

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

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case Nr: 1801/2009
Case Heard: 23/05/2010
Date delivered: 03/06/2010

In the matter between:

Coeromane Beleggings (Pty) Ltd

PLAINTIFF

and

Alpha Auto Electrical CC

RESPONDENT

JUDGMENT

Olivier J:

- 1]. The plaintiff, Coeromane Beleggings (Pty) Ltd, claims a declaratory order that the defendant, Alpha Auto Electrical CC, has no entitlement to occupy any portion of erf 4250, Kuruman, as well as orders that the defendant vacate the property, remove all its improvements and cease entering upon the property.
- 2]. It is the plaintiff's case that it had granted the defendant temporary consent to use a portion of the property, that such consent constituted a *precarium* which was revocable at the will of the plaintiff, that the defendant had abused the consent and that the plaintiff then terminated its consent.

3]. In the defendant's plea and counterclaim the following is alleged:

- 3.1] The defendant had purchased erf 1190 from the local municipality in 1999 (but it had not yet been transferred into the defendant's name);
- 3.2] JGPR Eiendomme (Edms) Bpk ("JGPR") purchased erf 3663, Kuruman, during the following year;
- 3.3] JGPR¹ wanted to purchase erf 1190 as well, in order to establish a shopping centre on these two adjacent erven².
- 3.4] During the year 2000 the plaintiff and the defendant³ concluded an oral agreement that the purchase contract between the defendant and the municipality would be cancelled⁴, on condition that the plaintiff would cause to be registered a right-of-way servitude (which would include a parking area) over both erf 3663 and erf 1190⁵ for the exclusive use of the defendant, as the owner of the adjacent erf 1119.
- 3.5] Although the plaintiff did give effect to this oral agreement to the extent that provision was made for such a right-of-way and parking area, which was utilised and in fact improved by the defendant, the plaintiff failed to have the servitude registered.

1 It is common cause that the plaintiff is the successor in title of JGPR.

2 It is also common cause that erf 4250 is the product of a consolidation (at a later stage) of erf 3663 and erf 1190.

3 It is furthermore common cause that the defendant had at all times material hereto been the owner of erf 1119, Kuruman, which lies adjacent to erf 4250.

4 which would (and did) enable JGPR/plaintiff to acquire erf 1190.

5 and therefore eventually and in effect over erf 4250.

4]. The defendant's counterclaim is for:

4.1] a declaratory order that the defendant acquired the exclusive right of that portion of erf 4250, Kuruman, in terms of the oral agreement; and

4.2] an order compelling the plaintiff to sign the necessary documentation to have a servitude⁶ registered, failing which the sheriff is to be authorised to sign such documentation on behalf of the plaintiff.

5]. In its replication the plaintiff pleaded, *inter alia*, that it denied that an agreement as alleged by the defendant could have been concluded and:

"3. *that:*

3.1.3 *the effect of the claimed right of exclusive use of a portion of Plaintiff's property amounts to an alienation thereof; and*

3.1.2 *by the requirements of the Alienation of Land Act no alienation is of any force or effect unless in writing and signed by the parties thereto; ..."*

6]. On the first day of the trial an "*informal*" exception to the defendant's plea and counterclaim was filed on behalf of the plaintiff. Such a procedure was condoned in **Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd**⁷ and it was

⁶ As set out in a proposed or draft deed of servitude, annexure "A" to the counterclaim.

⁷ 1995 (4) SA 128 (T) at 140F-G, 141G-142D; see also **Herbstein & Van Winsen – The Civil Practice of the High Courts of South Africa**, 5th edition, volume 1, Cilliers *et al*, p 645

in fact agreed upon by the parties on the first day of the trial.

7]. The exception reads as follows:

- "1. Defendant relies upon an oral agreement in terms whereof it acquired a servitude over a portion of Plaintiff's property and which servitude entitles Defendant as owner of the adjacent property to the exclusive use of a portion of Plaintiff's property in perpetuity.
2. The servitude claimed concerns an interest in land as defined by the alienation (**sic**) of Land Act 69 of 1981.
3. In the premises and by virtue of provisions (**sic**) of Section 2 of the Alienation of Land Act the oral agreement relied upon by Defendant in its Plea and Counterclaim is of no force or effect.
4. Defendant's Plea and Counterclaim accordingly discloses no defense to Plaintiff's claim and no cause of action for the Counterclaim."

8]. The relevant provisions of s 2 (1) of the Alienation of Land Act⁸ ("the Act") are that "No alienation of land ... shall ... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto ...".

9]. For these purposes the word "land" would include "any interest in land"⁹. In my view the creation and granting of such servitude would undoubtedly constitute a subtraction

⁸ 68 of 1981
⁹ Section 1

from the *dominium* of the plaintiff in erf 4250 and an alienation of an interest in that property¹⁰. It does not matter whether the servitude would be praedial or personal. Both would amount to the subtraction of a real right from the plaintiff's bundle of rights or *dominium* in erf 4250¹¹.

- 10]. What has to be considered, however, is whether an agreement as alleged by the defendant would have amounted to an alienation as envisaged in s 2 (1) of the Act.
- 11]. In s 1 the word "alienate" is defined as meaning "sell, exchange or donate, ..." and it is provided that the word "alienation" has a corresponding meaning".
- 12]. The allegations in this regard in the defendant's plea, as incorporated into the counterclaim, cannot in any way be interpreted to refer to an agreement of sale.
- 13]. In clause 4.5 of the draft servitude deed¹² provision was made for the payment of an amount of R100,00 by the dominant owner ("*Hersiende Eienaar*") to the servient owner ("*Dienende Eienaar*") upon registration of the servitude.
- 14]. In the allegations in the defendant's plea and counterclaim there is no reference to the draft deed of servitude. It was not, for example, alleged that the agreement had been that the terms of the servitude would be as set out in the draft deed of servitude. The only reference thereto appears in prayer 2 to the counterclaim where, as already mentioned, the defendant seeks an order to compel the registration of a

10 Compare **Felix en 'n Ander v Nortier NO en andere** [1996] 3 All SA 143 (SE) at 153F-154B; **Janse van Rensburg v Koekemoer** 2011 (1) SA 118 (GSJ) para's [16] – [17].

11 **National Stadium South Africa (Pty) Ltd and Others v Firststrand Bank Ltd** 2011 (2) SA 157 (SCA) para's [30] – [32].

12 Annexure A to the counterclaim

servitude as set out in the draft deed of servitude.

15]. Mr De Koning, counsel for the defendant, moved for an amendment to strike out clause 4.5 and stated that it had erroneously been included in the draft deed and that this would also appear from the discovered documentation. This was not disputed by Mr De la Harpe, counsel for the plaintiff, who also conceded that such an amendment would not prejudice the plaintiff. The amendment was accordingly granted and, insofar as the provisions of clause 4.5 may have been capable of forming a basis for an argument that the argument was one of sale, put an end to that.

16]. Mr De Koning argued that the alleged argument also did not amount to an agreement of exchange, as envisaged in s 2 (1) of the Act. In this regard he submitted:

16.1] that only property in a thing could form the subject of an exchange and that the defendant's right to have erf 1190 transferred to it by the municipality would not have been such a "*thing*"; and

16.2] that, in any event, the agreement, as alleged in the defendant's plea and counterclaim, did not entail an undertaking, on the part of the defendant, that such a right to claim transfer of erf 1190 would be ceded or in any way transferred to the plaintiff, and that the alleged agreement would therefore not have amounted to an agreement of exchange.

17]. In **Leonard Light Investments (Pty) Ltd v Wright and**

Others¹³, the case relied upon by Mr De Koning, it was held (at 633 D - E) that the word “exchange” in s 2(1) of the Act should be given its common law meaning and that “*At common law, ‘exchange’ is a contract for the transfer by one person of property in a thing to another in return for a similar agreement by the latter*”.

- 18]. In that case the alleged agreement had been that the applicant would lend an amount of money to the respondents for the purposes of the development of sectional title units and that the respondents would, upon completion of the project, transfer three of the units to the applicant.

At 633 E – F Streicher J (as he then was) held as follows:

“The applicant did not undertake to transfer a thing to the respondents. It undertook to lend money to the respondents. The undertaking to lend money created a personal right and was not an undertaking to transfer a personal right to the respondents. The transaction therefore did not constitute an exchange within the meaning of that word in the Alienation of Land Act 68 of 1981.”

- 19]. It was not, as I understand the judgment, held that a personal right could not be a “*thing*” capable of at being transferred; only that the agreement had not been that a personal right would be transferred to the respondents¹⁴.

- 20]. Under the heading “*All things may be exchanged but another’s property*” Voet said that “*As a general rule all things which*

¹³ 1991 (4) SA 628 (WLD)

¹⁴ Any personal right created by the undertaking to lend money would in any event, as I see it, have been that of the respondents.

admit of being sold may be exchanged ..."¹⁵.

- 21]. A claim (in this case to have erf 1190 transferred into the defendant's name) would have constituted a personal right¹⁶, capable of being sold, and therefore of being exchanged. Claims in the form of rights of action are movable incorporeal property, capable of attachment, cession and sale¹⁷, and I see no reason why a claim for transfer would be different.
- 22]. The question is, however, whether the agreement alleged by the defendant would have amounted to an exchange at all?
- 23]. The common law definition of exchange has to be applied¹⁸. I have already referred to the definition of exchange applied in the **Leonard Light** matter¹⁹. The definition applied in the **Hoeksma** case (at 897) was that an exchange "*marks a transaction between two people whereby each gives to the other, as his own, one thing in return for another*" and it was held that the reciprocal obligation in an agreement of exchange was "*the delivery or transfer of another asset*".
- 24]. In my view the agreement as pleaded by the defendant was not that the defendant had undertaken to "*give*", "*transfer*" or "*deliver*" anything to the plaintiff. In terms of the alleged agreement the defendant had merely undertaken to cancel its agreement with the municipality, thereby abandoning its right to claim transfer of erf 1190 into its name.

¹⁵ The Selective Voet being The Commentary on the Pandects, translated by Percival Gane, vol 3, p462.

¹⁶ Smith v Carniasaad en Andere 1998 (4) SA 877 (SCA) at 882D-E

¹⁷ Ormerod v Deputy Sheriff, Durban 1965 (4) SA 670 (D & CCD) at 673G-H; Herrigel NO v Bon Roads Construction 1980 (4) SA 569 (SWA) at 674D-G; Nahrungsmittel GmbH v Otto 1992 (2) SA 748 (CRD) at 753F-G; Nahrungsmittel GmbH v Otto 1993 (1) SA 639 (AD) at 647

¹⁸ Leonard Light Industries (Pty) Ltd v Wright and Others, supra, at 633E; Hoeksma and Another v Hoeksma 1990 (2) SA 893 (AD) at 897A-B.

¹⁹ Para [17] above; See also Mackeurtan's Sale of goods in South Africa, 5th edition, p271

- 25]. It was not, for example, alleged that the defendant had undertaken to cede that right to the plaintiff, which would arguably, for the purposes of an agreement of exchange, have amounted to the giving, transfer or delivery of something.
- 26]. The conclusion to which I have come is therefore that the agreement alleged by the defendant does not amount to an agreement of exchange. It entails an undertaking by the plaintiff to give, transfer and deliver an interest in its property to the defendant, but not a reciprocal undertaking and obligation on the part of the defendant to give, transfer or deliver anything to the plaintiff.
- 27]. Mr De la Harpe argued that, if the agreement does not constitute one of sale or of exchange, the undertaking to grant and register the servitude must necessarily amount to a donation as envisaged in s 2 (1) of the Act.
- 28]. I cannot agree. The allegation in paragraph 3.2.4 of the defendant's plea is that it had been agreed that the defendant's purchase agreement with the municipality would be cancelled on condition that²⁰ the plaintiff would register the servitude. The **quid pro quo** or "*counter-prestation*"²¹ for the servitude would therefore, according to the alleged agreement, be the cancellation of the purchase agreement between the defendant and the municipality, and the concomitant relinquishing by the defendant of its right to the transfer of erf 1190 into its name.
- 29]. In order to constitute a donation the promise or offer must be "*... prompted by sheer liberality or inspired solely by a*

²⁰ "*op voorwaarde dat*"

²¹ **Leonard Light Industries (Pty) Ltd v Wright and Others**, *supra*, at 633F-G

disinterested benevolence on the part of the donor ..."²² On the terms alleged by the defendant the plaintiff's undertaking to have the servitude registered would not have been prompted by "*sheer liberality*" or "*disinterested benevolence*", but rather by an undertaking on the part of the defendant to cancel the purchase agreement, which would enable the plaintiff to acquire erf 1190 itself.

30]. My conclusion is therefore that the alleged oral agreement would not violate the provisions of s 2 (1) of the Act, that the allegations in this regard do disclose a defence and a cause of action and that the exception has to be dismissed.

31]. What remains to consider is the issue of costs. There is no reason why costs should not follow the result. There is also no reason why such costs should be limited to the costs that would have been incurred had the exception been taken within the normal prescribed period²³. It is the plaintiff who chose not to take the exception then and, had it not taken the "*informal*" exception on the first day of the trial, I would in any event, and in view of the stand taken in the plaintiff's replication, have ordered this issue to be decided separately and before evidence regarding the alleged oral agreement was led.

32]. The following order is therefore made:

The exception is dismissed with costs.

²² *Commissioner for Inland Revenue v Estate Hulett* 1990 (2) SA 786 (AD) at 793 G; and also *Kay v Kay* 1961 (4) SA 257 (AD) at 261 A; *Welch's Estate v Commissioner, South Africa Revenue Service* 2005 (4) SA 173 (SCA) para [26]

²³ Uniform rule 23 (1), read with rule 25 (1)

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

For the Plaintiff: Adv D H De la Harpe
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