



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

NOT REPORTABLE

Case no: 2567/2021

In the matter between:

TERER BELEGGINGS (PTY) LTD

Applicant / Plaintiff

and

HOUGHAMDALE TRADING (PTY) LTD

First Respondent / Defendant

HUMANSDORP COOPERATIVE LTD

Second Respondent / Defendant

ABSA BANK LTD

Third Respondent / Defendant

THE REGISTRAR OF DEEDS,

KING WILLIAM'S TOWN

Fourth Respondent /

Defendant

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Govindjee J

[1] The plaintiff instituted an action claiming that a deed of sale entered into with the defendant was illegal and void ab initio because it contravened the Subdivision of

Agricultural Land Act, 1970.¹ This was on the basis that it constituted a sale of an undivided portion of agricultural land without the written consent of the Minister of Agriculture, Land Reform and Rural Development. As a result, it was argued that the subsequent transfer and registration of the immovable property ought to be set aside.

[2] In the alternative, it pleaded 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 an undivided portion comprising some 474 hectares, rather than the full 552,0256 hectares held by the title deed. As a result of the statutory prohibition against sale of agricultural land, transfer of the immovable property, in its full extent, was effected. As the parties never intended the transfer of the immovable property, ownership never passed on registration of transfer, so that the plaintiff 'remained owner of the immovable property' and was entitled to its return.

[3] The main claim was dismissed on the basis that the *rei vindicatio* was incorrectly invoked, the plaintiff not being the owner of the immovable property. The possible classification of the claim as a *condictio* was also considered. That claim was rejected based on prescription, being a claim to transfer immovable property in the name of another.

[4] This plaintiff takes no issue with the dismissal of the main claim. The basis for the application is, in essence, that the court erred in its interpretation of the agreement of sale; in finding that the plaintiff intended to transfer ownership of the whole of the farm to the defendant; and in not finding that the defendant never intended to receive transfer of ownership of the whole farm. The court is required to test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an appeal court 'would' interfere in the decision against which leave to appeal is sought.²

¹ Act 70 of 1970. The parties entered into a written deed of sale on 19 November 2007.

² *Van Den Heever v RC Christie Incorporated* (unreported, GJ case no 21746/2019 dated 5 March 2023) para 3.

[5] Both representatives who had entered into the deed of sale on behalf of the parties testified. There is no suggestion that the court erred in respect of its summary of the evidence, or in respect of its understanding of the legal position. Other than re-emphasising its reliance on the SCA decision in *Four Arrows Investment 68 (Pty) Ltd v Abigail Construction CC and Another*,³ there was also no reference to decided cases to support the argument. In particular, this court's reliance upon *Garden Estate Ltd v Lewis*⁴ was left unchallenged. The importance of that judgment is that it emphasised the effect of the express declaration in the Deed of Transfer, coupled with the fact of the transfer, the clear inference being that there was no intention to retain dominium of a portion of the immovable property. Had that been the case, the plaintiff would not have passed transfer of the whole.

[6] Leaving aside the clear wording of the power of attorney and Deed of Transfer, real agreement to pass ownership of the immovable property was also apparent from the evidence led by both parties, also when considering their testimony as to the history of the transaction and the surrounding circumstances. The plaintiff, through Mr Van Bergen, had itself purchased the entire immovable property, satisfied that the resolution of boundaries could be addressed with the seller separately and subsequently. The evidence was clear that he adopted the same approach in his engagements with the defendant, knowingly giving power to attorney for the sale of the immovable property in its entirety. On his own version, the predominant intention was to place the immovable property, as a whole, in the name of the defendant. Boundaries and any exchange of pieces of land with neighbouring land was, on his own evidence, a subsequent matter. The significant passage of time without any claim to the immovable property, or a portion thereof, is consistent with this.

[7] Suffice to say that Mr Holliday's evidence, on behalf of the defendant, accords with this. Importantly, he knew that the property had to be purchased as a whole and confirmed this repeatedly during cross-examination. He too understood any future exchange of land to be a subsequent, separate matter to the preceding transfer of

³ *Four Arrows Investment 68 (Pty) Ltd v Abigail Construction CC and Another*.

⁴ *Garden Estate Ltd v Lewis* 1920 AD 144.

the immovable property, as a whole, into the name of the defendant. This prompted the following conclusion in the judgment:⁵

‘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. 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...’

[8] This was not an instance where it could be held that a flaw in the contract of sale was so potent as to affect the real agreement, or the transaction being rendered *in fraudem legis* based on an unexpressed agreement or tacit understanding. In addition, properly interpreted, the contract of sale was for the whole property held by the deed. The various arguments advanced at the time have been repeated in this application and have been duly considered and addressed in the judgment. In particular, the reference to ‘474 hectares’ was overtaken by the various references to the description of the property ‘in the current title deed’. On an ordinary reading, the reference in clause 24.5 to ‘in the process of sub-dividing’ related to ‘a piece of the land hereby sold’. That the purchaser was expected ‘to sign all the necessary documentation to enable the seller to proceed with the aforesaid’ proved the point: the intention was clearly to sell the entire property to the defendant, and to deal with any other matters as a subsequent step, by which time the defendant would be the owner of the entire property. Had that not been the understanding, the last-mentioned insertion would have been unnecessary.

[9] The context in which the agreement was signed is also important. On the evidence, the ‘material known’ to the party responsible for the inclusion of clause 24.5 was that the immovable property had to be sold as a whole in order for the sale to be valid. The subsequent conduct of the parties in implementing the agreement is a further telltale indicator. The importance of this consideration in the process of interpretation has been repeatedly emphasised by the SCA. Here, Mr Van Bergen knowingly gave power of attorney to transfer the immovable property, in its full extent, approximately a month after conclusion of the contract of sale. The power of

⁵ At para 36, footnotes omitted.

attorney makes explicit reference to sale of the immovable property to the defendant in terms of the deed of sale. The immovable property was duly sold for an agreed R9,1 million during April 2008. On the evidence, any suggestion that this was the agreed price only for an undivided portion of the land was rejected. It goes without saying that the further subsequent 'conduct' includes the absence of any claim premised on a purported lack of intention until the particulars of claim were amended during May 2023. There has, in all the intervening time, been no claim by the plaintiff to that portion of the land that it now avers it did not intend to sell.

[10] Applications for leave to appeal require careful, dispassionate analysis of both the facts and the law. Proper consideration must be given to whether the appeal would have a reasonable prospect of success. The test is not whether another court 'may come to a different conclusion'.⁶

[11] As indicated, the present application is focused mainly on this court's interpretation of the written deed of sale. Many of the issues raised in the application (namely, paras 2.1, 2.3, 2.6, 6, 9-19) address the manner of interpretation. To this is added the defendant's conduct post-transfer in not exercising any rights in respect of the portion of the land over which the plaintiff avers it retained ownership.

[12] These matters were scrutinised in the judgment and it is unnecessary to summarise the full analysis. It may be emphasised that this court had the benefit of evidence being adduced in respect of the context surrounding the agreement of sale. In so far as the basis for the court's interpretation was reliant upon factual findings, as part of the interpretive exercise, the presumption is that the conclusion is correct, and an appeal court will only reverse it where it is convinced that it is wrong.⁷ This is, however, not an inflexible rule, also where credibility findings were largely unnecessary. There is no real suggestion of any misdirection of fact in the present instance, including the finding that on Mr Van Bergen's own evidence he had the intention to transfer ownership of the whole property *at the moment of transfer*.

⁶ See the judgment of Van Zyl DJP in *VN obo PN v MEC for Health and Social Development of the Eastern Cape Province* [2022] ZAECQBHC 13 para 3.

⁷ *R v Dhlumayo* 1948 (2) SA 677 (A).

[13] What appears to me to be an insurmountable difficulty for the plaintiff is that the question of intention of both parties must be gauged 'at the moment of transfer', not at the time of contracting, which appears to be the thrust of the plaintiff's contentions.⁸ The probabilities clearly favour consensus and 'real agreement' to pass ownership of the whole at the relevant time, namely the moment of transfer.

[14] To overcome the evidence of the real agreement, the plaintiff over-emphasised the contractual agreement that created the obligation to transfer (ie the deed of sale). Indeed, many of the grounds for seeking leave focus on the proper interpretation of the deed of sale, as opposed to the evidence of the parties' intention at the moment of transfer. The difficulty with this is that it must be accepted that under the abstract system of transfer of ownership of immovable property, the passing of ownership is wholly abstracted from the deed of sale. Even an invalid contractual agreement would not affect the validity of the real agreement. None of these principles were contested. Nor is there any argument countering the authority that 'in the context of registration of land, the intention to transfer is usually apparent from the power of attorney'.

[15] Here, the power of attorney to transfer makes clear reference to the full extent of the property, and conveys the plaintiff's intention to be divested of the immovable property as a whole, against payment of the purchase price. This, coupled with the fact of the transfer, is precisely what has been emphasised in *Lewis*. As Mr *De La Harpe* pointed out, the evidence as to the parties' intention *at the time* of transfer puts the matter beyond doubt. This is also illustrated by the fact that it is common cause that both parties knew that a sale of an undivided portion absent ministerial consent would be unlawful. To the extent that the evidence of the parties, their conduct before and after transfer, and the actual contents of the deed of sale are relevant and must be considered as part of the total picture, the probabilities favour the conclusion reached in the judgment.

⁸ 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*). Also see *Du Plessis v Propitius and Another* 2010 (1) SA 49 (SCA) para 11.

[16] In all these circumstances, I am unable to conclude that an appeal in respect of the judgment on the alternative claim would have a reasonable prospect of success. Nor is there any other compelling reason that has been demonstrated as to why an appeal should be heard. This is not an instance where there are conflicting interpretations of law or a matter of public importance that might have an effect on future matters. Although implicating the plaintiff's personal right to property, the matter was not, in any genuine sense, of a constitutional nature.⁹

Order

[17] The following order is issued:

1. The application for leave to appeal is dismissed with costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 22 November 2023

Delivered: 05 December 2023

APPEARANCES:

⁹ See *Minister of Safety and Security v Schuster and Another* [2018] ZASCA 112 paras 24 and 25.

Counsel for the Applicant / Plaintiff:

Adv JJ Nepgen
Chambers, Gqeberha

Instructed by:

Nolte Smit Inc.
Applicant / Plaintiff's Attorneys
51A Hill Street
Makhanda
Tel: 046 622 7209

Counsel for the First Respondent / Defendant: Adv DH De La Harpe SC

Chambers, Makhanda

Instructed by:

De Jager & Lordan Inc.
Respondent's / Defendant's Attorneys
2 Allen Street
Makhanda
Tel: 046 622 2799