Impact of Prior Sale Agreement on Intention to Transfer Ownership of Land

Melelwe v Songca [2024] ZAGPJHC 42

1 Introduction

The court in *Melelwe v Songca* ([2024] ZAGPJHC 42) set aside a contract of sale and ordered the cancellation of a deed of transfer pertaining to land under circumstances where two sale agreements had been entered into with respect to the same property. The property had been transferred to the second purchaser, but the court ordered the cancellation of the deed of transfer on the basis that a previous sale agreement had been concluded with the first purchaser, and the transferor therefore had no right to dispose of the property and could not have intended to transfer ownership to the second purchaser. After summarising the facts and findings of the court, this article sets out some background principles on the sale and transfer of land and their application to double sales. The court's reasoning is then analysed, and the author argues that although the court explained the abstract system accurately, it misconstrued the meaning of "intention to transfer" and did not give enough weight to the core differences between a contract of sale and a transfer of ownership, particularly in the context of double sales. Since the case concerned a transfer of property from a deceased estate, some principles in this respect are also summarised.

2 Facts and findings

In 1998, Melelwe and his wife, who passed away in 2002, concluded a written agreement in terms of which they purchased a piece of vacant land from Mabulala for R7 000. Although they paid the purchase price, ownership of the land was never transferred to the Melelwes. The agreement also provided that the purchasers would pay the outstanding municipal debts with respect to the property, but these were never settled in full. This was apparently the main reason that transfer had not taken place, since a rates clearance certificate is required to register a transfer of ownership (s 118(1) of the Local Government: Municipal Systems Act 32 of 2000).

The land did not remain vacant as Melelwe constructed a house on it and lived there for years. Mabulala passed away in 2006, and his daughter was appointed as the executrix of his estate, although only in 2014. Melelwe was unable to persuade Mabulala's family or the executrix to effect transfer of the property, but he believed that the existence of the sale agreement would be sufficient to guarantee his rights to the property.

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In 2017, Mr and Mrs Songca concluded an agreement with the executrix of Mabulala's estate to purchase the property for R445 985. This second contract of sale was followed by registration of transfer to the Songcas in the same year. They also passed a mortgage bond over the property in favour of SB Guarantee Company (Pty) Ltd as security for repayment of the loan they received to pay the purchase price. The Songcas then demanded that Melelwe vacate the property, and when he refused, they served an eviction application on him (see *Melelwe v Songca supra* par 2–17 for the facts).

In response to the eviction application, which was stayed pending the outcome of the present matter, Melelwe applied for an order setting aside the second contract of sale and also the transfer to the Songcas, on the basis that the property had already been sold to him. He furthermore contended that the second sale was invalid for failing to comply with certain provisions of the Administration of Estates Act (66 of 1965) (*Melelwe v Songca supra* par 18–19; see heading 3 4 below).

The court affirmed the settled legal principle that a contract of sale alone does not transfer ownership to the purchaser, which instead only occurs at registration of the transfer. This means that Melelwe and his wife did not (and could not have) become the owners when the first sale was concluded in 1998, since it was not followed by registration. However, the court also confirmed that registration (in the Songcas' names, in this case) is not unassailable (*Melelwe v Songca supra* par 27). South Africa follows an abstract system of transfer of ownership (see heading 3 1 below). Although a transfer will therefore be valid even if the underlying sale agreement is invalid, the court explained that the validity of transfer itself can be judged with reference to its real agreement. For instance, if the parties did not have the necessary intention to transfer and receive ownership, the transfer would be invalid regardless of the formally valid act of registration (*Melelwe v Songca supra* par 28–30).

Based on the argument that the executrix could not have had the intention to transfer ownership to the Songcas (which is analysed under heading 4 below), the court found that no valid transfer of ownership had taken place despite registration. The court consequently held that Melelwe was entitled to an order setting aside the second sale and cancelling the deed of transfer to the Songcas (*Melelwe v Songca supra* par 36 and 39(*a*)–(*b*)). Also, it held that once he had expunged the amounts owing to the municipality, Melelwe would be entitled to approach the court again for an order directing the executrix or, failing her, the sheriff, to do everything necessary to transfer the property to Melelwe (par 37 and 39(*c*)). Something that the court possibly missed in its order was that the first sale agreement was concluded by both Melelwe and his wife, who had since passed away. Thus, technically, the property ought not to be transferred to Melelwe alone but to him and his late wife's estate jointly, from where her share should be distributed to her heirs.

Before analysing the court's reasoning regarding the executrix's supposed lack of intention to transfer, it is worth summarising some general principles.

3 General principles

3 1 The abstract system of transfer

South African law follows an abstract system of transfer of ownership. This has been settled law for movable property for many years (*Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 398–400, 411–412; *Air-kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) 923–924; *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 (4) SA 281 (A) 301–302), while the Supreme Court of Appeal has more recently confirmed the same with respect to land (*Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) par 17; *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) par 21–22; *Du Plessis v Prophitius* 2010 (1) SA 49 (SCA) par 10; *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 (3) SA 96 (SCA) par 24; *Serne NO v Mzamomhle Educare* [2024] JOL 67521 (SCA) par 25).

In terms of the abstract system, the act of transfer (registration in the Deeds Office in the case of immovable property and delivery in the case of movables) and the underlying *causa* for the transfer (such as a contract of sale, donation or exchange) are two separate legal acts. Each has its own validity requirements and legal consequences. The validity or invalidity of one does not directly impact the validity or invalidity of the other, since each must be judged separately with reference to its own requirements. This means that the invalidity of an underlying sale does not make the transfer of ownership invalid as well. As long as the parties intended to transfer the property, it does not matter that the underlying contract was invalid. The invalidity of the sale may have other consequences, such as giving rise to a restitution claim, but it does not void the transfer or ownership. It could be that both the sale and transfer are invalid for the same reason – for instance, because in neither instance did the seller/transferor have the requisite legal capacity to conclude the legal act, or because fraud permeated both actions. However, this does not mean that either's invalidity is the direct reason for the other's invalidity. The act of transfer may instead be invalid owing to the absence of one of its own requirements (see Pienaar "The Real Agreement as *Causa* for the Transfer of Immovable Property" 2015 78 *THRHR* 47 61).

According to the causal system, which is not followed in South Africa, the validity of transfer depends on a valid contract of sale. Therefore, if the sale is not valid, transfer of ownership does not occur regardless of a formally valid act of registration. As a result, a "seller" under an invalid contract of sale is still the lawful owner of the property despite registration in a "purchaser's" name. (For more on the abstract and causal systems, see Schutte "The Characteristics of an Abstract System for the Transfer of Property in South African Law as Distinguished From a Causal System" 2012 15 *PELJ* 120; Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 84–93; *LAWSA XXVII Things* par 13, 210–213; Brits "Derivative Acquisition of Ownership" in Muller (ed) *General Principles of South African Property Law* 2ed (2025) 159–160.)

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3 2 Requirements for a contract of sale

A contract of sale must, in the first place, satisfy all the general requirements for a valid contract. In addition, the parties must reach consensus regarding the essential elements (*essentialia*) of sale. They must agree on the nature of the transaction (to buy and sell), the property sold, and the purchase price (Glover *Kerr's Law of Sale and Lease* 4ed (2014) 3–5). The seller does not have to be the owner of the property. If not the owner, the seller will not be able (or duty-bound) to transfer ownership to the purchaser but must then transfer vacant possession and provide the purchaser with a warranty against eviction (*Köster v Norval* [2015] JOL 34890 (SCA) par 4; *v Van der Watt* 1975 (3) SA 734 (A) 743–744).

If the property is immovable (land), the formalities stipulated by the Alienation of Land Act (68 of 1981) must also be satisfied. The key requirement in section 2(1) is as follows:

> "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

In other words, a sale of land must be contained in a written document and must be signed by the purchaser and seller or their duly authorised agents. The section 28 qualifier refers to the provisions in section 28(1) dealing with the consequences of the parties having performed partially under a sale that does not comply with section 2(1), while section 28(2) provides:

> "Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee."

Section 28(2) ensures that a completed transfer of the property cannot be overturned merely because the contract of sale was not in writing or signed correctly. There was no indication *in casu* that any of the statutory requirements for either of the two sale contracts were lacking. Thus, there were two valid sale contracts pertaining to the same property. The court nevertheless set aside the second one, for reasons explained under heading 4 below.

It is unquestioned law that a contract of sale itself does not transfer ownership to the buyer. As explained under heading 3 3 below, a change in ownership requires a separate act of transfer. Before transfer, the purchaser only has a personal right against the seller. The object of this right is not the property itself but performance of the seller's duty to transfer ownership of the property or, if the seller is not the owner, to provide the purchaser with a warranty against eviction. This duty is fulfilled when the seller effects transfer to the purchaser. The purchaser can enforce their right by obtaining a court order directing the seller to perform their duty (specific performance). Alternatively, and subject to the terms of the agreement, the purchaser can cancel the contract and claim damages should the seller breach their duty to transfer.

A question in light of the case under discussion is whether the seller has a duty to the purchaser not to conclude other sale contracts with respect to the same property and not to transfer the property to someone else. More importantly, would such further sale and transfer be invalid owing to the duties that exist under the first contract? Although the court appeared to suggest so, there is no authority in South African law for this proposition (see heading 4 below). Even if the contract contains an express or tacit agreement to this effect, it cannot impact the validity of a separate sale or transfer to which the first purchaser is not a party. The first purchaser's only recourse under such circumstances would be to hold the seller liable for damages based on breach of contract.

3 3 Requirements for transfer of ownership

The general requirements for the transfer of ownership, a slightly different version of which was summarised by the court (*Melelwe v Songca supra* par 30), are as follows:

a) The property must be capable of being owned and traded by private persons (*res in commercio*).

b) The transferor and transferee must have the necessary legal and contractual capacity to transfer and receive ownership.

c) The transferor must be the owner of the property, since they cannot transfer more rights than they have.

d) There must be an underlying reason (*causa*) for the transfer, such as a sale, but the latter does not have to be valid (see heading 3 1 above). The *causa* must also be disclosed in the deed of transfer in the case of immovable property.

e) The transferor and transferee must respectively intend to transfer and receive ownership. This is the so-called real agreement and, importantly, is distinct from the intention to buy and sell. The intention element of transfer involves the parties' subjective state of mind as far as transfer is concerned. In practice, this requirement is met by the transferor signing a power of attorney authorising a conveyancer to execute the deed of transfer before the registrar of deeds.

f) The publicity principle must be fulfilled. The property must be delivered to the purchaser in the case of movables, while registration is required in the case of immovable property. In a sale transaction, this will involve the registration of a deed of transfer, executed by a conveyancer (on the transferor's behalf) before and attested by the registrar of deeds (ss 16 and 20 of the Deeds Registries Act 47 of 1937).

g) The purchase price must be paid, but this requirement is only applicable to movables and is subject to the parties' intentions.

(On the requirements for transfer in general, see Muller *et al Silberberg and Schoeman* 84–86; *LAWSA XXVII* par 209; Brits in Muller (ed) *General Principles* 156–159.)

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3 4 Sale and transfer from a deceased estate

As mentioned under heading 2 above, one of Melelwe's arguments was that the second sale was invalid for violating certain provisions of the Administration of Estates Act. He specifically contended that the executrix did not a) advertise a notice to creditors; b) lodge a certificate from the Master that no objection to the transfer existed; or c) lodge, advertise and have lie open for inspection the liquidation and distribution (L and D) account (*Melelwe v Songca supra* par 18–19). These arguments did not have an impact on the outcome of the case, but it is nevertheless worth affirming how transfers of property work when the transferor is a deceased estate to show why these considerations could not have made a difference in the *Melelwe* matter.

Once an executor (or executrix as *in casu*) has been appointed by the Master of the High Court, the first step in the estate administration process is to place an advertisement in the *Government Gazette* and a local newspaper to notify potential creditors and grant them 30 days to lodge claims with the executrix (s 29(1) of the Administration of Estates Act). It is not required to advertise the estate in the case of a so-called section 18(3) estate, where the Master may dispense with the need to appoint an executrix and instead authorise someone to deal with the estate assets in a certain manner. This less complex process may be adopted where the gross asset value of the estate is below the prescribed threshold of R250 000 (GN R920 in *GG* 38238 of 2014-11-24). The threshold was R125 000 in 2006 when Mabulala passed away (GN R1318 in *GG* 25456 of 2003-09-19). Since the deceased's daughter is described as his executrix and not as the Master's representative, and since the second sale was for more than both of these thresholds, this would not have been a section 18(3) estate, and thus the executrix would have had to place the required advertisement. The author consulted the *Government Gazette*'s online archive but could not find such an advertisement. However, nothing turns on this matter, since placing the advertisement is not a formal requirement for selling land from the estate. As mentioned below, it is simply a requirement that must be satisfied before the L and D account may be lodged with the Master. Argument a) is therefore not relevant.

Land can be transferred from a deceased estate in two ways (see Cilliers *Meyerowitz on Administration of Estates and their Taxation* 2ed (2023) ch 13). In the first option, property can be transferred to the beneficiaries of the estate. In such instances, the L and D account, which will include the relevant property and will set out who inherits it, must be lodged with the Master before any transfer can take place. It may not be lodged before the 30 days referred to above have expired (s 35(1) of the Administration of Estates Act). Proof that the estate has been advertised to creditors must also be lodged with the Master. If the Master does not object to the L and D account, it must be advertised (once again in the *Government Gazette* and a local newspaper) and lodged with a magistrates' court (in the district where the deceased resided) to lie open for inspection by the public (s 35(4)–(11) of the Administration of Estates Act). If no one objects to the L and D account in the 21 days after the advertisement appears, or if any such objections have been resolved, the executrix may proceed to distribute the estate assets in

accordance with the L and D account (s 35(12)). The land may then be transferred to the beneficiaries by means of registration (s 39(1)). The conveyancer must certify that the L and D account has lain open for inspection and that there are no (unresolved) objections to it (s 42(1)). Argument c) is therefore irrelevant because the requirement to have the L and D account lie open for inspection is not applicable to a scenario where the property is sold from an estate. It only applies where there is a transfer to beneficiaries.

The second option is to transfer the land from the estate to a purchaser – based on a sale concluded either by the owner prior to his death or by the executrix while administering the estate. All beneficiaries with an interest in the property must consent to the manner and conditions of the sale (s 47). The L and D account will only be lodged with the Master after the land has been transferred and the purchase price collected. However, a copy of the contract of sale, the beneficiaries' consent and the original power of attorney to give transfer must be lodged with the Master before transfer. If the Master does not object to the sale, the Master will endorse the power of attorney or provide a certificate indicating that they have no objections to the transfer (s 42(2)). The endorsed power of attorney must then be lodged along with the rest of the transfer documents at the Deeds Office to register the transfer to the purchaser. After such transfer, the L and D account may be finalised and lodged with the Master, and the rest of the process will follow as explained in the previous paragraph.

The transfer to the Songcas never would have been registered by the Registrar of Deeds had the power of attorney not been endorsed by the Master, so unless there was some oversight or fraud at the Deeds Office (which is unlikely and was not alleged), argument b) is also not relevant.

3 5 Double sales and the doctrine of notice

It sometimes happens that more than one sale is concluded with respect to the same property, referred to as a "double sale". The two purchasers may or may not know of each other, but the seller will (or should) know about both. The reason for selling a property more than once may be relatively innocent, but it could also be that the seller is acting in bad faith or has a fraudulent intent. The second purchaser might also be purposefully interfering with a pre-existing agreement. Either way, these matters can be complicated to resolve.

Neither of the two contracts is invalid or unenforceable merely because the other exists. The second contract is not void just because the seller had already signed the first contract. Similarly, the first contract is not terminated just because a second is concluded. It is not a validity requirement for a sale contract that the same property should not be subject to another sale. There is also no preference for the first purchaser to take transfer of ownership in priority to the second purchaser. Both of them have the same type of right on an equal footing (a personal right to demand transfer of ownership).

If the seller transfers the property to the second purchaser, such transfer will be valid provided that the requirements for transfer are satisfied. The

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only way for the first purchaser to overturn the transfer to the second purchaser is to rely on the doctrine of notice. In terms of this doctrine, if the second purchaser had actual knowledge of the first purchaser's rights, the latter can apply to the court for an order setting aside the transfer to the second purchaser and ordering the property to be transferred to the first purchaser instead. The doctrine of notice is based on the equitable principle that the second purchaser should not benefit from their own bad faith. However, the doctrine of notice can only be relied on where the second purchaser had actual knowledge of the first contract at the time that they entered into the second sale (see further Muller *et al Silberberg and Schoeman* 95–98; *LAWSA XXVII* par 214).

Melelwe was living on the property when the Songcas concluded their sale agreement with the executrix. However, there is no indication from the disclosed facts that the Songcas knew or even suspected that Melelwe had concluded a sale agreement with the deceased years before. Indeed, there were no allegations of bad faith or knowledge on the Songcas' part, so the doctrine of notice was not relevant *in casu*. The court also did not consider the doctrine of notice, and it does not appear that it was even raised. However, this is the kind of factual scenario where one would usually consider whether the doctrine of notice applies and then (after concluding that it does not, owing to the second purchaser's lack of knowledge about the first sale) uphold the transfer to the second purchaser. The first purchaser will then have to seek an alternative remedy against the seller, such as a refund of the purchase price, and they might also have an enrichment claim based on improvements made to the property. As explained below, the court did not approach the dispute in this conventional manner but instead found a creative albeit questionable way to prefer the first purchaser's personal right to receive transfer of the property over the second purchaser's real right of ownership.

4 Analysis of the court's reasoning

The court's solution to the dilemma faced in this matter was to set aside both the second contract of sale and the transfer of the property to the Songcas. The court based this decision on the supposition that the seller/transferor (the executrix) could not have had the requisite intention to sell or transfer the property to the Songcas. The crux of the court's *ratio* is contained in the following two paragraphs:

> "It seems to me that the [e]xecutrix … was not in a position to enter into an agreement to transfer ownership of the … property, any more than would Mr Mabulala have been, were he to be still alive. Could it be said that [the executrix] had a true *animus contrahendi* when, as a matter of fact, an unimpugned deed of alienation had already bound the … property to someone else? It is not necessary to investigate this avenue, for it seems to me equally apposite (and determinative) that at least one import of the first Deed of Sale was to encumber Mr Mabulala with an obligation to do what was required in order for Mr Melelwe to bring about transfer of the property's ownership (to himself) when once he was in a position to do so. Absent release of that obligation – for example, by cancellation of the first Deed of Sale, Mr Mabulala was not free to dispose of the … property to third parties, and nor – accordingly – was the [e]xecutrix of his estate.

> Therefore, the real agreement underlying the second Deed of Sale was incompetent to achieve its objective. [The executrix] could not have agreed to sell to the Songcas the property." (*Melelwe v Songca* supra par 31–32, footnote omitted)

The author has reservations about the above *ratio* because it arguably does not accurately reflect the legal position. It neither agrees with the fundamental principles of property and contract law nor is it supported by any authority. The explanation is also somewhat confusing, since the court does not draw a clear distinction between the contract of sale and the act of transfer.

The court appears to have set forth two main propositions. The first is that the executrix could not have had the intention to conclude the second sale agreement or to transfer ownership thereunder because the deceased had already committed himself to transferring it to the first purchaser. The judge nevertheless stated that it was not necessary to follow "this avenue" and instead resorted to the second proposition, which does not differ much from the first. Because the deceased had a duty under the first sale to do everything necessary to transfer the property to Melelwe, the deceased (or his executrix after him) first had to be released from this duty (such as through a cancellation of the sale agreement) before he or she was "free to dispose of" the property (*Melelwe v Songca supra* par 31). This reasoning led the judge to the conclusion that "the real agreement underlying the second [sale]" was "incompetent to achieve its objective", namely to transfer ownership, and thus the executrix "could not have agreed to sell to the Songcas the property" (*Melelwe v Songca supra* par 32).

Significantly, the court did not find that the executrix *did not have* the intention to transfer ownership to the Songcas, which indeed would have rendered the transfer void, but that she *could not have had* the intention to do so owing to her contractual duty to transfer ownership to Melelwe. However, this is not how the intention element of derivative transfer of ownership works. Intention is a question of fact and must be proved with direct evidence such as witness testimony, the power of attorney to transfer ownership, the terms of the underlying agreement and/or the surrounding circumstances. Derivative transfer is about what the intention actually was, not what it could have or should have been. Therefore, if there had been a true intention to transfer, the court cannot ignore it and, in its place, assign a different intention (or lack thereof) based on what should or could (not) have been, given other contractual duties of the transferor towards a third party.

The transferor's intention to transfer ownership might indeed violate a duty towards another person and may even originate in a fraudulent motive, but that does not make it impossible to have such an intention or for that intention to have legal consequences. In fact, a fraudulent motive can sometimes serve as proof of the intention to transfer (*Du Plessis v Prophitius supra* par 12). The motivation of the parties to set up a simulated transaction can similarly prove their intention to transfer and receive ownership (*Absa Ltd v Moore* 2016 (3) SA 97 (SCA) par 27; *Legacy Business Finance (Pty) Ltd v Jacques* [2024] ZAGPPHC 752 par 26–28).

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When the executrix transferred ownership to the Songcas, she did indeed commit a breach of contract in relation to Melelwe, but that does not mean that it was legally impossible for her to transfer the property or to have the relevant intention to transfer. The law's response to a breach of contract is not to create a fiction that the breach did not occur when, in fact, it did. Instead, the law provides remedies to address the breach and its consequences, such as an order for specific performance. This is the natural and preferred remedy for breach of contract, but one that can only be granted if such performance is physically possible, which is not the case where the object of performance (the property) is not, or is no longer, owned by the seller. An alternative remedy, such as damages, would have to be sought in such instances. The solution is not to overturn an otherwise valid transfer of ownership on the basis of a fiction that the seller should or could not have intended to perform that transfer even though she expressly and incontrovertibly did have such an intention. Her contractual duty to the first purchaser neither removes from her the capacity to intend to do something that would breach that duty, nor does it void the consequences of such intention.

A further problem with the judgment is that, if the court is correct, there would be no further need for the doctrine of notice in this context. Double sales would no longer be a problem, since it would be legally impossible for a seller to enter into a second sale agreement or to intend to transfer ownership under a second sale. The first purchaser would always be entitled to receive transfer of ownership, no matter what the seller intended to do in a separate transaction. Thus, the court would simply be able to overturn any transfer under a second sale, irrespective of whether the second purchaser knew of the first. If the court's approach *in casu* is to be taken seriously, it would mean that if a seller entered into a contract of sale, it would be legally impossible for her to enter into a second sale with respect to the same property before the first is cancelled. There is no authority for this proposition in our law.

5 Conclusion

The courts in double sale cases often face a choice between two innocent parties. Is the first or the second purchaser entitled to the property? Whatever the court may decide, one of the two purchasers will be dissatisfied and will have to settle for seeking redress from the seller. This might not be easy or successful and will leave such a party without its ultimate desire, namely the property. Both parties cannot have the property, and so a choice must be made – one found in principle, not in equity. Indeed, the choice has already been made over the course of many years of legal development. It is reflected in the tried-and-tested principles surrounding the derivative transfer of ownership, the abstract system of transfer, the requirements for sale and transfer, the doctrine of notice, and the available remedies for prejudiced parties. Since transfer is a separate legal act, the purchaser who receives ownership first will be the owner, provided that all the requirements for transfer of ownership have been satisfied. Such a transferee's real right is favoured over the personal right of the other purchaser. The only exception is where the transferee had actual knowledge of the other sale agreement and thus took transfer in bad faith.

One has sympathy for Melelwe on the facts in this matter, since he clearly fell victim to a series of unfortunate events outside of his control. However, the Songcas were similarly innocent. They purchased the property and took transfer from a person who was legally entitled to sell and transfer it and who did everything she legally needed to do to pass ownership to them. As a result of the court's finding in favour of Melelwe, however, the Songcas now sit with a mortgage debt but nothing to show for it, except a claim against Mabulala's deceased estate for a refund of the purchase price. This claim could take years to collect and might prove fruitless, while in the meantime, they have to pay monthly instalments to the bank. What makes their predicament any less troublesome than Melelwe's? The court favoured Melelwe by imputing to the executrix a lack of intention to transfer, regardless of the fact that she indeed had the required intention. The court effectively set aside a perfectly valid transfer of property that complied with all the requirements and did so on grounds that are unknown to South African law, namely an imputed lack of intention that contradicts the transferor's actual intention. Perhaps the true, albeit unspoken, basis for the court's finding was its sense of what would be the most equitable outcome for the parties, but it is debatable whether the outcome arrived at was indeed the most equitable one. In any event, this is not how the decision should have been made.

It is hoped that this judgment is an outlier that will not be followed in future; otherwise it could cause serious uncertainties for property transactions. It will chip away at the abstract system and make the doctrine of notice all but redundant in this context. Most notably, it will open the door for courts to impute to a transferor what their intention should or could (not) have been, based on external factors such as commitments made to a third party and even the general equity of the matter, despite an intention that has been proved. Perfectly valid transfers would be subject to challenge based on previous sale agreements that the transferee did not know about. This prospect cannot be supported. Derivative transfer of ownership is premised on the intention to transfer as a question of fact – a core tenet of the abstract system. It is not based on what the intention could or should (not) have been in pursuit of fairness towards a third party of whom the transferee had no knowledge. Any change in approach to favour an innocent prior purchaser over an innocent transferee would require a thorough investigation into the possible development of the common law and would have to be based on something more principled than a fiction in terms of which a court may impute an intention (or lack thereof) to a transferor.

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