

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

APPEAL CASE NO: 2010/50006

DATE:28/05/2012

NOT REPORTABLE

In the matter between:

B, JM

Appellant

and

B, DH

Respondent

J U D G M E N T

SUTHERLAND J:

[1] The appellant and respondent were formerly married to one another. They were divorced on 12 May 2009. Among the disputes addressed in a contested divorce action was the question of whether or not the respondent was entitled to transfer of a one third share in a house at Erf 59 Honeyhills,

Johannesburg, which was, at all times, registered as the sole property of the appellant. The judgment on trial held that he was entitled to transfer and made a corresponding order.

[2] The appeal is against that part of the trial judgment's order.

[3] The basis of the claim by the respondent is that the provisions of clause 8 of an antenuptial contract, drawn on 22 September 1993 conferred such a right. That text reads:

“EIGHT

That the assets of either party, which are listed hereunder, and all liabilities presently associated therewith, or any other asset acquired by such party by virtue of his possession or former possession of such asset, shall not be taken into account as part of such party's estate at either the commencement or dissolution of the marriage:

That of Daniel Hugo Bath to be:

1/3 share of Erf 59 Honeyhills Township	R120,000
Erf 1829 Ramsgate Township	16,000
Stamp collection	2000
<i>[over page]</i>	
Wood and woodwork equipment	R10,333,00
All paintings by F Coetzee	4,000,00
Ford Prefect 1946	12,000,00
Antique sewing machine	1000,00
Chemical scale	3000,00
1940 Radio	500.00

All firearms	27,500.00
That of Joy Moonjean Usswald	
2/3 share Erf Honeyhills Township	R 240 000
3 Tier antique bookcase	3000,00
Pearls, emerald ring, gold bracelet	5000,00
Antique teak desk	5000,00
Lladro porcelain collection	10,000,00”

[4] It is common cause that the assertion of a right to transfer of fixed property must satisfy the provisions of Section 2 of the Alienation of Land Act 68 of 1981. That text reads:

“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 contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”” .

The concept of “land” includes, in terms of Section 1, ‘*any right to claim transfer of land*’.

[5] In support of his contention that he is entitled to a transfer of the third share, as recorded in the ANC, the respondent testified that he and the appellant reached an oral agreement. The agreement arose from the respondent’s payment of a sum to the appellant’s then, about to be, ex-husband, Usswald, to discharge her indebtedness to Usswald in respect of Usswald’s entitlement to a share in the value of her estate by reason of his disbursements to pay the bond on the house. In return for the respondent’s

payment on her behalf, the appellant agreed to give him a third of the property. Although this account was disputed by the appellant, and gallantly corroborated by Usswald, we prefer the version of the respondent because of the poor showing of the appellant as a witness and because the probabilities are overwhelmingly in favour of the respondent's version. On the appellant's version no plausible reason was given for what appears in clause 8 of the ANC. Her professed ignorance of its provisions is unconvincing. However, for the reasons that follow, it is unnecessary to address the credibility of the parties any further.

[6] The essential difficulty with the case for the respondent, despite acceptance of his testimony on the origins of the provisions of clause 8, is the absence of evidence to demonstrate a valid and enforceable agreement in the terms that he alleges.

[7] The primary impression upon the reader of clause 8 is that the parties have recorded a schedule of property each asserts they own. The purpose of the clause is to identify plainly which of their assets are to be expressly excluded from their estates subject to accrual. The text does not purport to record the actual transfer or an obligation to transfer or a right to receive transfer. Signally absent is any reference to a causa for the passing, from the appellant to the respondent, of an entitlement; rather, the text, at best, presumes the existence of the fact of the entitlement, which, in turn, would be premised upon a valid agreement to pass transfer of fixed property.

[8] Self evidently, a *bona fide* belief in a given state of fact may be incorrect in law. This case illustrates exactly that.

[9] It is plain that there is no other writing of any sort upon which the respondent can rely to assert his claim.

[10] It is argued that the text of clause 8 can be read to mean that it was within the contemplation of the contracting parties when concluding the ANC that the third share was 'to be' transferred in the future. The premise for this contention rests wholly upon the use of the words 'to be' in the preamble to the schedule of the respondent's excluded assets. Those words are not used in the preamble to the appellant's schedule. The argument is that, with regard to that contrast, the text envisages a future transfer of the third share.

[11] There seem to be two reasons why that contention cannot be sustained. First, there are 10 items of property in the respondent's schedule, of which 9 items were already his property. The preamble must be read to apply to all the items. Logically, the notion of future acquisition cannot apply selectively to one and not the others. Secondly, Clause 7 of the ANC also employs the words 'to be' in respect of the parties declarations about the present value of their estates subject to an accrual. The sentence reads: "*...the intended spouses declared the net value of their respective estates to be as follows: ...*". The usage of the words 'to be' in that clause could not mean a future acquisition of assets up to the given values.

[12] It seems more likely that the drafting was inept in not keeping to a consistent structure, a conclusion which is fortified by the fact that both clauses 7 and 8 begin with the word ‘that’ which was superfluous and grammatically incorrect given that the clauses are all subordinate to the introductory mantra which ends: ‘..., *they have contracted and agreed, as by these presents, that: ...*’ None of the other subordinate clauses commit this error.

[13] The harsh reality is that, notwithstanding a de facto intention to make over to the respondent an interest in the house, because the legal formalities for that transaction were not fulfilled, that undertaking cannot be enforced. The very point of the Alienation of Land Act is to compel prescribed writing to be effected and to penalise non-compliance with invalidity. The very words of the statute “*No alienation of land ... shall,be of any force or effect unless contained in a deed of alienation signed by the parties*” eliminates any doubt. The whole contract to effect a valid alienation must be in writing and no room exists to supplement it (*Leal v Johnston* 1978 (4) SA 706 (W) at 711A). Although it is now uncontroversial that in the exercise to interpret any writing recording a contract, ambiguities in the writing can be resolved by reference to evidence of the context (*KPMG Chartered Accountants (SA) v Securifin Ltd & Ano* 2009 (4) SA 300 (SCA) at [39], per Harms DP) there can be no amplification of the record created by the contracting parties. The unavoidable implications of the contentions on behalf of the respondent are that the court is indeed asked to supply exactly such an amplification.

[14] The consequence is that the respondent has no enforceable right to a transfer of a third share of the house because there is no written instrument which confers that right upon him, as contemplated by Section 2 of the Alienation of Land Act.

[15] In the circumstances, the appeal must succeed.

[16] In addition, it must follow that as the appellant remains the owner of three thirds of the house; but, only two thirds were excluded from the accrual, a third of the value of the house must be taken into the reckoning for the calculation of any accrual.

[17] It is unnecessary for us in this judgment to make any findings about the question of Unjust Enrichment, if any, that has resulted from the failure to reimburse the respondent for his outlay which has enriched the appellant.

[18] As to costs, as the appellant has been wholly successful, and resistance by the respondent was persisted with to the end, no circumstance exists of sufficient weight which might persuade the court to vary the usual consequence that costs follow the result.

[19] Accordingly, an order is made as follows:

- 19.1 The appeal is upheld.
- 19.2 Orders 2, 3, 4 and 5 of the judgment a quo are set aside.
- 19.3 The respondent shall pay the appellant's costs.

RT SUTHERLAND J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree, and it is so ordered:

K SATCHWELL J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

B A MASHILE AJ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Date of Hearing : 26 April 2012

Judgment handed down : 28 May 2012

For Appellant : Adv HL Haskins SC
Shapiro & Shapiro Inc

Reference : Shapiro/N Oosthuizen/b0032/amn

For Respondent : Attorney M W Verster
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