FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A55/2011

In the matter between:

LOUISA JOHANNA SLABBERT	First appellant
STEPHANUS JACOBUS VAN WYNGAARD	Second Appellant
CHANTELL VAN WYNGAARD	Third Appellant

and

STEPHANUS JACOBUS SLABBERT	First Respondent
ELIZABETH MARIA SLABBERT	Second Respondent
REGISTRAR OF DEEDS	Third Respondent

CORAM: EBRAHIM *et* VAN DER MERWE, JJ *et* MATHEBULA, AJ

HEARD ON: 19 SEPTEMBER 2011

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 20 OCTOBER 2011

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[1] The first and second respondents, who are married to each other in community of property, instituted action against the three appellants on the basis of a contract of purchase and sale entered into between the first respondent and the first appellant on 16 December 2002, claiming, *inter alia*, an order

for the registration of transfer of a certain immovable property, described as the farm Ventersbloem and situated in the district of Brandfort, into their names against payment of R120 000,00 ("the purchase price").

[2] At the conclusion of the trial, the court *a quo* granted judgment in favour of the respondents, in the following terms:

> "1. The sale agreement between the first plaintiff and the first defendant is declared to be valid.
>
> 2. The costs will stand over for later determination."

It is against this decision that the appellants now appeal with the leave of the court *a quo*.

[3] It appears from the evidence, which is common cause, that the first appellant, who is the mother of the first respondent, inherited the farm Ventersbloem from her husband on his death in September 1996. On 16 December 2002 she signed a Deed of Sale (annexure "A" to the pleadings), in terms of which she agreed to sell the farm to the first respondent for the sum of R120 000,00.

[4] The document incorporating this sale agreement (annexure "A") consists of four pages. At the very top of the first page the following words appear "**Offer to Purchase**" in bold type and medium sized lettering. Underneath that appears in very small print, the following words "which constitutes a", then follows in very big bold print the words "**Deed of Sale**" and directly underneath this the words "when accepted" again in very small print.

The remainder of the document consists, as is usual, of printed provisions with blank spaces into which have been inserted, in manuscript, the appropriate information and particulars.

[5] The first page, apart from the heading described above, reads as follows (the handwritten portions being shown in italics):

"OFFER TO PURCHASE

which constitutes a

DEED OF SALE

when accepted

I, the undersigned, *Stefanus Jacobus Slabbert*

Identity No. *5405025089083*

of *Wrightstraat 13* (insert both physical

Westonaria and postal addresses)

(**hereinafter called 'the Purchaser')**

hereby offer to purchase from: *Louisa JohannaSlabbert*

Identity No. *2812120046087*

of *Plaas Ventersbloem* (insert both physical

Distrik Brandfort and postal addresses)

(**hereinafter called 'the Seller'**)

the following property, namely:

Plaas Ventersbloem

Distrik Brandfort op 1 September 2004 en/of

Soos verder ooreengekom..

(**hereinafter called 'the Property'"**

At the bottom right hand corner of the first page appears the signature of the first appellant and diagonally across it to the left is the signature of the first respondent.

[6] Adjacent to the information inserted in manuscript on the

printed pages and to any changes or alterations to the printed words appear the initiallings effected by both parties to the sale. Page 2 of the document contains a number of terms appertaining to the transaction between the parties. Of significance to the present appeal are clause 2 and clause 4.

Clause 2 provides:

> "2. PURCHASE PRICE.
>
> The purchase price is the sum of R*120 000-00* (exclusive*/inclusive* of Value Added Tax) Payable by the Purchaser to the Seller as follows:
>
> *Soos ooreengekom* ....
>
> ....
>
> ....
>
> ..
>
> (NB: VAT IS ONLY APPLICABLE IF THE SELLER IS REGISTERED AS A VENDOR UNDER THE VALUE ADDED TAX ACT). (*delete that which is not applicable)"

Clause 4 provides:

> "4. TRANSFER
>
> Transfer of the property shall be passed by the Seller's*/Purchaser's* Conveyancer and shall be given and taken upon the Purchaser having complied with his obligations in terms of clause 2 and 3 hereof. (*Delete that which is not applicable)"

[8] The parties' initials appear at the bottom right hand corner of each of pages 2 and 3 of the document and their full signatures are appended in the appropriate space designated for "purchaser" and "seller" on page 4. The second respondent did not sign the document.

[9] The first and second respondents took occupation of the property in February 2005 and have remained in occupation ever since. The first appellant left the farm in March 2005.

[10] At the time the Deed of Sale was signed the farm had been the subject of a lease agreement entered into between the first appellant and a third party, the DPS Trust. It was the first respondent's evidence that it had been envisaged by both the first appellant and the first respondent that registration of transfer would be effected into the names of

the respondents upon the termination of the lease. In view of the uncertainty surrounding the precise date of expiry of the lease, the words "op 1 September 2004 en/of soos verder ooreengekom" had been inserted in manuscript on page 1 of the sale agreement.

[11] As it transpired, after the departure of the first appellant from the farm, a long and protracted dispute arose between her and the first respondent over the precise basis upon which the respondents occupied the farm, in light of the fact that the first appellant was receiving no income from the first respondent, but was still being held accountable by creditors for expenses in connection with the farm. An attempt was made to put in place a signed lease agreement between them, but due to an inability to reach consensus on material aspects, nothing came of it.

[12] Ultimately, the first appellant, through her attorneys, notified the first respondent by letter that no legal and valid contract had come into existence between them due to the vagueness of the agreement. The first appellant then proceeded to sell the farm to the second appellant, her

grandson, who is married in community of property to the third appellant.

On 20 March 2007, an agreement was entered into by the appellants in terms whereof the first appellant sold Ventersbloem farm to the second and third appellants for the sum of R300 000,00. The property was subsequently registered in the names of the second and third appellants.

[13] In their particulars of claim annexed to the summons instituting action in the court *a quo*, the respondents claimed that the setting aside of the registration of the transfer of the property into the names of the second and third appellants was warranted on the grounds of the prior knowledge of the second and third appellants of the sale agreement entered into between the first appellant and the first respondent on 16 December 2002 ("the first sale").

[14] In their plea, the second and third appellants denied such knowledge and denied the validity of the first sale agreement on two grounds:

(a) that it did not comply with section 2(1) of the Alienation of Land Act 68 of 1981 in that the time for payment of the purchase price was not stipulated in writing; and

(b) that the provisions of section 15(2)(g) of the Matrimonial Property Act 88 of 1984 had not been complied with as no written consent of the second respondent to the purchase of the farm had been obtained by the first respondent prior to signing the contract with the first appellant.

[15] At the commencement of the trial an order of separation of issues was made by agreement between the parties which had the effect that the first and second respondents had to prove both the validity of the contract of 16 December 2002 and that the second and third appellants had knowledge thereof. The learned trial judge appears to have overlooked the issue relating to the second and third appellants knowledge of the first sale in her deliberations and failed to pronounce upon it in her judgment which is singularly lacking in any analysis thereof. I shall revert to this aspect in due course.

[16] On the issue pertinent to the validity of the first sale agreement she appears to have pinned her colours to the

mast symbolized by clause 4 of the agreement. I quote from her judgment.

> "In my view it can be inferred from clause 4 that transfer to Stefanus Jacobus Slabbert should be given and taken by him upon payment, *inter alia*, of R120,000-00. It is evident therefore that it was understood by the parties to the agreement that the purchase price will be paid in cash and not instalments."

For the convenience of the reader, I shall set out the provisions of clause 4 once again. Clause 4 provides:

> "4. TRANSFER
>
> Transfer of the property shall be passed by the Seller's*/Purchaser's* Conveyancer and shall be given and taken upon the Purchaser having complied with his obligations in terms of clause 2 and 3 hereof. (*Delete that which is not applicable)"

[17] Section 2(1) of the Alienation of Land Act 68 of 1981 ("the Act") provides:

> "**2 Formalities in respect of alienation of land**

(1) 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."

It is trite that the general object of this Statute is to avoid or, at the least, reduce to a minimum, uncertainty, disputes and possible malpractices such as perjury and fraud in contracts for the sale of immovable property. To that end the Act requires all the essential and material terms of the contract to be in writing. **VAN WYK v ROTTCHER'S SAW MILLS (PTY) Ltd** 1948 (1) SA 983 (AD)

The price is an essential and material term of the contract and accordingly must be stated in writing.

The time and method of payment of the purchase price is also an essential term of the contract and must be stipulated in writing. **KUPER v BOLLEURS** 1913 TPD 334; **CHRETIEN AND ANOTHER v BELL** [2010] 2 ALL SA 428 (SCA)

A written contract for the sale of immovable property which leaves the method of payment vague or leaves it over for future negotiation, is void *ab initio* and cannot be rectified. **JAMMINE v LOWRIE** 1958 (2) SA 430 (T); **PATEL v ADAM** 1977 (2) SA 653 (A)

[18] I am prepared to accept that in terms of the Deed of Sale the purchase price was payable in cash. But the essential question was whether a time of payment was stipulated in the Deed of Sale. This question was not considered by the trial court.

[19] The Deed of Sale clearly contains no time for payment of the purchase price. On the contrary, the words “soos ooreengekom” signify that agreement was reached in this regard but not put down in writing. This accords with the evidence, namely that it was agreed that the purchase price was payable on expiry of the existing lease or any extension thereof.

[20] Accordingly, the court *a quo* was erroneous in its finding that the contract was not void. As no time of payment of the

purchase price was stipulated in writing in the contract, annexure “A”, I find that it does not comply with section 2(1) of the Alienation of Land Act 68 of 1981 and is therefore unenforceable.

[21] The second issue in the appeal, that of the first respondent’s non-compliance with section 15(2)(g) of the Matrimonial Property Act 88 of 1984, has fallen away due to Mr. Benade’s wise and timely concession that the distinction drawn by Mr. Reinders between a Contract of Sale and a Deed of Alienation, is sound. A contract is defined as a Deed of Alienation under which land is sold against payment by the purchaser to, or to any person on behalf, of the seller, of an amount of money in more than two instalments over a period exceeding one year.

A Deed of Alienation is defined as a document or documents under which land is alienated. Thus a sale agreement of immovable property is a Deed of Alienation whilst an Agreement of Sale of immovable property in terms of which the purchase price is payable in at least three instalments over more than a year, is a special kind of Deed of

Alienation, which for purposes of the Alienation of Land Act 68 of 1981 is called a "contract".

It is only a contract in terms of the Alienation of Land Act 68 of 1981 which is deserving of the protection afforded in section 15(2)(g) of the Matrimonial Property Act 88 of 1984. Section 15(2)(g) provides:

> "**15 Powers of spouses**
>
> (2) Such a spouse shall not without the written consent of the other spouse-
>
> *(g)* as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act 68 of 1981), and to which the provisions of that Act apply;"

Because the alleged contract between the first appellant and the first respondent was purportedly a cash sale and not one in terms of which the purchase price was payable in instalments, it does not fall within the ambit of the protection afforded by section 15(2)(g) as there is no danger of the one spouse (i.e. first respondent) dissipating the financial resources of the joint estate without the consent of the other spouse (second respondent). **AMALGAMATED BANKS OF**

SOUTH AFRICA BPK v DE GOEDE EN 'N ANDER 1997 (4) SA 66 (SCA) AT 74 B – E

In view of the conclusion I have reached as regards the unenforceability of annexure "A", it is not necessary to dwell on this aspect of the matter any further.

[22] In my judgment the first and second respondents in any event failed to prove the requisite knowledge of the subsequent purchasers, the second and third appellants. When one is dealing with the question of double sales of immovable property, as in the matter under consideration, the preference to real rights is tempered by an equitable doctrine in our law called the Doctrine of Notice (in Afrikaans "die Kennisleer"). In **CUSSONS EN ANDERE v KROON** 2001 (4) SA 833 (SCA) at 839 para [9] Streicher JA described the operation of the Doctrine.

> "[9] In die geval van dubbelverkope word 'n beginsel bekend as die kennisleer toegepas. Waar A sy goed aan B verkoop en daarna C dieselfde goed verkoop en oordra aan C, wat bewus was van die regte van B, is B geregtig

> op kansellasie van die verkoping en van die oordrag van die goed, op grond daarvan dat die verkoper en C geag word op 'n bedrieglike wyse teenoor hom op te getree het (*Tiger-Eye Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd*1971 (1) SA 351 (K) op 358F - H). Werklike bedrog word nie D vereis nie. Blote kennis aan die kant van C van die bestaan van B se vorderingsreg is voldoende (*Kazazis v Georghiades en Andere*1979 (3) SA 886 (T) op 893). Die verwysings na bedrog in sake van hierdie aard dien slegs as aanknopingspunt in die regsisteem ter onderskraging van die kennisleer (*Associated South African* E *Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere*1982 (3) SA 893 (A) (*ASA Bakeries*) op 910E)."

Thus if it is shown that second and third appellants, at the time of entering into the sale with first appellant, knew that the Ventersbloem farm had already been sold by first appellant to first respondent, they would, despite transfer having been registered in their names, be enjoined to relinquish the farm in favour of the first respondent. It is actual knowledge which is required and this may take the form of *dolus eventualis*, i.e. circumstances which show that the second and third appellants ought reasonably to have known of the prior sale, but chose to ignore it and proceeded to purchase the same property from the first appellant. **MERIDIAN BAY RESTAURANT (PTY) LTD AND OTHERS v MITCHELL NO** 2011 (4) SA 1 (SCA)

The knowledge of the second and third respondents is essentially a question of fact and one primarily for the decision of the trial court. It is the party alleging knowledge who carries the onus of proving it, i.e. the first respondent in this case. **PILLAY v KRISHNA AND ANOTHER** 1946 AD 946

[23] No evidence whatsoever was adduced at the trial to show that either the second or the third appellants were aware of the prior sale. The second appellant testified that he knew the farm as it belonged to his grandparents and he had visited the farm on many occasions as a youth. He testified however that because of family feuds he had last been on the farm in 1999. He bought the farm in March 2007 and it was registered in his and his wife's name in May 2007. He denied any knowledge of the earlier sale at the time he purchased the farm and said that the first time he had heard

of the first sale, was in August 2007 through the conveyancing attorneys, who had attended to the registration of the property into his name. Mr. Reinders made an attempt to argue that the version of this witness was improbable. He also made a half-hearted submission that second appellant must be taken to have been aware of the first sale between the first appellant and first respondent prior to concluding the sale agreement in respect of the same farm with the first appellant, because the same set of attorneys acted as his conveyancers and first appellant's attorneys of record in her dispute with first respondent over the farm. (See **BASSON v REMINI AND ANOTHER** 1992 (2) SA 322 (N).) Even if I were to assume in Mr. Reinders' favour (which I do not do), it would assist the case of his clients not in the least, because constructive knowledge has no application to this particular enquiry. **GRANT AND ANOTHER v STONESTREET AND OTHERS** 1968 (4) SA 1 (A)

The credibility of the second appellant was a critical factor in the decision of this case. Despite that, the trial court made no credibility findings in its judgment. It is not possible to reject the evidence of the second appellant on the record.

Consequently Mr. Reinders' task in argument that actual knowledge is to be imputed to the second appellant on the strength of the evidence as it stands, was not without its difficulties and in fact proved to be an insurmountable hurdle for him to cross.

[24] On all accounts therefore, the second and third appellants must be allowed what is rightfully due to them, as envisaged by the title deed registered in their name. The third respondent was joined in the proceedings merely as a formality. No order has been sought against him in this appeal.

[25] At the hearing of the appeal, we granted two applications for condonation brought by the appellants for the late noting of their appeal in terms of Rule 49(2) and for the late filing of their security for costs of the appeal in terms of Rule 49(13) of the Uniform Rules of the High Court.

[26] Accordingly the order I make is the following:

1. The appeal succeeds with costs.
2. The orders of the court *a quo* are set aside and

substituted with the following order:

"(i) It is declared that the plaintiffs are not entitled to transfer of the farm Ventersbloem 934, Brandfort from the second and third defendants.

(ii) The plaintiffs are ordered to pay the costs of the trial."

S. EBRAHIM, J

I concur.

C.H.G. VAN DER MERWE, J

I concur.

M.A. MATHEBULA, AJ

On behalf of appellants: Adv. H.J. Benade
Instructed by:

Symington & De Kok
BLOEMFONTEIN
Ref. T O'Reilly/Adele/MXS2229

On behalf of first two respondents: Adv. S.J. Reinders
Instructed by:
Honey Attorneys
BLOEMFONTEIN
(Ref. DP Rossouw/sa/L02313)

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