



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No 20276/12

In the matter between:

CHAO-CHEN CHEN

Applicant

and

KELLY-ANNE DUARTE

First Respondent

REGISTRAR OF DEEDS

Second Respondent

SHIREEN AHMED-KAGEE

Third Respondent

GABRIEL GIDEON CILLIE

Fourth Respondent

NADIA MOERAT

Fifth Respondent

SHIREEN SITY

Sixth Respondent

NATASHA CHANG

Seventh Respondent

CHANGCHUAN LIN

Eighth Respondent

Court: GRIESEL J
Heard: 27 May 2013
Delivered: 28 May 2013

JUDGMENT

GRIESEL J:

[1] This is a rather unusual application in which it is sought to cancel and set aside the registration of transfer of the immovable property, erf 6020 Constantia, situated at 7 Wittebomen Road, Constantia ('the property'), that was effected by the second respondent, the Registrar of Deeds, to the first respondent, Mrs Kelly-Anne Duarte, on 7 September 2011.

[2] The applicant is Mr Chao-Chen Chen, a Taiwanese national, who was born on 15 August 1962. It is common cause that on 20 June 2011 the first respondent, as purchaser, entered into a deed of sale in respect of the property at a purchase price of R2,2m. In the deed of sale the seller is described as '*Chen Chao-Chen*' ('Chao Chen').¹

[3] The applicant's case is that the sale and transfer of the property was effected pursuant to an elaborate fraud perpetrated by someone unknown to him, who used the name mentioned above and signed such name on the deed of sale and power of attorney without his knowledge or consent in order to pass transfer to the first respondent.

[4] The sale was brokered by the sixth respondent, while the third, fourth and fifth respondents are conveyancers who attended to various stages of the transfer. The seventh and eighth respondent received the

¹ Chinese names usually consist of three characters. The first character is the family name (surname) and the other two characters are the given names. According to Wikipedia, *Chén* (陈/陳) is perhaps the most common surname in Hong Kong and Macau, where it is romanized as *Chan*, and is also common in Taiwan, where it is romanized as *Chen*. See: <http://en.wikipedia.org/wiki/Chinesesurname> (accessed on 24/5/13). In this judgment, the ordinary Western convention is followed of reflecting the given names before the family name of the individuals in question.

proceeds of the purported sale, but both appear in the interim to have absconded. The first respondent is opposing the application, but no relief is claimed herein against any of the other respondents, all of whom abide the court's decision.

[5] The first respondent stated that she is not in a position to admit or deny the bulk of the allegations made herein by the applicant. She accordingly required the applicant to prove the allegations made by him and, to this end, asked that the matter be referred for oral evidence on the following issues:

- (a) whether or not the applicant was the registered owner of the property when transfer thereof was effected by the Registrar of Deeds to the first respondent; and
- (b) if so, whether the said transfer was effected with the authority or consent of the applicant.

[6] An order in these terms was duly granted by agreement between the applicant and the first respondent and I accordingly heard the oral evidence of the applicant and various other witnesses on his behalf.

Ad (a):

[7] In his evidence, the applicant testified that he became the lawful owner of the property in question when it was transferred to him on 6 June 1990 in terms of Deed of Transfer No T31790/90 and that he remained so until the property was transferred to the first respondent on 7 September 2011.

[8] In support of this claim, the applicant testified that he is the person referred to in the deed of transfer referred to above. His name, personal details (date of birth, marital status, etc) and appearance correspond with the photocopy of his passport appearing in the papers. He also signed the power of attorney that was required to register a mortgage bond over the property in 1992.

[9] In addition, evidence was adduced of how the property was administered on his behalf by his attorneys and other appointed representatives since the time he left South Africa for Taiwan around 1995/1996. The first respondent's husband, who was the only witness called on behalf of the respondents, confirmed that he had seen the applicant living in the house before the latter's departure in the mid-90s, after which the house in question became 'derelict' and an 'eyesore', as he put it.

[10] On the evidence as a whole, therefore, it is clear on an overwhelming balance of probability that the applicant was indeed the registered owner of the property when transfer thereof was effected to the first respondent in 2011.

Ad (b):

[11] As for the second issue, the applicant emphatically denied that he had ever authorised the sale or transfer of the property. He also denied having signed the deed of sale and the power of attorney that was relied on to effect the transfer.

[12] The applicant's evidence in this regard is supported by the facts (a) that Chao Chen appears to have made use of a forged passport in order to persuade the relevant authorities that he was the person entitled to pass transfer of the property; (b) that the photograph on the passport of Chao Chen is manifestly not a photograph of the applicant; (c) that the signature on the deed of sale and power of attorney has been forged; (d) that the marital status of the seller on the power of attorney does not correspond with that of the applicant; and (e) that the purported 'seller' as well as the recipients of the proceeds of the sale appear to have vanished since finalisation of the transaction.

[13] Regarding the various signatures, the applicant presented expert evidence by a handwriting expert, Ms Palm, who compared the genuine and purported signatures of the applicant and who persuasively demonstrated the dissimilarities between the genuine and the disputed signatures.

[14] The court is accordingly left with only two alternative hypotheses: either the applicant was an innocent victim of a fraudulent scam resulting from the forgery of his signature; or he was somehow complicit in a plot to transfer the property. While there is ample support for the first hypothesis, there is none whatsoever in support of the second one, nor was this even suggested to the applicant during cross-examination (although this possibility was hinted at, albeit somewhat tentatively, in the first respondent's answering affidavit).

[15] Having considered the evidence as a whole, I am left in no doubt whatsoever that the applicant was not party to the whole scam. I accordingly find on a balance of probability that the applicant's signature had been forged and that this enabled the perpetrator(s) to effect transfer of the property to the first respondent. It is a trite principle of our law that a non-owner cannot transfer ownership, except if granted authority by an owner.² The result is that the forged power of attorney to pass transfer herein was 'mere waste paper', as it was put by Bristowe J in *Kristal v Rowell*.³ The subsequent deed of transfer issued in favour of the first respondent therefore conferred no right or title of any sort upon her and it follows that the applicant is entitled to the relief claimed.

Costs

[16] There was some argument before me as to the appropriate order as to costs that should be granted in the circumstances. Mr *Donen*, on behalf of the applicant, asked for an order for costs against the first respondent in accordance with the general principle that costs should ordinarily follow the result. Mr *Walther*, on behalf of the first respondent, argued that she was obliged, if she wants to pursue her remedies against the 'seller' or the conveyancer, to put up a *virilis defensio* against the applicant's action for eviction.⁴

[17] In my view, the argument advanced on behalf of the first respondent is no ground for depriving the successful applicant of his costs herein. In any event, it would seem that the costs of a defence can

² *Wille's Principles of South African Law* 9ed p 521.

³ 1904 TH 66 at 71.

⁴ See eg 24 *Lawsa* (2ed) para 91.

eventually be recovered from the seller (or other guilty party/parties) as part of the compensation claimed.⁵

Order

[18] In the circumstances, it is ordered as follows:

- (a) **The registration of transfer to the first respondent of the immovable property, Erf 6020 Constantia, situated at 7 Wittebomen Road, Constantia, Western Cape, that was effected by the second respondent on 7 September 2011, is declared to be of no effect;**
- (b) **The second respondent is directed to cancel the aforementioned transfer;**
- (c) **The first respondent and all those holding under her are forthwith ejected from the aforementioned property;**
- (d) **The first respondent is ordered to pay the costs of the application, including the reasonable travelling expenses of the applicant and the witness Robert Hsiang; the qualifying expenses of the expert witness, Ms Yvette Palm; and the costs of the Chinese interpreter.**

B M GRIESEL
Judge of the High Court

⁵ *Lawsa, loc cit.*