 28 December 2005. Already at the end of 2006 Mr Kuk started making enquiries from the conveyancer at Webber Wentzel Bowens in Johannesburg to ascertain whether the third respondent had been in contact with them regarding any sale of the property. Clearly Mr Kuk and Ms Cook were suspicious of the third respondent's conduct as early as December 2006.

[17] By 18 December 2006 the directors of the appellant knew that the property was no longer registered in its name but in the name of the second respondent. They

did nothing to intervene and put the record straight by either writing a letter to the Registrar or the new registered owner (the second respondent) or launching an interdict for that matter. Since the appellant was represented by attorneys in Johannesburg, it cannot be heard, in my view, to plead ignorance of the South African system of registration of transfer of ownership of immovable property. Ms Cook conceded, during her cross-examination, that Hong Kong also has a system of property registration and transfer similar to our system.

[18] The first respondent's contention is that the failure to take immediate steps to bring proceedings against the second respondent amounts to a representation that the second respondent was the lawful and registered owner with a right to sell the property. The first respondent further argues that the said failure also carries with it the requisite negligence on the part of the appellant to found estoppel. The first respondent contends that, had the appellant acted timeously, the property would not have been transferred to the second respondent and the first respondent would, not have embarked on high scale development of the property, which it did. In order to demonstrate that the appellant acted negligently, Ms Cook testified that in January 2007 she did not know that the first respondent had purchased the property and she had not decided who was going to be her attorney to deal with the matter. On the contrary, by 18 December 2006 she knew that the property had been transferred and registered in the name of the second respondent. Webber Wentzel Bowens had already informed her of the first transaction. Relying on the appellants' inaction the second respondent sold the property to the first respondent who consequently started developing it. Had the appellant acted swiftly the chain of events would have been avoided.

[19] It is generally accepted that an owner of movable property is estopped from asserting his right to his property only where the person who acquired his property did so because the negligence of the true owner misled him into the belief that the person from whom he acquired it was the owner and was entitled to dispose of it. (See *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A); *Electrolux (Pty) Ltd v Khota & another* 1961 (4) SA 244 (W)). There seems to be no reason why this principle cannot be applied to immovable property. The possessor raising estoppel must prove that:

(a) There was a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner or was entitled to dispose of it;
(b) The representation must have been made negligently in the circumstances;

(c) The representation must have been relied upon by the person raising the estoppel, and
(d) Such person's reliance upon the representation must be the cause of his detriment.

[20] The appellant contends that there is no proper basis for an estoppel to operate because there is no evidence tendered to the effect that the first and second respondents knew of the representation and that they relied upon it in conducting their affairs in regard to the property. The appellant argued that all that the first respondent relied upon was the mere fact of the sale of the property by the second respondent to the first respondent and the process of registration of transfer, which followed from the sale. The appellant further contended that estoppel 'is by its nature, a weapon of defence, it cannot be used as a weapon of attack, to transfer ownership of a property which, but for the operation of estoppel, would not have been transferred'. The logical consequence of upholding the defence of estoppel is that the person in possession of the goods or property, raising estoppel, acquires an unassailable right to continue possessing the goods. In my view, it is still a defence entitling the possessor to continue exercising that right. In the present case transfer had already occurred long before the defence was raised. We were not referred to any unequivocal authority, nor have I found any, to the effect that estoppel can or cannot be used in cases involving the transfer of ownership of immovable property. The case quoted by counsel for the appellant (*Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (CC)) simply states the requirements to prove the defence of estoppel. I consider this point moot in the South African jurisprudence. The present case does not strictly turn on this point. (See J W Louw 'Estoppel en die Rei Vindicatio' (1975) 38 *THRHR* 218 and H J O van Heerden 'Estoppel: 'n Wyse Van Eiendoms-verkryging?' (1970) 33 *THRHR* 19 at 25).

[21] The relevant period in this case is between 18 December 2006, when attorneys Webber Wentzel Bowens wrote a letter to Mr Kuk advising him that the property had been registered in the name of the second respondent and 8 February 2007 when the property was indeed transferred to the first respondent. The directors of the appellant remained inactive for almost two months after learning that its property had been registered in the name of the second respondent. The inaction for almost two months is sufficient to constitute negligence considering the surrounding circumstances as described above. One must bear in mind that we are dealing with immovable property which was the core business of the appellant. It should have rung a bell and raised a red flag immediately to Mr Kuk and Ms Cook after they heard of the new developments in mid December 2006. They only launched the application for vindication on 7 May 2008, almost seventeen months after knowing that the property had been fraudulently sold and transferred.

[22] I am satisfied in concluding that the appellant's inaction was negligent representation which led the first respondent to rely on it to its detriment. Steyn JA in *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 427 defines estoppel as a principle in terms of which an owner 'forfeits his right to vindicate where the person who acquires his property does so because, by the culpa of the owner he has been misled into the belief that the person from whom he acquired it, is entitled to dispose of it.' (See Voet *Commentarius ad Pandectas*, 6 1 13 & 23; P J Rabie *The Law of Estoppel in South Africa* at (1992) 86 599; D L Carey Miller *The Acquisition and Protection of Ownership* (1986) at 263 and *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 at (A) 406).

[23] In the context of this case, the appellant is entitled to retransfer of the property but for the fact that it cannot assert its right of ownership because of estoppel. Hence the applicant loses its ownership of the property. It is not necessary to deal with the other points referred to oral evidence in view of the conclusion I have reached.

[24] For the above reasons the appeal is dismissed with costs.

J SHONGWE
JUDGE OF APPEAL

HARMS DP (Lewis and Maya JJA and R Pillay AJA concurring)

[25] I have read the judgment of my learned my colleague Shongwe JA and although I agree with the conclusion that the appeal should be dismissed with costs I do not agree with all the reasoning. His judgment sets out the salient facts and I do not intend to repeat them unless necessary for an understanding of this judgment.

[26] The case of the appellant was that it remained owner of the property because it had been transferred to the second respondent by Mr Qu who had no authority to transfer it; and that the transfer to the first respondent was likewise void because the second respondent was not the true owner and could, accordingly, not have effected transfer. Both transfers were consequently void for the same reason. The old adage, nemo plus iuris ad alium transferre potest quam ipse haberet, as formulated by Ulpian (Digest 50.17.54), applies: no one can transfer more rights to another than he himself has (using Hiemstra and Gonin's translation for safety's sake). Applied to this case it means that Qu had no rights to ownership and, in the absence of the owner's authority, he could not have transferred ownership to the first purchaser. And because the first purchaser did not become owner it, in turn, was unable to transfer ownership to the second purchaser. All this, in my respectful view, has nothing to do with the abstract system of transfer which, in any event, is a well established principle of our law. Because counsel argued the case before the court below with reference to the abstract system that it, incorrectly, found that the second transfer was valid – something no one argued before us.

[27] The real issue in this case concerns estoppel. The two requirements for a valid reliance on estoppel at issue in this case require consideration: misrepresentation and negligence. Although the issues are legally discrete, they become intermingled because the same facts are relevant to both issues.

[28] The first respondent's case was that the deeds registry reflected, to the knowledge of the appellant, that the second respondent was the true owner of the

property. In his judgment, Shongwe JA has pointed out with reference to cases dating back to 1904 that the public is entitled to rely on the correctness of entries in the deeds office. Although the fact of registration is not a guarantee of any right registered, a party will not take transfer of immovable property if he has reason to suspect that the register is wrong. By knowingly leaving the register to reflect the incorrect position as to ownership the appellant, by omission, represented to the world in general and to the first respondent in particular that the second respondent was the true owner of the property. It could not be said with any measure of confidence that the first respondent did not take transfer in the light of this representation.

[29] The more difficult issue concerns negligence because of the short period that elapsed between the date on which the appellant became aware of the state of affairs (18 December 2006) and the date on which the first respondent acted on the representation, which was the date of transfer (8 February 2007). Although the application was launched only during January 2008, nothing in my views turns on this delay as far as the vindicatory claim is concerned because the detrimental act on which the first respondent relies was the taking of transfer.

[30] The following facts dispose in my view of this issue in favour of the first respondent. The appellant knew from past experience that Qu was not to be trusted with company property. The appellant also knew that Qu had no authority to transfer the property and that he had in fact done so. It was aware of the value attached to entries in the deeds register and it should have known that others could act on the assumption that the register was correct by not only selling the property but also by effecting improvements thereon. All this called for urgent action, which was feasible because there was no suggestion that the appellant did not have the necessary funds or expertise to launch an application. The only explanation for the lackadaisical approach given by Ms Cook was that the company had to find an attorney. But this explanation does not hold water. The company had access to the services of the attorney who did the deeds office search on its behalf. Although this is a borderline case I am satisfied that the first respondent was able to discharge its onus.

[31] Counsel for the appellant argued that a finding that the first respondent could rely on estoppel meant that estoppel has become a method of acquisition of ownership while it is supposed to be a shield of defence and not a sword of attack. That estoppel may only be used as a defence is part of English law and since the Roman-Dutch roots of the doctrine are said to be found in the exceptio doli, a legal defence rather than an action, the same may be said to apply in our law. Whether this formalistic approach can still be justified need not be considered in this case even though the effect of the successful reliance on estoppel has the effect that the appellant may not deny that the first respondent holds the unassailable title in the property or that the deeds registry entry is correct. This means that should the latter wish to dispose of the property the appellant would not be able to interfere. If this means that ownership passed by virtue of estoppel so be it. The better view would be that the underlying act of transfer is deemed to have been validly executed.

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L T C HARMS
DEPUTY PRESIDENT

APPEARANCES:

For Appellants:	J C King SC
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	Claude Reid Inc BLOEMFONTEIN
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