

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal number: A145/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

KATHRINE MARY YVONNE DE LANGE (born LEDIMO)

Appellant

and

STANLEY JOSEPH LUCAS LEDIMO

Respondent

CORAM: MATHEBULA, J et DANISO, J

HEARD ON: 25 APRIL 2022

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 01 AUGUST

2022. The date and time for hand-down is deemed to be 01 AUGUST 2022 at 15H00.

Introduction

[1] This appeal is from the decision of the learned acting magistrate S. Ernest of Bloemfontein in favour of the respondent. The respondent, as plaintiff in the court *a quo*, claimed from the appellant, as the defendant in that court, in an action for the following: -

- “1. That the defendant be ordered to take all the necessary steps and/or sign all the necessary documentation, within fourteen (14) days to effect the transfer of the property known as Portion [...] of Erf [...], A[...], district Bloemfontein also known as [...] P[...] Street, H[...], Bloemfontein onto the name of the plaintiff.
2. In the alternative, payment of the sum of R160,000.00.
3. Interest at the rate of 10.25% *a tempora morae*.
4. Costs of suit.”

[2] Before us Mr M.S. Mazibuko appeared on behalf of the appellant. The respondent who was legally represented at all times in the court *a quo*, appeared in person before us. The matter was postponed a number of times in order to accommodate him to sort out his financial issues with his erstwhile attorneys. Ultimately, he could not raise the necessary funds to secure legal representation nor could he qualify for assistance from the Legal Aid Board. I am setting out these facts because they play a role on the consideration of costs.

Condonation for late filing of the notice of appeal

[3] It is common cause that this appeal is late. The notice of appeal was filed way out of the prescribed period. To be exact, approximately a period of one (1) year elapsed before it was served and filed. The first hurdle that the appellant must jump before the appeal is properly placed before us is to be granted condonation for late filing of the notice of appeal. Her application for the appropriate order is supported by two (2) affidavits, one deposed to by her and the other by her attorney of record.

[4] The appellant averred that after the court *a quo* ruled against her on 25 September 2019, she immediately instructed her attorneys to prosecute this appeal. A notice in terms of rule 51 of the Rules Regulating the Conduct of Proceedings in the Magistrates' Court dated 30 September 2019 was served and filed the next day. Regrettably, her instructions to an erstwhile employee of her attorneys of record named Ms Vinger, were not carried out. It was only a year later that she learned from attorney Thabo Mhlokonya that nothing has been done on the matter beyond the filing of the aforesaid notice. Understandably, she cannot say much about the internal workings of her law firm of choice as to why a matter can remain unattended and undetected for an entire year.

[5] The paucity of the information in the confirmatory affidavit deposed to by Mr Mhlokonya is startling. It is unclear at what level Ms Vinger was an employee of his firm, when did she leave his employ and/or what control measures were in place to ensure that all her work is accounted for and a proper handover is done. The period from 2 October 2019 to 19 September 2020 remains unaccounted. The only credible explanation commences from the events that took place from 30 September 2020. The unavoidable conclusion is that the delay was due to negligence on the part of the attorneys of record.

[6] The application is not opposed by the respondent. I gained the impression that he is supportive of it. Primarily because his wish is that the matter should not be detained by peripheral issues any longer. His response was unequivocal that the matter should be placed before us and be heard on the merits. It will also be prejudicial to the appellant that she finds herself on the short end of the stick through no fault of her own. It is on these bases that despite holding a view that the

application lacks merit, I am inclined to grant to it. I will deal with the issue of costs in the succeeding paragraphs.

Facts

[7] The material facts are either common cause or have not been placed in dispute. The dispute has caused a schism in a once close-knit family. The parties are siblings and both of them are in their sixties. They are locked in a bitter battle over the ownership of a piece of land described as portion [...] of Erf [...], A[...] District Bloemfontein, in extent 451 square metres alias [...] P[...] Street, H[...], Bloemfontein.

[8] The respondent, plaintiff in the court *a quo*, alleges that they entered into a written agreement over the aforementioned erf. The salient terms of the agreement are that he will purchase it from the owner identified as the Mangaung Metropolitan Municipality for five thousand rands (R5,000.00) in the name of the appellant. The appellant will accept transfer and re-transfer it to him at the appropriate time. The appellant shall be responsible for all the municipal levies. According to him, he performed as per stipulations of the agreement. The sticking point is that the respondent has reneged from effecting transfer to him.

[9] The appellant's response to the action instituted against her was to file a plea denying each and every allegation made by the respondent. It was further pleaded that the purported agreement does not comply with the formalities in respect of deeds of alienation.¹ The appellant concentrated her attack on the legality and enforceability of the agreement contending that the respondent has not satisfied the requisite element of legality of a contract. The substance of her contention is that the respondent seeks to benefit from an unlawful conduct.

¹ Section 2(1) of Act 68 of 1981 reads 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.”

[10] It appears that the issue of illegality of the agreement was not pleaded and was only argued by counsel in the heads of argument submitted at the end of the trial. The learned acting magistrate in the court *a quo* rejected this argument.

Grounds of appeal

[11] The appeal is premised on two (2) key grounds. It is contended that the learned acting magistrate erred in finding that there was an agreement in place between the parties. The crucial contention is that even if there was an agreement, it was *contra bonos mores* and therefore wanting in legality. There is another point that is raised for the first time as a point of law in the appeal. It is contended that the claim against the appellant was instituted after it has already prescribed.

Point of law raised for the first time in the appeal

[12] I consider it appropriate to deal first with the point that the appellant seeks to raise for the first time before us. It should be remembered that the court *a quo* rejected all the arguments raised in defence by the appellant. The contention is that the claim has prescribed. On that basis alone, the argument is that the appeal should succeed. There are no weighty reasons advanced why this issue was not placed before the court *a quo* for consideration. It can be accepted that this point was an afterthought and only canvassed as such by counsel.

[13] The issue of a point being raised for the first time on appeal does arise from time to time in our courts. Such a new point may well be raised by a party on appeal. The appellant relied on **Greathead v Saccawu** as authority that this court must consider the point of law and that it will not be unfair to the respondent.² In that matter the appellant was afforded a fair hearing in the court *a quo* and was afforded a full opportunity to deal with all her issues.

² 2001 (3) SA 464 (SCA) at para 15.

[14] The proviso is that such a point does not result in unfairness to the other party, raise new factual issues and does not cause prejudice.³ Once these requirements are met, the court may exercise its discretion to consider the point.⁴

[15] This brings us to the approach of the appellant for the right to canvass this point. Plainly there are no reasons, as already stated, why this issue is of general public importance. Not only that, we were not pointed to any part of the record of appeal where this point appears or emerges.⁵ In the absence of such, then it defeats the entire purpose of an appeal which is to correct the mistakes of the court *a quo*.

[16] The reliance of the appellant on the insistence of raising this point is ill founded. This is so because the requirements were clearly explained in the authorities discussed in the preceding paragraphs. In order to establish the issue raised by the appellant, unavoidably new factual issues will be raised. This issue cannot be adjudicated in isolation. Undoubtedly the respondent will suffer prejudice in that he will not have an opportunity to deal with them. The court *a quo* could not have adjudicated on this issue simply because it did not arise in the contentions before it. Any argument that the appellant has met requirements set out in the authorities is devoid of any merit.

Other grounds of appeal

[17] The foregoing point detracts from the main focus of the appeal in the sense that it introduces a contradiction to the case. When the appellant placed her reliance on prescription, it meant that she acknowledges the existence of the written agreement. This was not her case in the pleadings and no evidence was led on this aspect. It means that the appellant is uneasily sitting on two chairs unable to decide on the real grounds of appeal to be pursued.

[18] I now turn to what apparently is the real issue in this appeal. That is the contention that there was no agreement concluded between the parties. On the

³ Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC) at para 44.

⁴ Barkhuizen v Napier 2007 (5) SA 323 (CC) at para 39.

⁵ Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd & Others 2019 (7) BCLR 850 (CC) at para 31.

contrary, the formidable oral and documentary evidence tendered on behalf of the respondent indicate that there was such an agreement. The version of the respondent relating to the circumstances leading to the conclusion of the agreement was corroborated in material respects by other witnesses. In addition, there was documentary proof which showed that there was an agreement between them. The court *a quo* did not commit any misdirection or error in accepting their evidence.

[19] Definitely an agreement crafted by two lay persons will not have the elegance of the one drafted for them by a well-trained legal mind. The agreement upon which the respondent place reliance was reduced to writing and signed by both parties in the presence of a witness. Therefore, there can be no talk of non-compliance with section 2 of Act 68 of 1981. Then there is a slight issue about the interpretation of the agreement. In this regard I am reminded of the principles of interpretation outlined in **Natal Joint Municipal Pension Fund v Endumeni Municipality**.⁶ The surrounding circumstances clearly confirm the evidence of the respondent. At all times he carried the burden of paying the local authority for all rates and taxes. The court *a quo* was correct in rejecting a version of the appellant which was nothing but a bare denial.

[20] The second ground raised both in the court *a quo* and before us, is based on the contention that the agreement between the parties was against public policy. Therefore, the court cannot sanction or encourage illegal activity. It is settled law that the courts should not shy away from declaring contracts that are against public policy void.⁷ This special defence which in my opinion should have been pleaded, did not find its way to be placed before court. Whether this omission was deliberate due to, oversight, it defeated the whole purpose of the pleadings. It did not bring to the attention of the court and respondent the issues upon which reliance is placed.

[21] This contention is premised on the existence of a policy of Mangaung Local Municipality which prohibits acquisition and ownership of multiple properties by the residents. I hasten to add that the local authority is not a party to these proceedings.

⁶ 2012 (4) SA 593 (SCA).

⁷ Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A).

Such allegation of illegality emanates from appellant and she bears the onus of proving all its requirements and that it was contravened.

[22] Reliance on this ground is fallacious as it will be demonstrated hereunder. Apart from pleading illegality, the appellant was duty bound to adduce evidence of all necessary and relevant facts to support it.⁸ None of the parties, in the court *a quo*, led evidence concerning the existence and details of the policy which prohibited the conclusion of the agreement. As matters stand, apart from the mere mentioning of the policy, there is no evidence to the effect that any specific clause or section of it was not complied with thus making the agreement unlawful.

[23] The appellant simply made broad generalisation on this aspect not supported by any evidence. It was also contended that the court must *mero motu* take the point of illegality. In **Yannakou v Apollo Club** the court explained that a court can only do so “if the illegality appears *ex facie* the transaction or from the evidence before it and, in the latter event, it is also satisfied that all the necessary and relevant factors are before it.”⁹ In this matter the case for the appellant does not satisfy the requirements of this enquiry.

[24] I come now to the issue of costs. In the application for condonation, the appellant was seeking an indulgence from the court. It goes without saying that she must bear the costs. The costs occasioned by the postponement on 14 March 2022 were ordered to stand over for later adjudication. The main reason for the postponement was that the respondent had not accumulated enough funds to make copies of the file. It will be inconsiderate to order the respondent, who appeared in person, to pay the wasted costs purely because he is impecunious. The appropriate order should be that each party pays his or her own costs.

[25] As far as the costs of the appeal are concerned, there is no reason why we should depart from the general rule. The costs follows the event.

Order

⁸ Pratt v First Rand Bank [2008] ZASCA 92 (12 September 2008).

⁹ Yannakou v Apollo Club 1974 (1) SA 614 (A) at 623H.

[26] I make the following order: -

26.1. Condonation for late filing of the notice of appeal and reinstatement of the appeal is granted

26.2. The appellant is to pay the costs of the application for late filing of the notice of appeal.

26.3. Each party to pay his or her own costs occasioned by the postponement on 14 March 2022.

26.4. The appeal is dismissed.

26.5. The appellant is to pay the costs of the appeal.

M.A. MATHEBULA, J

I concur,

N.S. DANISO, J

On behalf of appellant:

Instructed by:

Adv. M.S. Mazibuko
Mhlokonya Attorneys
Bloemfontein

On behalf of respondent:

In person