



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number:	1146 / 2016
Datum aangehoor / Date Heard:	02 / 12 / 2016
Datum gelewer/Date delivered:	10 / 02 / 2017

In the exception of:

NICOLAAS BURGER JACOBS N.O.
CHRISTIAAN JACOBUS KIRSTEIN N.O.
LEZMARI JACOBS N.O.

First Excipient
Second Excipient
Third Excipient

and

SALUT LA VIE ESTATE (PTY) LTD

Respondent

In re the matter of:

SALUT LA VIE ESATE (PTY) LTD

Plaintiff

and

NICOLAAS BURGER JACOBS N.O.
CHRISTIAAN JACOBUS KIRSTEIN N.O.
LEZMARI JACOBS N.O.
SURVEY-GENERAL
REGISTRAR OF DEEDS: KIMBERLEY
MINISTER OF AGRICULTURE, FISHERIES
AND FORESTRY
GRIEKWALAND WES KORPORATIEF
STANDARD BANK OF SA LIMITED

First Defendant
Second Defendant
Third Defendant
Fourth Defendant
Fifth Defendant

Sixth Defendant
Seventh Defendant
Eighth Defendant

Coram: Erasmus, AJ

JUDGMENT: EXCEPTION

ERASMUS, AJ

[1] The plaintiff ("Salut la Vie"), instituted action seeking

- 1.1 a declarator that an addendum, annexure POC4 to the particulars of claim ("the addendum"), signed by the representative of the plaintiff and two of the three appointed trustees of the Pamperlang Trust ("the Trust") be declared null and void and of no force and effect,
- 1.2 that Portion 47, a portion of portion 1, Rietriviernedersetting Wes ("the property") be retransferred into the name of Salut la Vie against payment of the amount of R14,540,000.00 plus Value Added Tax by Salut la Vie,
- 1.3 that Salut la Vie be ordered to pay interest to the trust, in terms of the provisions of section 28(1)(a) of the Alienation of Land Act, No 68 of 1981 ("the Act"),
- 1.4 a declarator whereby the agreement, annexure POC3 to the particulars of claim ("the agreement of sale"), be declared null and void and of no force and effect, and

1.5 in the alternative, should it be found that the addendum and main agreement are valid and of full force and effect, that certain lots be transferred into Salut la Vie's name, and further

1.6 in the event of Salut la Vie succeeding with its main claim, payment of a certain amount and interest thereon in terms of section 28(1)(b)(i) of the Act, as reasonable compensation for the occupation, use or enjoyment of the property and certain lots.

[2] The first, second and third defendants ("the excipients") noted an exception in respect of the main cause of action on the basis that the allegations do not support a cause of action against the excipients for the retransfer of the property on the basis of a void underlying agreement. The exception is specifically directed at the contents of paragraphs 19 to 24 of the particulars of claim, which read as follows:

*"19. The addendum, annexed hereunto as annexure **"POC4"** is null and void, for the following reasons:*

19.1 The purported Addendum has been signed only by one AL Kluge and NB Jacobs;

19.2 At the time the duly appointed trustees of the Pamperlang Trust were:

19.2.1 L Kritzinger;

19.2.2 AO Kluge; and

19.2.3 NB Jacobs.

- 19.3 *Because all the appointed trustees appointed in terms of section 6 of the Trust Property Control Act, 57 of 1998, did not append their signatures to the purported Addendum, the Pamperlang Trust was not properly represented and the signatories not properly authorised to act on behalf of the Pamperlang Trust;*
- 19.4 *The Addendum does not comply with the provisions of Section 2(1) of the Alienation of Land Act, 68 of 1981 because the Deed of Alienation has not been signed properly on behalf of the Pamperlang Trust.*
20. *The purported addendum is therefore null and void and of no force or effect.*
21. *The transfer of portion 47 was given into the name of the Pamperlang Trust, on the strength of and by virtue of the purported addendum, which is null and void and of no force and effect;*
22. *The Pamperlang Trust did not fully comply with its obligations in terms of the purported addendum in that:*
- 22.1 *In terms of clause 1, the Pamperlang Trust was under the obligation to retransfer in the Plaintiff's name those lots not forming part of the object of the purchase, but being part and parcel of Portion 47;*
- 22.2 *The Lots that should have been transferred to the plaintiff are:*
- 22.2.1 *...;*
- 22.2.5 *....*
23. *Notwithstanding demand, alternatively this summons constitutes demand, the Pamperlang Trust has failed to retransfer into the plaintiff's name, the aforementioned lots.*
24. *Because Portion 47 was transferred to the Pamperlang Trust on the strength of the addendum which is null and void and of no force and effect:*
- 24.1 *the Plaintiff is entitled to a Declaratory Order whereby it is declared that the Addendum is null and void and of no force and effect;*
- 24.2 *that an order be made whereby the fourth defendant is ordered, against submission of all required documentation and payment of any fees, to retransfer Portion 47, a Portion of Portion 1, Rietriviernedersetting*

Wes, Northern Cape Province, in extent 1851,1063 hectares into the name of the Plaintiff, against payment by the Plaintiff of the amount of R14,540,000.00 plus Value Added Tax to the Pamperlang Trust;

24.3 The plaintiff is liable to pay interest to the Pamperlang Trust, in terms of the provisions of section 28(1)(a)(i) of the Alienation of Land Act, at the rate of 9 % per annum from 27 May 2010 to date of payment."

[3] The following are common cause between the parties to the exception:

- 3.1 Salut la Vie and the Trust represented by its three appointed trustees entered into the agreement of sale in respect of certain lots forming part of the property, yet to be subdivided.
- 3.2 Salut la Vie and the Trust purported to enter into a further agreement, the addendum. Only two of the three appointed trustees signed the addendum. The addendum does not comply with the provisions of section 2 of the Act.
- 3.3 The property in question is agricultural land and the sixth defendant had to consent to subdivision thereof in terms of the provisions of the Subdivision of Agricultural Land Act, No. 70 of 1970.

3.4 It was recorded in the addendum that transfer of certain lots had not taken place because the fifth defendant had insisted on obtaining a letter from the Department of Agriculture evidencing their consent to the subdivision of the aforementioned lots.

3.5 Salut la Vie and the Trust then purported to agree to the transfer of the property into the name of the Trust for the same purchase price stated in the main agreement, subject thereto that the Trust transfer back to Salut la Vie that portion of the property which had not initially formed part of the object of the earlier agreement of sale, on demand and at no consideration;

3.6 Transfer of the property was effected in the records of the fifth defendant on or about 26 May 2010.

3.7 The Trust had not complied with its obligations in terms of the addendum as it had not retransferred certain lots back to Salut la Vie.

[4] It is trite that a plaintiff must disclose a cause of action, which implies that it must set out every fact which would be necessary to prove in order to support his right to

judgment. It does not comprise however that he set out every piece of evidence which would be necessary to prove such fact.¹

- [5] The approach to be followed when deciding if an exception has been validly raised, was set out in *Colonial Industries Ltd v Provincial Insurance Co Ltd* ²

“... its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings... and that save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.”

- [6] It is trite that an exception must be decided on the basis that the facts pleaded have been established.³ In *Lewis v Oneanate (Pty) Ltd*⁴, Nicholas AJA stated that:

“Since these are proceedings on exception, it must be borne in mind that the appellant has the duty as excipient to persuade the Court that upon every interpretation which the particulars of claim,..., can reasonably bear, no cause of action is disclosed.”

- [7] The passage above implies that it would not be correct to isolate certain passages or a few passages and analyse them without reference to the rest of the document or the documents that make up such claim. An over-technical

¹ *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Blue Chip 2 (Pty) Ltd v Ryneveldt* (499/15) [2016] ZASCA 98 at para [14]

² 1920 CPD 627 at 630E

³ *AB Ventures Limited v Siemens Ltd* 2011(4) SA 614 (SCA) at para[2]

⁴ 1992 (4) SA 811 (AD) at 817 F to G

approach should not be taken in assessing whether a cause of action has been disclosed.⁵

[8] In short, the exception is based thereupon that the abstract theory of transfer applies to the sale and transfer of immovable property and as such does not require a valid underlying contract or legal *causa* for the transfer. The requirements for passing ownership is delivery, effected by registration of transfer in the Deeds Office, coupled with a real agreement that the parties intended to transfer ownership and the other party to become the owner of the property.⁶ A defect in the underlying agreement, such as non-compliance of the provisions of section 2(1) of the Act, does not affect the validity of the transfer of ownership to a *bona fide* purchaser and the property cannot be vindicated.⁷

[9] Adv Snellenburg SC, with reference to *Legator McKenna Inc & Another v Shea and Others*⁸ and *Kriel v Terblanche*⁹, submitted that Salut la Vie's claim does not contain the averments necessary to sustain a cause of action because it was merely alleged that the addendum had not been signed by all the trustees, that it is therefore null and void and thus entitles Salut la Vie to a declaratory order to that

⁵ *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541 I to J

⁶ *Kriel v Terblanche NO en Andere* 2002(6) SA 132 (NC)

⁷ *Du Plessis v Proffitius & Another* 2010 (1) SA 49 SCA; *Oriental Products (Pty) Ltd v Petma 178 Investments Tradings & Others* 2011 (2) SA SCA

⁸ [2009] All SA 45 SCA

⁹ 2002 (6) SA 132 NC

effect and entitles it to claim retransfer as a consequence thereof. He submitted that there had in this instance been the serious intention to pass and receive ownership and that the transfer of ownership was therefore valid.

[10] The facts of this matter differ from those in the Legator- and Kriel-cases. In both those matters the transferor and transferee had fulfilled their obligations in terms of the underlying agreement. In his heads of argument Mr Snellenburg only referred to paragraphs 20 and 24 of the particulars of claim, but not the allegations contained in paragraphs 22 and 23 thereof, where it was alleged that the Trust, in this instance the transferee/alienee, had not fully performed in terms of the addendum as certain lots had not been retransferred to the plaintiff. These allegations must, for purposes of the exception, be accepted as having been established.

[11] As far as formal defects in contracts of sale of land are concerned, the position is governed by the Act. As one of the trustees had not signed the addendum, the Trust had not been properly represented and this constituted a formal defect in the underlying agreement and non-compliance with section 2(1) of the Act.¹⁰ The effect of such non-compliance is that no alienation of the land shall,

¹⁰ *Thorpe & others v Trittenwein & another* 2007 (2) SA 172 (SCA) at para [14]-[17]

subject to the provisions of section 28 of the Act, be of any force or effect.

[12] Section 28 deals with consequences of deeds of alienation which are void or are terminated and reads as follows:

*“(1) Subject to the provisions of subsection (2), **any person who has performed partially or in full** (my emphasis) in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and-*

(a) the alienee may in addition recover from the alienator ...

(b) the alienator may in addition recover from the alienee ...

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

[13] Adv Michau SC, on behalf of Salut la Vie, submitted that the particulars of claim are not excipiable as the excipients had not performed fully in terms of the addendum and this being so, the provisions of section 28(2) of the Act would not render the addendum valid *ab initio*.

[14] Salut la Vie alleged in the particulars of claim that the alienee, being the excipients, had not performed in full

under the addendum and the addendum can thus not be deemed to be valid *ab initio* in terms of section 28(2) of the Act. In terms of section 28(2) of the Act the addendum (underlying agreement) would be deemed valid *ab initio*, if the alienee (the Trust in this instance) had performed in full in terms of the addendum.

[15] It was also alleged in the particulars of claim that Salut la Vie had performed in terms of the addendum, which it seeks to have declared to be of no force or effect. A viable interpretation section 28(1) of the Act, at least for purposes of the exception, would be that any person who had performed partially or in full (Salut la Vie in this instance), would be entitled to recover from another party which had not performed in full (the Trust in this instance) that which it had performed in terms of the underlying agreement (the addendum in this instance). It thus appears as if recovery of performance would be barred only if both parties have already performed in full.¹¹

[16] At this stage of proceedings, when considering the exception, it cannot be said that upon every interpretation which the particulars of claim can reasonably bear, no cause of action has been disclosed.

¹¹ Silberg and Schoemans: *The Law of Property*, 5th edition (2015) 77-78

[17] With regard to the submissions by Mr Snellenburg that the real agreement was valid in that there had been the serious intention to pass and receive ownership, it was submitted on behalf of Salut la Vie, although not explicitly pleaded as such, that the absence of the signature of the third trustee is not simply a case of the underlying agreement being *void ab initio* and the real agreement remaining in existence.

[18] Mr Michau submitted that the absence of the signature of the third trustee is not a mere formality but strikes at the heart of the transaction as it impacted on the ability of the Trust to be bound to the addendum. In the absence of a joint decision by all the trustees, there could never have been an expression of intent on the part of the Trust to enter into an agreement and to accept transfer in the circumstances. There could therefore be no real agreement because of a lack of consensus.

[19] Paragraph 19 of the particulars of claim contains specific allegations pertaining to the trustees and the absence of the signature of the third trustee. In *Land and Agricultural Bank of SA v Parker & Others*¹² it was found that in order to bind a trust all the trustees must act jointly and, in the absence thereof, no agreement whether real or otherwise, can come into existence. Although not explicitly pleaded

¹² 2005 (2) SA 77 SCA at paras [15] – [18]

that there had been no consensus in respect of the real agreement, evidence in this regard will be admissible during the trial.¹³ I am thus not convinced that no evidence can be led which can disclose a cause of action that the addendum was null and void because of a lack of consensus.¹⁴

[20] If accepted that all the averments contained in paragraphs 19 to 24 are assumed to be correct and if read with the other averments contained in the particulars of claim and the annexures thereto, I cannot find that, on every interpretation of the particulars of claim, a cause of action has not been disclosed. Even if allowed, it would not dispense with the leading of unnecessary evidence since the evidence required to prove the claim in paragraphs 19 to 24 will also have to be led in respect of the remainder of the claims.¹⁵ The exception therefore stands to be dismissed.

[21] Mr Snellenburg did not advance any argument why costs should not follow the event. I find no reason why it should not. The matter is clearly of great importance to both parties and from the start of the proceedings two counsel had been briefed by the plaintiff, Salut la Vie. I am satisfied, on a consideration of the relevant factors and the

¹³ *McKelvey v Cowan* NO 1984 SA 525 (Z) at 526D-E

¹⁴ *Thorpe & Others v Trittenwein & Another* supra

¹⁵ *Barclays National Bank Ltd v Thompson* 1989(1) SA 547 (A) at 553

complexity of the matter, that the employment of two counsel by the plaintiff in the exception was justified.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

- 1. THE EXCEPTION RAISED BY THE FIRST, SECOND AND THIRD DEFENDANTS IS DISMISSED.**
- 2. THE FIRST, SECOND AND THIRD DEFENDANTS ARE ORDERED TO PAY THE COSTS OF THE EXCEPTION, INCLUDING THE COSTS OF TWO COUNSEL, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED.**

ERASMUS, SL
ACTING JUDGE

On behalf of the Excipients: Adv N Snellenburg SC oio Haarhoffs Inc

On behalf of Respondent: Adv R Michau SC and Adv J Hershensohn oio Hugo Matthewson and Oosthuizen Inc