



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.5171/2015

Case No.4070/2015

In the matter between:

KOMMANDANTSDRIFT

Plaintiff

and

JOHANNES BRITS

First Defendant

NICO LE ROUX

Second Defendant

REGISTER OF DEEDS

Third Defendant

ABSA BANK LIMITED

Fourth Defendant

Coram: NUKU J
Heard on: 21 November 2024
Delivered on: 13 January 2025

JUDGMENT

NUKU, J

[1] The ongoing dispute between the parties in this matter relates to the validity of two transfers of the property known as The Farm Oude Zanddrift Number 446, situated in the Division of Uniondale, Western Cape Province (**the property**). The first is the transfer of the property from the plaintiff to the second defendant which was registered at the Deeds Office in Cape Town on 21 September 2000 (**the first transfer**). The second is the subsequent transfer of the property from the second defendant to the first defendant which was registered at the Deeds Office in Cape Town on 17 July 2008 (**the second transfer**).

[2] The property is currently registered in the name of the first defendant under Deed of Transfer Number T 47986/2008 and two mortgage bonds are registered over the property, one in favour of Absa Bank Limited, the fourth defendant and the other in favour of Sentraal-Suid Kooperasie Limited (**SSK**). SSK is not a party to these proceedings because it elected to abide the court's decision when these proceedings were brought to its attention.

[3] The property is a product of a consolidation of the following two properties, namely Portion 3 (a portion of portion 2) of the Farm Zand Drift Number 118 (**Micheal's Farm**) and Portion 2 (a portion of portion 1) of the Farm Onder Zanddrift Number 119 (**the Wedge**) in respect of which the Certificate of Consolidated Title Number T90464/1994 was issued by the Registrar of Deeds, Cape Town on 29 November 1994.

[4] Prior to the consolidation referred to above Micheal's Farm had been registered in the names of Mr Micheal Arnaoldus Le Roux (**Micheal**) and Mrs Petra Le Roux and this may explain why it became known as Micheal's Farm. The Wedge, on the other had been part of another property known as Portion 1 of the Farm Onder Zanddrift Number

119 which was registered in the name of Mr Meyer Le Roux (**Mr Le Roux**), the father of Mr Meyer Le Roux (**Meyer**), Nico Le Roux (**Nico**) and Micheal.

[5] During 1993, Mr Le Roux subdivided Portion 1 of the Farm Onder Zandrif Number 119 to create the Wedge which he transferred to Micheal and his wife during 1994. Micheal and his wife, in turn consolidated the Wedge with Micheal's Farm to create the property as mentioned in paragraph 3 above.

[6] The plaintiff acquired the property from Micheal and his wife in terms of a Deed of Transfer registered at the Deeds Office in Cape Town on 11 December 1997 under Deed of Transfer Number T119146/1997. Meyer is the sole member of the plaintiff.

[7] During 2000, the plaintiff and the second defendant concluded an agreement for the sale of the property (**the 2000 agreement of sale**) pursuant to which the property was transferred to the second defendant as described above. It is now common cause that the plaintiff and the second defendant laboured under a common mistake that they were only dealing with Micheal's Farm and not the Wedge or the property. It is because of this common mistake that Parker J declared the agreement of sale void, a decision which the first defendant has unsuccessfully appealed.

[8] During 2008, the first and second defendants concluded an agreement for the sale of the property (**the 2008 agreement of sale**) pursuant to which the property was transferred to the first plaintiff. Again, Parker J has determined that this agreement of sale is void because of the common mistake that the first and second defendants laboured under when they concluded the agreement, namely that they were dealing with Micheal's Farm and not the Wedge or the property.

[9] In declaring the two agreements of sale void, Parker J either omitted or was not called upon to deal with the issue of the validity of the transfers pursuant to which the property was transferred. When the matter served before the Supreme Court of Appeal, that court declined to decide the issue as a court of first instance and referred it back to

this court for determination. Thus, this court is required to determine the validity of the first and second transfers. The plaintiff appreciating that a decision on this issue is not dispositive of the entire list between the parties, has indicated that the issue of a consequential relief, in the event of the transfers being declared void, will have to be dealt with at a later stage.

[10] No additional evidence was led for the purposes of determining the validity of the transfers and the court was requested to determine the issues based on the evidence that was led in the trial before Parker J. That evidence has been summarised both in the judgment of Parker J, as well as the Supreme Court of Appeal judgment and in my view, it is not necessary to summarise it again. It suffices to state that what that evidence boiled down to is that the plaintiff never intended to sell the property to Nico and Nico never intended to purchase the property from the plaintiff because both parties intended to buy and sell Micheal's Farm. Further, Nico never intended to sell the property to the first defendant because as he only meant to sell Micheal's Farm which as his understanding was that he had only acquired Micheal's Farm from the plaintiff.

[11] The submissions made on behalf of the plaintiff, paraphrased amount to this – regarding the first transfer - the plaintiff had no intention of transferring the property to the second defendant because it never intended to sell the property to the second defendant in the first place. Similarly, the second defendant had no intention of taking ownership of the property as he, when taking ownership of the property, laboured under the mistaken idea that he was taking ownership of Michael's Farm, this being the property he understood to have bought from the plaintiff.

[12] As regards to the second transfer – the submissions are that the second defendant who did not regard himself as the owner of the property had no intention of passing ownership of the property to the first plaintiff. This is because he could never have intended to pass ownership of something that he did not think was his. The submission goes further that judging from the conduct of the first defendant, he also could not have intended to take ownership of the property. Thus, so goes the

submission, the common mistake that vitiated the agreements of sale should also vitiate the transfers.

[13] The conduct of the first defendant referred to above is the fact that the first defendant had allowed the plaintiff to continue with its farming operations on the Wedge, in the period between 2008 and 2012, without a demur. This, however, only changed when the first defendant engaged the services of a land surveyor who advised that the extent of the property includes the Wedge. In short, the argument is that the first defendant, prior to the advice by the land surveyor, did not regard the Wedge as part of the property.

[14] It was submitted on behalf of the first defendant that the plaintiff is not entitled to claim retransfer of the property because Nico, in signing the necessary documents on the basis of which the transfer of the property was effected, signalled his intention to pass ownership of the property to the first defendant. It was submitted further that the voidness of the underlying agreement for the sale of property is irrelevant for the purposes of determining the validity of the transfer of the property. The latter argument is based on the land registration system that South Africa has adopted called the abstract system of transfer in terms of which the validity of the transfer does not depend on the validity of the underlying agreement pursuant to which the transfer is effected.

[15] Both parties approached the matter from a correct legal position that the abstract system of land registration applies with the result that the underlying agreement pursuant to which the transfer is registered is not determinative of the validity of the transfer. In this regard both parties referred the court to the decision of the Supreme Court of Appeal in ***Legator McKenna Inc and Another v Shea and Others***¹ where Brand, JA stated the following:

‘In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely, delivery – which in the case of immovable

¹ 2010 (1) SA 35 (SCA) at para [22]

property, is effected by registration in the Deeds Office – coupled with a so-called real agreement or “saaklike ooreenkoms”. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become owner of the property... Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, for example sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement...” (footnotes omitted)

[16] None of the parties take issue with the first requirement for the passing of transfer, namely, the registration of the property at the Deeds Office in Cape Town in the name of the first defendant. The issue is whether such registration was coupled with the so-called real agreement and as Brand JA stated, the principles applicable to agreements apply to real agreements. Essentially then this involves a factual enquiry whether the registration of the property at the Deeds Office in Cape Town in the name of the first defendant was coupled with an intention on the part of Nico to transfer ownership and the intention on the part of the plaintiff to become owner of the property.

[17] On the acceptance of the common cause facts that Nico never intended to purchase the property from the plaintiff it seems to me that it follows logically that he could never have intended to give what he never thought he had in the first place. Otherwise, Nico would have had to have two intentions at odd with each other, that is one intention to sell only Micheal’s Farm and another intention to give transfer of the property. For that conclusion to be reached one would need clear evidence that Nico had become aware of the fact that he had acquired not only Micheal’s Farm but the entire property. His awareness of this fact would have to be shown to exist prior to him signing documents necessary to pass transfer. No such evidence was presented in this matter.

[18] In my view, the first defendant misconstrued the plaintiff’s argument as if plaintiff relied on the voidness of the agreements of sale as its basis of attacking the validity of

the transfers. This may have been due to the fact that the plaintiff prefaced its arguments with reference to the judgment that declared the agreements of sale void. But that was not the end of the plaintiff's argument as paragraph 19 of the plaintiff's heads of argument makes plain:

‘As important as the court's declaration that the contracts were void ab initio, is the reason why they were found to be void. They were found to be void because both parties did not intend to buy, sell and transfer the property. They intended to buy, sell and transfer something else, i.e the property less the piece of land known as the wedge, a piece of land known as Micheal's Farm.’

[19] I must hasten to add that the reason that the agreements were found to be void, did not include the fact that the parties never intended to transfer the property as that issue was left undetermined. That court held that the parties intended to buy and sell something (Micheal's Farm) but the agreements recorded the Merx as the property due to a common mistake between the parties, as the property. But as I understand the plaintiff's argument it is that the parties could never have intended to give and take transfer of something different to which they intended to buy and sell in the first place. So, the argument relies not on the invalidity of the agreements of sale but on the mistake which resulted in the agreements of sale being found to be void.

[20] In my view, the fact that Nico signed the necessary documents to pass transfer of the property to the plaintiff cannot assist the plaintiff in the absence of evidence to support a conclusion that Nico intended to give transfer of the property to the first defendant. The first defendant also gave no evidence to suggest that he regarded himself as the owner of the property from the date of its registration into his name. This is hardly surprising in view of the fact that it took him approximately four years before he started laying claim to the Wedge and that this only came about after he had consulted a land surveyor. Had he regarded himself as having acquired the property including the Wedge, he would have undoubtedly asserted his rights soon after taking transfer of the property.

[21] The first defendant has also sought to define a “real agreement” with reference to the Deeds Registries Act, 47 of 1937, as amended (**Deeds Registries Act**) and the regulations promulgated thereunder. This, however, cannot assist the first defendant in that it cannot provide evidence of the presence or absence of an intention of the transferor to pass transfer as well as an intention on the part of the transferee to become owner of the property being transferred.

[22] Reference was also made to some academic writings criticising the abstract system and in particular an extract from **LAWSA**² where the author states:

‘The most serious objection to the abstract principle is that it works unfairly towards the transferor who is left with a *condictio* on the ground of unjust enrichment instead of a *rei vindication*. The transferor is especially hard hit in cases where the transferee is insolvent. Since the transferee acquired ownership in the article, he or she can also give valid title to a third party who will be protected against the claims of the first transferor. The abstract principle thus gives preference to considerations of legal certainty over considerations of fairness. In this sense the abstract principle supports the principle of publicity. Third parties who rely on the impression that a transfer has been completed are protected.’

[23] With reference to the above passage it was submitted that titles of the first defendant (as the second transferee), Absa Bank as well as SSK (as bondholders over the property) are protected because they can rely on the accuracy and reliability of the documents held by the Deeds Office which are public documents.

[24] The criticism of the abstract principle, in my view, misses the point. A transferor who had an intention to pass transfer of a property can never be heard to complain about being held to a transfer that he or she intended to give. The criticism seems to

² LAWSA Vol 27, Things, para 13

conflate situations where a transferor could potentially assail the transfer based on some defect regarding the underlying agreement. In that case it is the real agreement that must prevail regardless of some defect in the underlying agreement. A defect in the real agreement, on the other hand, is fatal to the transfer. This is because the registration of transfer that is not coupled with the real intention does not result in a valid transfer. In my view, there is thus no merit in this argument.

[25] To recap, the evidence established that the plaintiff, first and second defendant all laboured under the mistaken understanding that the property that they were dealing with was the Micheal's Farm. Contrary to that understanding it was the property that was transferred and not Micheal's Farm. It was not even possible for the parties to transfer Micheal's Farm as the latter ceased to exist, in a form capable of being transferred, when it was consolidated with the Wedge to create the property. Such a mistake is of such a nature as to render the transfer void in that at the time when the transfer was registered the plaintiff's intention in respect of the first transfer was to give transfer of Micheal's Farm. For his part, Nico's intention was to become owner of Micheal's Farm and not the property. There was thus a defect in the real agreement the consequence of which is that there was no valid transfer of the property. The plaintiff is therefore entitled to the relief set out in prayers A1 to A3 of the summons to be declared as the rightful owner of the property, to have the records held by the Registrar of Deeds, Cape Town rectified to reflect it as the rightful owner of the property as well as an order directing the third defendant to rectify its records to reflect the plaintiff as the rightful owner of the property.

[26] The above outcome concludes only but one aspect of the litigation between the parties, that is the issue of the rectification of the documents held at the Deeds Office in Cape Town to reflect the plaintiff as the owner of the property. There are still outstanding issues including the monies exchanged between the parties as part of the purchase price. As well as mortgage bonds registered over the property. The parties' legal representatives did not make it clear whether the order, in the event of the plaintiff being successful, would be carried into effect immediately before dealing with what the

plaintiff's legal representatives termed consequential relief. The parties are at liberty to determine these issues among themselves failing which they can approach the court for direction on whether this order is to be carried into effect immediately or whether the order is suspended pending finalisation of the residual issues including the consequential relief.

[27] The plaintiff has been successful, and I am of the view that the costs should follow the result. Only the first defendant defended the action and as such the costs are awarded only against him. The plaintiff has submitted that costs should be awarded on the C-scale given the complexity of the matter. I am not persuaded that costs on the C-scale are warranted. The matter involves an application of trite principles to a given set of fact. The facts themselves do not present any complexity. Costs therefore shall be awarded on the B-scale.

ORDER

[28] In the result I make the following order:

- 28.1 It is declared that the plaintiff is the owner of the property known as The Farm Oude Zanddrift Number 446, situated in the Division of Uniondale, Western Cape Province (**the property**) which is currently registered at the Deeds Office in Cape Town in the name of the first defendant under Deed of Transfer Number T46 007/2008 (**the Deed of Transfer**);
- 28.2 The Deed of Transfer and/ or any other deeds or documents held by the third defendant relating to the property are be rectified to reflect the plaintiff as the owner of the property;
- 28.3 The third defendant is authorized and directed to give effect to the orders set out in sub-paragraphs 26.1 and 26.2 above;

28.4 The first defendant is ordered to pay the plaintiff's costs of suit on the B-scale including costs occasioned by employment of counsel;

28.5 The parties are granted leave to approach the court for directions on whether sub-paragraphs 26.1 to 26.3 of this order are to be carried into effect immediately or whether they are to be suspended pending finalisation of the residual issues including the consequential relief.

L.G. Nuku
Judge of the High Court

APPEARANCES

For plaintiff:	P A Myburg SC
Instructed by:	Cluver Markotter Attorneys, Stellenbosch
For first defendant:	J I Du Toit SC
Instructed by:	Le Roux Lamprecht Inc, George
For Second to Fourth defendants:	No appearance