

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

OF INTEREST

Case No: 2567/2021

In the matter between:

TERER BELEGGINGS (PTY) LTD

PLAINTIFF

and

HOUGHAMDALE TRADING (PTY) LTD

FIRST DEFENDANT

HUMANSDORP COOPERATIVE LTD

SECOND DEFENDANT

ABSA BANK LTD

THIRD DEFENDANT

**THE REGISTRAR OF DEEDS,
KING WILLIAM'S TOWN**

FOURTH DEFENDANT

JUDGMENT

Govindjee J

Introduction

[1] The Subdivision of Agricultural Land Act, 1970¹ ('the Act') prohibits the subdivision of agricultural land absent the consent of the Minister of Agriculture, Land

¹ Act 70 of 1970.

Reform and Rural Development. This matter concerns claims for restoration of agricultural land transferred by the plaintiff to the first defendant during 2008, either on the basis that the deed of sale was illegal and void ab initio, due to the absence of the Minister's consent, alternatively because the plaintiff has always remained owner of the immovable property due to the parties' absence of intention to transfer ownership. Various complex issues require determination.² These include the proper categorisation of the plaintiff's main claim, also for purposes of determining the special plea of prescription,³ the so-called 'real agreement' as part of the abstract system of transfer of immovable property, the impact of any invalidity in the deed of sale on the real agreement and whether an offending clause may be severable.

The parties

[2] Terer Beleggings (Pty) Ltd ('the plaintiff') was the registered owner of the immovable property described as 'remainder of portion 7 of the farm Houghamdale North Nr 341' ('the immovable property'). The immovable property is situated in the Blue Crane Route Municipality in Somerset East and is 552.0256 hectares in extent, held by title deed number T85[...].

[3] The plaintiff, represented by Mr Willem van Bergen, and the first defendant, then known as RZT Zepty 5196 (Pty) Ltd ('the defendant') entered into a written deed of sale on 19 November 2007. The defendant was represented by Mr Mark Holliday. Subsequently, the plaintiff transferred the immovable property to the defendant and received payment of R9,1 million plus VAT ('the purchase price').

The pleadings

[4] The plaintiff instituted action during August 2021. It averred that the subject matter of the deed of sale was 'an undivided portion of the immovable property',

² In *Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd and Others* [2016] ZASCA 190; [2017] 1 All SA 401 (SCA) ('*Nuance*') para 26, Willis JA described similar issues as 'an intricate web of tangled questions of law ...[that] are not straightforward'.

³ See *Off-Beat Holiday Club & Another v Sanbonani Holiday Spa Shareblock Ltd and Others* [2017] ZACC 15; 2017 (5) SA 9 (CC); 2017 (7) BCLR 916 (CC) para 31.

comprising 474 hectares, ('the undivided portion') together with a portion of the plaintiff's water rights. The plaintiff pleaded that it was in the process of sub-dividing and selling a 52-hectare portion of the immovable property, intending to consolidate that land with another piece of land. In terms of clause 24.5 of the deed of sale, the defendant agreed to sign all the necessary documentation to enable the plaintiff to proceed with the sub-division and consolidation. The plaintiff highlights this clause to demonstrate that the defendant would not receive ownership of the immovable property in its full extent. The agreement, according to the plaintiff, was that the defendant agreed to pay the purchase price to the plaintiff in return for the undivided portion and water rights, upon registration of transfer of the immovable property in its name.

[5] The crux of the plaintiff's main claim is that the deed of sale is illegal and void ab initio because it contravenes s 3(e)(i) of the Act.⁴ This is on the basis that it constituted the sale of an undivided portion of agricultural land without the written consent of the Minister. As a result, the subsequent transfer and registration of the immovable property falls to be set aside, the status quo ante to the deed of sale to be restored.

[6] The plaintiff's alternative claim is that, at the time of contracting, neither party intended that the defendant would become owner of the whole of the immovable property. The intention was that the defendant would become owner only of the undivided portion but that, as a result of the statutory prohibition against sale of an undivided portion of agricultural land, transfer of the immovable property was effected. As the parties never intended the transfer of ownership of the immovable property to the defendant, ownership never passed on registration of transfer, so that the plaintiff

⁴ Section 3(e)(i) provides that, subject to the provisions of section 2, no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in legislation unless the Minister has consented in writing. On the definition of agricultural land, see T Kotze *The regulation of agricultural land in South Africa: A legal comparative perspective* (unpublished LLD dissertation, Stellenbosch University, 2020) chapter 2. The purpose of the Act is to prevent the fragmentation of agricultural land into uneconomic units: see *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

‘remained owner of the immovable property and is entitled to its return through rectification of the Deeds Registry to reflect its ownership’.⁵

[7] The defendant denied that the deed of sale was in respect of only the undivided portion or that it would not receive ownership of the immovable property in terms thereof. It pleaded, in essence, that the deed of sale pertained to the immovable property, which had been transferred to it, and that reference to 474 hectares in the deed of sale was immaterial upon proper interpretation. The purchase price had been paid in consideration of transfer of the immovable property and ministerial consent was unnecessary prior to transfer. It advanced an interpretation of clause 24.5 to support its contention, pleading that the clause extended a personal right to the plaintiff to make application for a sub-division and consolidation with other property, and that it was severable from the remaining clauses of the deed of sale, void and unenforceable by virtue of s 3(e)(i) of the Act.

[8] In respect of the alternative claim, the defendant pleaded that it intended to become the owner of the immovable property upon registration of transfer, denying that the parties had intended ownership of only the undivided portion to pass and referring to the statutory prohibition in support of this. The plaintiff had transferred the immovable property with the conscious intention of doing so and the defendant had received such transfer with the same intention.

The special plea

[9] The defendant entered a special plea that the main claim was premised upon an erroneous interpretation of the deed of sale. That claim was for a declaratory order, together with consequential relief, and was extinguished by prescription on either 20 November 2010 or 12 April 2011.⁶

⁵ The plaintiff tendered to repay the defendant the purchase price against rectification of the Register of Deeds to reflect the plaintiff as the owner of the immovable property.

⁶ The defendant’s rejoinder persisted with the special plea of prescription: ‘The first defendant ... denies that the plaintiff’s claim is a vindicatory claim and pleads further that that plaintiff’s claim, as it is advanced in its particulars of claim, is for an order declaring the deed of sale, annexure “POC 1”, unlawful and void and a consequent claim for the transfer of the property, by the plaintiff to the first defendant, to be cancelled and set aside and which claim, being the complement of the plaintiff’s

[10] The plaintiff replicated to the special plea, pleading that its claim was a vindicatory action for the return of immovable property through the rectification of the Register of Deeds, and did not constitute a debt for purposes of the Prescription Act, 1969.⁷ The defendant denied this in its rejoinder, on the basis that the plaintiff had not alleged that it was the owner of the immovable property and had not advanced a claim for its return on the basis of ownership. It averred that the plaintiff's claim was advanced in terms of the *condictio ob turpem vel iniustam causam* ('the *condictio*').

Separation of issues

[11] The parties agreed that a conditional counterclaim, filed by the defendant, should be separated from the merits of the plaintiff's claim and the special plea of prescription. I granted an order of separation in terms of Uniform rule 33(4) at the onset of the trial and the matter proceeded on this basis.

The plaintiff's evidence

[12] Mr Van Bergen testified that he was the only director and sole shareholder of the plaintiff. He had purchased the immovable property from Mr Carel Otto and Swartot Beleggings BK, an entity represented by Mr Otto ('Otto') during 2004. Otto was the owner of the land neighbouring the immovable property, which contained a number of centre pivots for purposes of irrigation. Some of the centre pivots that had been installed by Otto, and used by him, overlapped onto the land Mr Van Bergen had purchased. The agreement was for Mr Van Bergen to purchase the entire Farm No. 341/7, but not the pieces used by Otto, which were to be retained by him. In exchange for this concession, Farm No. 341/14, which was a narrow portion of land in the midst of Farm No. 341/7, was given to Mr Van Bergen. A contract written in Mr Van Bergen's hand purported to give effect to this arrangement. An unsigned, typed contract included a clause referring to Mr Van Bergen and Mr Otto's intention to

claimed right to an order declaring the deed of sale unlawful and void, and which claims constitute a debt for the purposes of prescription in terms of the Prescription Act'.

⁷ Act 68 of 1969.

formally apply to subdivide and consolidate their land to give effect to their arrangement ('clause 18').⁸

[13] Mr Van Bergen explained that the typed contract had not been concluded and had remained unsigned. Correspondence from his attorney, Mr Schutte, dated 16 August 2004, had drawn his attention to the conflict between clause 18 of that draft contract, and the Act, as interpreted by the courts, in clear terms.

[14] The plaintiff and Swartot Beleggings BK, represented by Otto, subsequently concluded a contract of sale of the immovable property on 10 September 2004. The problematic clause 18 had, on the advice of Mr Schutte, been removed. The plaintiff took occupation and started farming the land, excluding that portion that Otto still used. Mr Van Bergen understood that he and Otto had reached agreement regarding future subdivision in accordance with what had been contained in clause 18, and Otto farmed those portions of the immovable property on which his centre pivots encroached, rent free, as if it was his own.

[15] A memorandum of agreement was subsequently entered into between the Kallie Otto Seuns Trust, represented by Otto, and the plaintiff on 1 August 2007. This document reflected the agreement of the parties to transfer certain undivided portions of property listed in the agreement to each other without any compensation payable. Mr Van Bergen confirmed that the portions of property in question were the same as per the 2004 understanding. However, approximately a month prior to entering into

⁸ Clause 18 of that document reads as follows:

'18.1 Die koop is onderhewig daaraan dat: -

18.1.1 die Koper die reg sal hê om op sodanige gedeelte van Blok 12 soos aangedui op die kaart hierby aangeheg, te oorskrei deur middel van 'n spilpunt wat die Koper van voorneme is om op die hierin verkoopte eiendom, op te rig; en

18.1.2 dat Carel Lodewyk Otto die reg sal hê om op Blok 20 soos aangedui op die kaart hierby aangeheg, te oorskrei deur middel van 'n spilpunt wat hy van voorneme is om op die oorblywende eiendom op te rig; en

18.1.3 dat Carel Lodewyk Otto die uitsluitlike gebruik sal hê van alle gedeeltes wat deur die spilpunt synde Blok 11 op die kaart besproei word asook Blokke 13, 14 en 15.

18.2 Dit word voorts hiermee geboekstaaf dat dit die partye se bedoeling is om binne 'redelik tyd aansoek te doen om die onderverdeling en konsolidasie van die hiermee verkoopte en aangresende eiendomme sodat die gedeeltes waarna in Sub-Klousule 1 hiervan verwys, van en by hul eiendom afgesny en byvoeg word en oor te dra aan die ander party.'

this agreement, Otto sold the portions of land he owned to No 2 Piggeries (Pty) Ltd ('Piggeries').

[16] The immovable property was subsequently sold to the defendant. Mr Van Bergen explained that an estate agent contacted him and that he mainly engaged with her. Mr Holliday, representing the defendant, had subsequently met with Mr Van Bergen and the agent at the farm to clinch the deal. According to Mr Van Bergen, it was only the undivided portion that had been sold, which was the land that he had been farming and the undeveloped part of the farm without centre pivots. Mr Holliday had understood that the parts of the farm covered by Otto's centre pivots were 'not negotiable'. This explained the reference in the deed of sale, which had been drafted by Mr Schutte, to the extent of the farm being only approximately 474 hectares, as opposed to the entire extent of the immovable property (552 hectares). The defendant had purchased only the undivided portion and 200 hectares of water rights for R9,1 million. The defendant took occupation of the undivided portion soon thereafter and Otto, or his successor, continued to farm those parts of the immovable property covered by his centre pivots, which remains the current position. The deed of sale included the following clause ('clause 24.5'):

'The Seller records that he is in the process of sub-dividing and selling a piece of the land hereby sold, approximately 52 hectares in extent, and to consolidate the said land with another piece of land as will more fully appear on the diagram attached to this agreement, marked Annexure B and initialed for identification purposes by the parties. The costs for this sub-division and consolidation will be for the account of the Seller. The Purchaser agrees to sign all the necessary documentation to enable the Seller to proceed with the aforesaid.'

[17] A diagram attached to the deed of sale and signed by the parties contained a handwritten note by Mr Van Bergen making reference to 'die gedeelte met die kruisies is die gedeelte wat by Mnr Otto bly. Mnr Du Preez in Somerset is besig met die onderverdeling'. To translate, 'the part with the crosses is the part that stays with Mr Otto. Mr Du Preez in Somerset is busy with the subdivision'. Crosses appeared on the sketch reflecting the 'Otto part'. Mr Van Bergen reiterated that his intention was to sell only the undivided portion. Even though the immovable property, in its entirety, had

been transferred to the defendant, they had never taken occupation of the portion Mr Van Bergen would exchange with Otto.

[18] Mr Van Bergen testified that any efforts to subdivide the immovable property in terms of his arrangement with Otto had subsequently stalled. The papers reveal that an application to subdivide the immovable property, as well as other portions of the Farm Houghamdale No. 341, in terms of the Act appears to have been submitted to the Department of Agriculture, Land Reform and Rural Development during March 2017. Correspondence from the Acting Chief Director: Natural Resources Management, as 'delegate of the Minister', indicates that the application had been granted during June 2017. This included consent to subdivide the immovable property into two portions measuring approximately 79 hectares and 473 hectares respectively. Mr Van Bergen confirmed that this attempt to sort out the encroachments had been on the part of Piggeries and the defendant, rather than by the plaintiff and Otto. He had, for various reasons, insisted that the subdivision be placed on hold pending these proceedings.

[19] During cross-examination, Mr Van Bergen confirmed that he purchased the immovable property from Otto on the understanding that the boundaries would be resolved later by way of an application for subdivision and consolidation, and with the permission of the Minister. This never happened and both he and Otto sold their properties separately during 2007. Any exchange of land subsequent to this was a matter of concern to the new owners, namely the defendant and Piggeries.

[20] Mr Van Bergen conceded that he had knowingly transferred the immovable property, in its entirety to the defendant. A power of attorney appointing an attorney to pass transfer of the immovable property to the defendant reflects this. The power of attorney was signed by Mr Van Bergen at Hopetown on 24 December 2007. It refers to the R9,1 million purchase price and, contrary to the deed of sale, describes the immovable property in its full extent (552.0256 hectares). Mr Van Bergen explained that he knew that the power of attorney pertained to the entire extent of the immovable property and had been forced to do so to enable the defendant to 'put the ground on his name'. However, he maintained that he had not sold that part of the farm used by Otto, adding:

‘We agreed that part to be taken off should be done after this, we can’t do that if the farm is not on his name ... the rest [was] to be done later ... From my view we just did that to get the farm into his name and then we subdivide it ... [we] had to do that because [in terms of the law] we could not pass it over if subdivided ... it was not my intention [to transfer the entire farm but] I had to do it to help Holliday.’

[21] With reference to clause 24.5, Mr Van Bergen explained that the intention was to secure future cooperation for purposes of subdivision and consolidation, once the (entire) immovable property had been transferred. The defendant was never approached by Mr Van Bergen for implementation of this clause. Mr Van Bergen also indicated that what he had intended and achieved was to sell and transfer the whole farm, with a secondary agreement that both parties would cooperate ‘to effect subdivisions and consolidations with the permission of the Minister’. The sale and transfer had deliberately been of the immovable property as a whole. Mr Van Bergen, understandably considering the passage of time, had little recollection of the single meeting he had with Mr Holliday prior to the sale.

The defendant’s evidence

[22] Mr Holliday explained the circumstances that resulted in the purchase of the immovable property. He and Mr Lourens Fourie agreed to form a dairy partnership and he contacted an agent to identify a farm for this purpose during August to October 2007. He and the agent met with the farm manager on site and drove around the farm together. As the intention was to establish a dairy, acquisition of irrigated land with centre pivots, or land on which centre pivots could be installed, was the focus. He subsequently met with Mr Van Bergen at the farmhouse and an agreement in principle was reached in respect of purchase price and existing crops. The understanding was that lawyers would be engaged on both sides to take matters forward and conclude a deed of sale. He received clear advice that the entire property had to be purchased ‘altogether’.

[23] Clause 24.5 had, for the first time, been added to the final draft of the deed of sale. Mr Holliday was unconcerned by its inclusion given that he had examined a map of the property provided by the farm manager during his initial visit. As owner of the property he took the view that he would retain a right to refuse anything more than cooperation, and was satisfied as long as his intended centre pivots could proceed for purposes of dairy farming. This planned development was on the western part of the property and the boundaries in question were on the eastern side.

[24] Mr Van Bergen contacted Mr Holliday sometime during 2013/2014 in respect of possible transfer of water rights. Although 200 hectares of water rights had been the subject of the deed of sale, only 174 hectares were in fact recognised by the relevant Department. The defendant was aware that Otto sold his property to Piggeries. The encroachment persisted and was allowed despite the absence of a formal arrangement. Attempts to formalise the arrangement to reflect 'the existing boundaries' had commenced during 2011, but had not been completed for various reasons. The intention of the new owners appears to have been exactly the same as that of Mr Van Bergen and Otto, namely to subdivide and consolidate the land to enable Piggeries to own the portion of the immovable property on which its centre pivots encroached (amounting to almost 80 hectares), in exchange for the defendant obtaining the tongue of land owned but not used by Piggeries in the midst of the immovable property (amounting to approximately 20 hectares).

[25] The crux of Mr Holliday's evidence was that he purchased the immovable property in its entirety. According to the legal advice he received, this was the only possibility in the absence of surveys of subdivisions and additional formalities. He testified, during cross-examination, that the neighbour's encroachment had occurred continuously since the defendant took occupation of the immovable property. The effect was that a part of the property purchased was being farmed by someone other than the defendant from the time of purchase. Mr Holliday's attention was drawn to this with the inclusion of clause 24.5 in the final version of the deed of sale. The portion that the defendant had occupied and farmed was that which had been shown to Mr Holliday by the farm manager on his first visit.

[26] In terms of the proposed subdivision, Piggeries would receive more than 80 hectares of land, including centre pivots, in exchange for a portion of only 20 hectares without compensation. Mr Holliday explained that while the land to be subdivided and effectively given away was not being farmed or used by the defendant, they would have to sign the paperwork as owner. In response to the proposition that this arrangement demonstrated a lack of intention to take ownership of the undivided portion, Mr Holliday indicated that it was explained to him that the defendant had to take ownership of the entire property, even if they never occupied it. While none of the rights of ownership had ever been exercised, this did not mean that the defendant's intention was not to take ownership of the entire property. The occupational interest paid was, according to Mr Holliday's understanding, in respect of the property bought, rather than the part occupied.

Analysis

The alternative claim

[27] It is convenient to deal with the alternative claim first - namely that ownership never passed on registration of transfer based on absence of intention.⁹ The core issue raised is whether the plaintiff had the intention to transfer ownership of the immovable property, as a whole, and whether the defendant intended to receive such ownership.¹⁰

[28] One of the essential elements of transfer of real rights by registration is that the transferor must have the intention to transfer the land or rights to it, and the transferee must have the intention to receive transfer of it.¹¹ Consensus between the parties is required, with reference to the so-called 'real agreement' to pass ownership.¹² Broadly

⁹ On such an approach being adopted in the context of a special plea, see *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 277J—282D.

¹⁰ See F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) at 521: at the moment of transfer, the transferor must have the intention to transfer ownership (*animus transferendi domini*) and the transferee must have the intention to accept ownership (*animus accipiendi domini*).

¹¹ See *Nuance* above n 2 para 22: '...ownership passes on registration if there is a real agreement to do so, that is, an intention to transfer and receive ownership'.

¹² See G Muller et al *Silberberg and Schoeman's The Law of Property* 6 ed (2019) at 245. Also see *Klerck NO v Van Zyl and Maritz NNO and Another* 1989 (4) SA 263 (SE).

speaking, the principles applicable to agreements in general also apply to real agreements.¹³

[29] Under the applicable abstract system of transfer of ownership of immovable property, the passing of ownership is wholly abstracted from the agreement giving rise to the transfer (in this case, the deed of sale), irrespective of whether the latter agreement is void, voidable, putative or fictional.¹⁴ A clear distinction is drawn between the contractual agreement creating the obligation to transfer and the real agreement by which the parties agree to pass ownership. Significantly, the invalidity of the contractual agreement does not affect the validity of the real agreement.¹⁵ The importance of this is clear when considering the position of an innocent third party relying in good faith on the records in the Deeds Office: voidness of a contract of sale that was the cause for registering the land in the name of the transferee would be immaterial.¹⁶

[30] In the context of registration of land, the intention to transfer is usually apparent from the power of attorney granted to the conveyancer to effect transfer and registration in the name of the transferee.¹⁷ The Power of Attorney to Transfer, granted by Mr Van Bergen in favour of his attorney on 24 December 2007, reflects a clear intention to transfer the immovable property in its full extent. The Deed of Transfer, dated 11 April 2008, refers to that power of attorney and confirms the plaintiff's intention to sell and transfer the immovable property 'full and free'. As with the power

¹³ *Legator McKenna Incorporated & Another v Shea & Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009] 2 All SA 45 (SCA) ('*Legator McKenna*') para 22: ownership will not pass, despite registration or transfer, if there is a defect in the 'real agreement'.

¹⁴ Du Bois above n 10 at 522. *Legator McKenna* above n 13 para 25.

¹⁵ Du Bois above n 10 at 522, 523: if there is a serious intention to transfer ownership, ownership passes to the transferee. Following the abstract system of transfer, such intention can exist in the absence of a valid cause. In other words, the reason for the transfer, whether invalid, putative or defective, does not affect passing of ownership where the parties intend ownership to pass. Also see Muller et al above n 12 at 80: even an illegal underlying contract may be followed by a perfectly valid act of transfer.

¹⁶ See Du Bois above n 10 at 523, 524 and the authorities cited. Also see the remarks of Harms DP, in the context of reliance on estoppel, in *Oriental Products v Pegma 178 Investments Trading CC and Others* [2010] ZASCA 166; 2011 (2) SA 508 (SCA); [2011] 3 All SA 173 (SCA) para 28: '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'.

¹⁷ Muller et al above n 12 at 245, 246. Also see *Du Plessis v Prophitius and Another* [2009] ZASCA 79; 2010 (1) SA 49 (SCA); [2009] 4 All SA 302 (SCA) para 11. Cf *Bester NO and Others v Schmidt Bou Ontwikkelings CC* [2012] ZASCA 125; 2013 (1) SA 125 (SCA).

of attorney, the extent is expressly confirmed to be 552,0256 hectares (that is, the full extent). The plaintiff renounced 'all the right and title' which it had previously had to the property. The Deed of Transfer confirms that the plaintiff acknowledged that it was 'entirely dispossessed of, and disentitled to' the immovable property against payment of the purchase price. The Deed of Transfer further referenced the deed of sale, signed by Mr Holliday on 19 November 2007, as the basis for the sale of the immovable property.

[31] The effect of the express declaration contained in the Deed of Transfer, coupled with the fact of the transfer, has been emphasised in *Gardens Estate Ltd v Lewis*.¹⁸ Prima facie, the plaintiff was divested of the dominium of the immovable property.¹⁹ This is because of the 'clear inference' to be drawn from the plaintiff's agent's declaration that the immovable property in its entirety had been sold, coupled with the actual transfer of the immovable property.²⁰ The purchaser obtained transfer of the immovable property. Had the intention been to retain the dominium of a portion of the immovable property, the plaintiff should not have passed transfer of the whole.²¹

[32] Leaving aside the wording of the power of attorney and Deed of Transfer, real agreement to pass ownership of the immovable property is also readily apparent from the evidence led by both parties. It will be recalled that Mr Van Bergen and Otto's original intention was to exchange pieces of land and for that sale to exclude the portions to be retained by Otto. An agreement couched in those terms had been removed from their contract of sale and addressed separately precisely because of the provisions of the Act. Based on the legal advice obtained, the plaintiff was content to purchase the immovable property as a whole during 2004, while Otto continued to farm portions of that property as if it were his own.

¹⁸ *Gardens Estate Ltd v Lewis* 1920 AD 144.

¹⁹ *Ibid* at 149.

²⁰ See *Gardens Estate Ltd v Lewis* above n 18 at 149, particularly the following: 'No doubt the position of Voet 41.1.35., supported as it is by the authority of the *Digest* 41.1.31 and 44.7.55, that mere delivery without the intention to transfer the ownership does not pass dominium, is impregnable, but so long as the Deed of Transfer and the diagram stand – and it is now too late to attempt to rectify it – the argument for the respondent is hopeless'.

²¹ *Gardens Estate Ltd v Lewis* above n 18 at 149. On the meaning of 'portion', in the context of the Act, see *Adlem and Another v Arlow* [2012] ZASCA 164; 2013 (3) SA 1 (SCA); [2013] 1 All SA 1 (SCA) para 13.

[33] The subsequent memorandum of agreement entered into between Otto and the plaintiff reflects their intention to transfer or exchange certain pieces of land to one another without any compensation payable. Mr Van Bergen confirmed during cross-examination that, despite this issue, he had purchased the immovable property as a whole, satisfied that the resolution of boundaries could be addressed separately and subsequently.

[34] It is evident that the same approach was adopted in his dealings with the defendant. He testified honestly that he had knowingly given power of attorney for the sale of the immovable property in its entirety, and proceeded with that sale. Rather than making reservation for the portions being farmed by Otto, or Otto's successors, the predominant intention, on his own version, was for the immovable property to be placed in the name of the defendant. As had been the approach in his dealings with Otto, he was happy to address the issue of boundaries, including the exchange of land, later, and separately from the sale of the immovable property. In all probability this was so that he could secure the sale and payment of his purchase price without having to first attend to the formalities necessary for consolidation in terms of the Act.

[35] Mr Holliday's evidence accords with this position. His focus was on establishing a dairy farm. He relied firstly on an agent to identify a farm, and, secondly, on his attorney, to attend to the associated legalities. He appears to have known that the property had to be purchased as a whole and confirmed this repeatedly during cross-examination. He too understood future exchange of land, with whatever that entailed, to be a separate matter to be addressed subsequent to the transfer of the immovable property. He was understandably vague on the specifics and legal nuances at play. He had wanted a property for a dairy farm and, with the relevant assistance, had managed to identify and purchase one, which he and his partner had farmed for a number of years. As for the inclusion of the disputed clause, he contented himself in the knowledge that the boundaries in issue were not in the area of his operation and believed he would be able to refuse any unreasonable requests when the time came. As for his neighbour's encroachment and use of part of his property, he had simply perpetuated what his predecessor in title had permitted.

[36] The consequence is that there is ample direct evidence to show that both parties genuinely intended for the plaintiff to sell (and the defendant to purchase) the immovable property as a whole and that the process of transfer of ownership of that property was completed when the act of registration occurred.²² Come the time of execution of the deed of transfer, and delivery of the immovable property by registration, there was simply no error or doubt about the extent of the property being sold.²³ The object of the real agreement was legal and no other defect attached to that agreement, so that the real right of ownership passed on transfer.

[37] In terms of the abstract system, there is authority that neither the voidness nor the voidability of a preceding contract (i.e. the deed of sale) can affect the question whether a real right indeed passed to the defendant on delivery.²⁴ Considering the evidence as to real agreement, it is unsurprising that the plaintiff was constrained to argue the case on the basis that the contract of sale was invalid to the extent that this vitiated the real agreement, alternatively was relevant to the question of the parties' true intentions and real agreement. Considering the factual matrix in its entirety, this is not an instance where it can be said that any flaw in the preceding contract of sale was so potent as to also affect the real agreement. This is also not an instance of some unexpressed agreement or tacit understanding rendering the transaction *in fraudem legis*.²⁵

[38] I am in any event unconvinced by the argument that the contract of sale, properly interpreted,²⁶ was in respect of only the undivided portion and, consequently, in contravention of the Act. Other than the reference to the property's extent being

²² See the judgment of Centlivres JA in *Commissioner of Customs and Excise v Randles Brothers & Hudsom Ltd* 1941 (AD) 369 ('*Randles Brothers*') at 411: 'There may be direct evidence of an intention to pass and acquire ownership and, if there is, there is no need to rely on a preceding legal transaction in order to show that ownership has, as a fact, passed ... [S]uch intention may be proved in various ways'. Also see *Meintjies NO v Coetzer and Others* [2010] ZASCA 32; 2010 (5) SA 186 (SCA); [2010] 4 All SA 34 (SCA).

²³ Muller et al above n 12 at 80.

²⁴ *Ibid* at 77.

²⁵ *Randles Brothers* above n 22 at 396, 401 and 402.

²⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18. It is accepted that the written agreement is conclusive as to its terms and that no evidence is admissible to prove them, and that the document may not be contradicted, altered, added to or varied by the oral evidence adduced: *Dreyer NO and Another v AXZS Industries (Pty) Ltd* [2005] ZASCA 88; 2006 (5) SA 548 (SCA); [2006] 3 All SA 219 (SCA) para 18.

‘approximately 474 hectares’, in clause 1.1, there is little to support that reading, particularly when considering the remaining language adopted in the contract, read in the context of the circumstances in which the document came into being as well as the parties’ subsequent conduct in implementing the agreement, which is decisive.

[39] As for the ordinary language used, the reference to the reduced extent is coupled with reference to the correct description of the immovable property and title deed number. Leaving aside the reference to 474 hectares, there is no mention of a sale of a ‘portion’ or of an ‘undivided portion’. What is being sold, in effect, is the property held by that title deed. As *Mr De La Harpe*, for the defendant, pointed out, that reading is supported by clause 7, which adds that ‘the property is sold in the extent as it now lies and *is described in the current title deed ...*’.²⁷ (Own emphasis.) Furthermore, that clause provides that ‘...neither shall [the plaintiff] be entitled to claim additional compensation for any excess’. It bears repeating that the ‘current title deed’ description was of the immovable property in its full extent.

[40] The plaintiff placed great reliance on the disputed clause 24.5 in support of its case.²⁸ That clause is itself clear in its construction: the plaintiff recorded that it was ‘in the process of sub-dividing and selling a piece of the land hereby sold...’ On an ordinary reading, the words ‘land hereby sold’ precedes, in time, the ongoing separate process of sub-division and ‘selling’ of a piece of land. Supporting this interpretation, the inclusion of reference to the purchaser’s agreement ‘to sign all the necessary documentation to enable the seller to proceed with the aforesaid’ would have been unnecessary had the intention been for the plaintiff to have retained ownership of a piece of the land.

[41] The context in which the provision appears is that already described and a sensible, business-like meaning supports a reading that treats this clause as the seller’s wish for the purchaser’s cooperation in respect of events that would follow the actual sale of the immovable property. In reaching this conclusion, it cannot be ignored

²⁷ Clause 7 also provides that the seller shall not be liable for ‘any difference or shortfall, neither shall he be entitled to claim additional compensation for any excess’.

²⁸ The other clauses relied upon by the plaintiff were clauses 8, 13, 22 and 24.2. Little was made of this during argument and the clauses fail to support the plaintiff’s position.

that the 'material known' to the party responsible for inclusion of the clause was that the immovable property had to be sold as a whole in order for the sale to be valid, and that the plaintiff had itself purchased the property from Otto in this fashion, concluding a separate agreement in respect of the intended land swop. Considering the passing of time and the vague recollection of both witnesses, there is little more of substance to be gleaned from the circumstances as they were at the time the deed of sale was concluded. What is apparent is that Mr Holliday did not have sight of the title deed and that it was left to the parties' legal representatives to attend to a relatively ordinary transfer of immovable property held by title deed.

[42] The subsequent conduct of the parties in implementing the agreement is particularly telling.²⁹ In *Comwezi Security Services (Pty) Ltd & Another v Cape Empowerment Trust Ltd*,³⁰ Wallis JA emphasised the importance of this consideration as follows:

'Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties.'

[43] Approximately a month after conclusion of the contract of sale, Mr Van Bergen knowingly gave power of attorney to transfer the immovable property, in its full extent of 552,0256 hectares, to an appointed agent. That power of attorney makes explicit

²⁹ On the role of context, including the parties' subsequent conduct in implementing their agreement, in interpretation of a contract, see the judgments of Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transports (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA); [2014] 1 All SA 517 (SCA) para 12 and *Comwezi Security Services (Pty) Ltd & Another v Cape Empowerment Trust Ltd* [2012] ZASCA 126 ('*Comwezi*') para 15. Also see *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) para 35.

³⁰ *Comwezi* above n 29 para 15.

reference to sale of the immovable property to the defendant in terms of the deed of sale.³¹ That was the trigger for the deed of transfer being concluded during April 2008, some four months later. In terms of that deed, the immovable property was duly sold for an agreed R9,1 million. On the evidence, any suggestion that the agreement, properly interpreted, was for payment of this amount in return for only the undivided portion must be rejected. That conclusion is buttressed by the plaintiff's preceding plan to swap portions of property with Otto without any compensation payable. As had been the case then, it was satisfied with transfer of the entire immovable property before continuing with any attempts to formally swap land. Having taken transfer of the immovable property, permitted Otto to use a portion of that property, while separately reaching agreement on transfer of portions of each other's land without compensation, the plaintiff proceeded in a similar vein in its dealings with the defendant. The handwritten note appended to the diagram attached to the deed of sale, with its reference to Otto, confirms that it was not Mr Van Bergen's intention to keep a portion of the immovable property for himself.

[44] Little of significance followed during the subsequent years until issue of summons in this matter. It is so that either Otto or Piggeries have continuously made use of a portion of the property with the knowledge of the respective owners, and that the defendant was willing to engage with Piggeries in an attempt to formalise a swap including a portion of the immovable property. Considered together with the conduct of the parties subsequent to the conclusion of the contract of sale, however, that usage pales into insignificance in respect of assessing the parties' intended scope of the deed of sale and intentions as to transfer of ownership of the immovable property. That the defendant may never have intended to utilise a portion of the immovable property, and permitted Piggeries to utilise same rent free, does not overtake the clear intention to purchase the immovable property in its entirety.

³¹ The wording appears as follows: '...the following property...in extent 552.0256 hectares held by deed of transfer no T...*sold to him by me* by Private on 19 November 2007, for the sum of R9 100 000 ...' (Own emphasis.)

[45] In the event that this interpretation is erroneous, it may be added that clause 24.5 cannot be said to reflect ‘the principal purpose of the contract’.³² Rather, it is a recording, by the seller, of future intended activities. The probable intention of the parties, as is apparent from the contract as a whole, was that the principal purpose of the contract was to enable the defendant to purchase the immovable property as a whole, with the clause constituting only a subsidiary point.³³ As judgments of the SCA have indicated, while the agreement for future cooperation with the defendant may have been included in the contract of sale, and was therefore practically linked, juristically they may be treated separately.³⁴ This was the probable intention of the parties, which is the key principle for determining severability.³⁵ The wording of the clause suggests separate or distinct performance, so that the agreement to cooperate on a future date is divisible.³⁶ In support of this assessment, and applying the test cited in *Bob’s Shoe Centre v Heneways Freight Services (Pty) Ltd*, it is apparent that the parties would have entered into the contract even without that provision.³⁷ The consequences for the plaintiff’s alternative claim remains the same throughout the analysis.³⁸ It stands to be dismissed.

The main claim

[46] *Mr Nepgen*, for the plaintiff, submitted that the relief seeking the correction of the Register of Deeds to reflect the ownership of the plaintiff would effectively be vindicatory in nature. In the case of a *rei vindicatio*, the claimant seeks to vindicate an

³² Cf *Four Arrows Investment 68 (Pty) Ltd v Abigail Construction CC and Another* [2015] ZASCA 121; 2016 (1) SA 257 (SCA) (*‘Four Arrows’*) para 5, where all the clauses, barring one, indicated an intended sale of the property subject to a suspensive condition.

³³ See *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 94; 1989 (1) SA 1 (A); [1989] 1 All SA 347 (A) (*‘Sasfin’*) at 16B and 17D—E, as applied in *Four Arrows* above n 32 para 13.

³⁴ See *Middleton v Carr* 1949 (2) SA 374 (A) at 391; *Nash v Golden Dumps (Pty) Ltd* [1985] ZASCA 6; 1985 (3) SA 1 (A); [1985] 2 All SA 161 (A) at 23D—E.

³⁵ *Sasfin* above n 33 at 16A—B.

³⁶ Performance will usually by its very nature be divisible where the contract makes provision for separate or distinct performances: *Bob’s Shoe Centre v Heneways Freight Services (Pty) Ltd* [1994] ZASCA 158; 1995 (2) SA 421 (AD); [1995] 1 All SA 693 (A) (*‘Bob’s Shoe Centre’*) at 429H—I. Also see *Du Plooy v Sasol Bedryf (Edms) Bpk* [1987] ZASCA 123; 1988 (1) SA 438 (A); [1988] 1 All SA 417 (A).

³⁷ See *Bob’s Shoe Centre* above n 36 at 430G—H.

³⁸ See *Bob’s Shoe Centre* above n 36 at 429F—I and following; *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* [2010] ZASCA 170; 2011 (2) SA 282 (SCA); [2011] 2 All SA 371 (SCA) para 14.

asset of which he is the owner. This is based on a right to recover the asset from a possessor, as an incident of a real right of ownership.³⁹

[47] That being the pleaded case, the difficulty for the plaintiff is immediately apparent considering the evidence. Once a transferor has transferred an object, even by virtue of an invalid *causa*, ownership passes to the transferee and the transferor is deprived of the *rei vindicatio*.⁴⁰ For that remedy, ownership was an essential averment and had to be adequately proved by the plaintiff on a balance of probabilities.⁴¹ Failure to adduce proper proof would result in the failure of vindictory proceedings, irrespective of the defendant's own entitlement.⁴² Considering the evidence presented, including the admitted registration of the immovable property in the name of the defendant,⁴³ the plaintiff has failed to prove that it is the owner of the immovable property on a balance of probabilities.⁴⁴ To the extent that the main claim is vindictory in nature, the plaintiff therefore fails at the first hurdle. For the sake of completeness, what remains is to consider the main claim outside of this categorisation.

[48] *Mr De La Harpe* pointed out that the plaintiff's claim, properly construed, was not based on alleged (present) ownership of the immovable property and, consequently, could not be vindictory.⁴⁵ Indeed, that approach, and reliance on the SCA decision in *Absa Bank Limited v Keet* ('*Keet*'),⁴⁶ appears to have been designed purely to avoid the plaintiff's difficulties in overcoming the prescription point, on the basis that the claim was not a 'debt' and had consequently not prescribed.

³⁹ *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA); [2019] 3 All SA 673 (SCA) para 17.

⁴⁰ See 'Things' in *Lawsa* 2 ed para 13; ZT Boggenpoel *Property Remedies* (2017) at 38 and following.

⁴¹ *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) at 744A—B.

⁴² *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1992] ZASCA 186; 1993 (1) SA 77 (A); [1993] 1 All SA 259 (A) ('*Goudini*') at 82A—B.

⁴³ Paragraph 9 of the particulars of claim makes reference to the plaintiff's transfer of the immovable property to the defendant.

⁴⁴ See, in general, *Badenhorst NO v Manyatta Properties Close Corporation and Others* [2021] ZAMPMBHC 54; *Fischer NO and Others v Mahlabe* [2018] ZANCHC 7. The best evidence of ownership of immovable property is the title deed to that property: *Goudini* above n 42 at 82A—B.

⁴⁵ This was based on the plaintiff's particulars of claim disclosing transfer of the immovable property to the defendant so that, upon registration, the defendant acquired a real right of ownership. *Ethekwini Municipality v Mounthaven (Pty) Ltd* [2018] ZACC 43; 2019 (4) SA 394 (CC); 2019 (2) BCLR 236 (CC) ('*Mounthaven*') para 19. Also see *Harris v Trustee of Buissinne* (1840) 2 Menz 105 at 107—108 as cited in *Jordaan and Others v Tshwane Metropolitan Municipality and Others* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) para 34.

⁴⁶ *Absa Bank Limited v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA); [2015] 4 All SA 1 (SCA) ('*Keet*').

[49] *Keet* is distinguishable on the facts.⁴⁷ In *Keet*, it was an express term of the agreement that ownership of the vehicle sold would not pass to the respondent until all amounts owing under the agreement had been paid in full. It was a further term of the agreement that, if the respondent failed to comply with any provisions of the agreement, or failed to make any payment in terms thereof, the appellant would be entitled to the return and possession of the vehicle.⁴⁸ As was the case in *Staegemann v Langhoven*,⁴⁹ upon which the SCA in *Keet* relied, the applicant claimed the return of *his* vehicle. The claim, being based on ownership of a thing, was vindicatory and therefore could not be described as a debt as envisaged by the Prescription Act.⁵⁰

[50] *Leketi v Tladi NO and Others* ('*Leketi*') appears to be closer to the mark.⁵¹ Here the appellant claimed that the immovable property in question was the property of his late father ('GM'), and that he had a right to the property in terms of 'intestate devolution according to Black custom'. Instead, his grandfather ('AM') had fraudulently caused the property to be transferred and registered in his name by representing to the Registrar of Deeds, Pretoria, that he was the only male heir of GM. AM had subsequently executed a will in which he bequeathed the disputed property to other people. The appellant's claim was for a declarator and vindicatory relief aimed at recovering the property from AM's estate. The SCA concluded that the appellant could have acquired knowledge of AM's fraud sooner, through the exercise of reasonable care, so that the claim had prescribed.

[51] Importantly, the SCA in *Keet* noted the distinction between vindicatory claims and the claim in *Leketi* for 'recovery' of immovable property that was allegedly transferred fraudulently:

⁴⁷ See *Cook v Morrison and Another* above n 39 para 17.

⁴⁸ *Keet* above n 46 para 3.

⁴⁹ *Staegemann v Langhoven and Others* [2011] ZAWCHC 302; 2011 (5) SA 648 (WCC).

⁵⁰ *Keet* above n 46 para 20. The SCA went on to explain the basis for this decision, which was grounded in a person entitled to a real right over a thing utilising a vindicatory action, as a right of ownership, to claim that thing from any individual interfering with the right. A relative right only enforceable against a determined individual or a class of individuals would only be a personal right.

⁵¹ *Leketi v Tladi NO and Others* [2010] ZASCA 38; [2010] 3 All SA 519 (SCA).

‘In *Leketi* the ... claim was directed at setting aside the registration in the name of his grandfather and then procuring transfer of the property from his late father’s estate. The claim was not a vindicatory claim ...’

[52] It may be accepted that, properly construed, the claim advanced was in the form of the *condictio* as against the defendant for the return of the immovable property.⁵² For reasons that follow, that claim must be dismissed either on the basis that it has prescribed, or because the central requirement has not been proved.

[53] The real right having already passed to the defendant on transfer, despite any deficiency of the underlying contract, that remedy was only a personal action.⁵³ Consequently, and to the extent that it remains open for the plaintiff to argue the main claim outside of the pleaded claim for vindicatory relief, the defendant’s prescription point is decisive. This is because such a claim would amount to a claim for transfer of immovable property in the name of the defendant, which constitutes a ‘debt’ for purposes of the Prescription Act.

[54] In *Ethekwini Municipality v Mounthaven (Pty) Ltd*,⁵⁴ the Constitutional Court considered the appellant’s claim for retransfer of a property that it had earlier sold to the respondent, based on a reversionary clause in the original deed of sale and subsequent deed of transfer. Both the SCA and the court *a quo* had considered the registered right contained in the clause to constitute a ‘debt’ that had prescribed in terms of the Prescription Act. In answering the question whether the claim was a ‘debt’, Froneman J, on behalf of a unanimous court, held as follows (footnotes omitted):⁵⁵

‘In terms of the dictionary meaning of “debt” accepted in *Makate*, an obligation to pay money, deliver goods, or render services is included under the definition and would prescribe within three years under the Prescription Act. Material or

⁵² See *First National Bank of SA Ltd v Perry NO* (‘*Perry NO*’) [2001] ZASCA 37; 2001 (3) SA 960 (SCA); [2001] 3 All SA 331 (A) at 969. Also see JE Du Plessis *The South African Law of Unjustified Enrichment* (2012) at 195 and following.

⁵³ See Muller et al above n 12 at 77.

⁵⁴ *Mounthaven* above n 45.

⁵⁵ *Mounthaven* above n 45 para 8. Also see *Makate v Vodacom* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) paras 83, 85.

corporeal goods consist of property, movable or immovable. Ownership of movable corporeal property is transferred to another by delivery, actual or deemed, of the goods. That is practically impossible in the case of immovable property like land. Hence it is an accepted principle of venerable ancestry in our law that the equivalent of delivery of movables is, in the case of immovable property, registration of transfer in the deeds office. *A claim to transfer immovable property in the name of another is thus a claim to perform an obligation to deliver goods in the form of immovable property. It is a “debt” in the dictionary sense accepted in Makate. It really is as simple and straightforward as that.*’ (Own emphasis.)

[55] Prescription of the debt commenced running when it became due.⁵⁶ That requires consideration of the extent of the plaintiff’s knowledge of the identity of the debtor and of the facts from which the debt arises.⁵⁷ Considering the particulars of claim and the evidence, the plaintiff, through Mr Van Bergen, can be said to have had knowledge of sufficient material facts pertaining to the debt by time transfer occurred.⁵⁸ That includes knowledge that the deed of sale, on the plaintiff’s version, was only for the undivided portion and that ministerial consent had not been obtained.⁵⁹ As such, the defendant has established that any such claim has prescribed.⁶⁰

[56] It follows from the earlier analysis of the provisions of the deed of sale that the outcome would have been the same even if this had not been the case. This is because the central requirement of the *condictio* is that the transfer occurred pursuant

⁵⁶ Section 12(1) of the Prescription Act. The general principle is that the period of prescription of claims for restitution commence running on the day upon which the person claiming restitution had performed, because the right to claim restitution arose on that date: *Van Staden v Fourie* [1989] ZASCA 36; 1989 (3) SA 200 (A); [1989] 2 All SA 329 (A) at 215B; M Loubser *Extinctive Prescription* 2ed (2019) at 121—125.

⁵⁷ Section 12(3) of the Prescription Act. Knowledge of the unlawfulness of an agreement is not a fact and the running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights: see *Minister of Finance & Others v Gore NO* 2007 (1) SA 111 (SCA) para 17.

⁵⁸ See, in general, *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC).

⁵⁹ In terms of s 4 of the Act, it is the duty of the owner of the land, wishing to lease or sell a portion of agricultural land to obtain ministerial consent before concluding an agreement: Cf *Nuance* above n 2 para 14, in the context of a seller raising prescription, as opposed to a purchaser.

⁶⁰ See *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA). Also see *Knysna Hotel CC v Coetzee NO* [1997] ZASCA 114; 1998 (2) SA 743 (SCA); [1998] 1 All SA 261 (A) at 754B/C—E: a formally valid transfer may be challenged on a number of grounds but remains valid until set aside by an order of court.

to an agreement that is void and unenforceable because it is illegal.⁶¹ On my assessment that requirement has not been met. The result is that, on this basis too, the main claim must be dismissed.

Order

[57] I make the following order:

1. The plaintiff's claims are dismissed with costs, including the costs of the preparation of heads of argument.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 18,19 & 21 July 2023

Delivered: 17 October 2023

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⁶¹ *Perry NO* above n 52 para 23.

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