



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

JUDGMENT

Not Reportable

Case no: 2025-001018

In the matter between:

ROBIN ROY SCHLEICH

First Applicant

**STELLA KATHARINA
KÜHN-VON BURGSDORFF**

Second Applicant

and

BRIAN RAMON LANTON

First Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Second Respondent

CRAIG SCHNEIDER ASSOCIATES

Third Respondent

THE CITY OF CAPE TOWN

Fourth Respondent

CAPITEC BANK LTD

Fifth Respondent

ABSA DEBTOR FINANCE (PTY) LTD

Sixth Respondent

In re:

Case No.: 20377/2024

In the matter between:

BRIAN RAMON LANTON

Plaintiff

and

ROBIN ROY SCHLEICH

First Defendant

**STELLA KATHARINA
KÜHN-VON BURGSDORFF**

Second Defendant

REGISTRAR OF DEEDS, CAPE TOWN

Third Defendant

CRAIG SCHNEIDER ASSOCIATES

Fourth Defendant

THE CITY OF CAPE TOWN

Fifth Defendant

CAPITEC BANK LTD

Sixth Defendant

ABSA DEBTOR FINANCE (PTY) LTD

Seventh Defendant

Neutral citation:

Coram: COOKE AJ

Heard: 7 August 2025

Delivered: 12 September 2025

Summary: Application to strike out rescission action as an abuse of process - acquisition of domicile – third party claims under the Matrimonial Property Act 88 of 1984

ORDER

- [1] The application for condonation of the late filing of the affidavit of Allison Alexander is granted. The costs of the application to be paid by the first respondent, including the costs of two counsel, with senior counsel on scale C, and junior counsel on scale B.
- [2] The application for condonation of the late filing of the supplementary replying affidavit and the confirmatory affidavit of the first and second applicants respectively is granted, with no order as to costs.
- [3] The application to strike out the action is dismissed, with costs to stand over for determination in case number 20377/2024.

JUDGMENT

Introduction

- [1] At one point, the applicants and the first respondent shared a friendship. I shall refer to them as the Schleichs and Mr Lanton. In 2018, an amicable

agreement was reached ('the sale agreement') in terms of which Mr Lanton sold a property adjacent to the Cape Point Vineyards in Noordhoek ('the Nthombeni Way property') to Mr Schleich. The Schleichs were excited about the purchase and intended to construct a family home on the property. To this end, they held detailed discussions with architects as they planned their dream home. Seven years later, the relationship has soured and conflict between the parties has spawned several court cases. Despite Mr Schleich having paid over R5.4 million towards the purchase price, the property remains registered in the name of Mr Lanton, and the imagined home is no closer to being built.

- [2] Attitudes to the sale have fluctuated. Initially, during the Covid pandemic, the Schleichs expressed their desire to cancel the sale. This was resisted by Mr Lanton. Then, a few years later, the Schleichs reconsidered their decision and pursued the enforcement of the sale. This too was initially opposed by Mr Lanton and was eventually resolved when the court ordered Mr Lanton to implement the transfer.
- [3] While arranging the transfer, Mr Lanton received evidence suggesting that perhaps a necessary formality had not been satisfied. Ms Kühn-Von Burgsdorff had not provided her written consent to the sale. Mr Lanton relied upon this evidence as a ground to challenge the court's order and subsequently issued summons seeking a rescission. The Schleichs consider this action to be an abuse of process and ask that the court set aside the summons.
- [4] The Registrar of Deeds, being the second respondent, filed a report in which it stated that based on its records, Mr Schleich is married in community of property. It also noted that from a registration perspective, there are no objections to the order being granted as prayed. The fourth respondent ('the City'), abides by the decision of the court.

Background

- [5] In 2012, prior to their marriage, the Schleichs purchased their first property in Noordhoek ('the first property'). The correspondence indicates that they spent several million Rands improving this property. A couple of years later, on Valentine's Day in 2014, the Schleichs were married. No antenuptial contract was concluded. During that period, Ms Kühn-Von Burgsdorff was residing in Belgium, and Mr Schleich was working temporarily in Ghana. When not in Ghana, Mr Schleich resided in Belgium or Cape Town. The Schleichs chose Cape Town as the venue for their wedding as it was convenient for both families.
- [6] A few years following the wedding, on 13 October 2017, Mr Schleich purchased the Nthombeni Way property for the sum of R12 million from Mr Lanton. This property was to be created through the consolidation and subdivision of other properties owned by Mr Lanton. Although Ms Kühn-Von Burgsdorff was aware of the sale and was copied in on emails pertaining to the sale, she was not a party to the transaction and did not provide her prior written consent. On the day of the purchase, Mr Schleich paid US\$20 000 to an entity related to Mr Lanton for brokerage and related services. Five days later, on 18 October 2017, Mr Schleich paid R2.4 million to Mr Lanton.
- [7] On 21 January 2018, the Schleichs completed the sale of the first property. Ms Alexander, a conveyancer, assisted with this transfer. At the time, Mr Schleich advised that he and Ms Kühn-Von Burgsdorff had purchased the first property as non-residents without visas, and Mr Schleich had been a tax resident in South Africa for merely 11 months in the previous six years. This information was conveyed to Ms Alexander. She prepared the documents required to pass transfer of the first property. Notably, these documents included affidavits in which the Schleichs recorded their marriage as being in

community of property. The Schleichs signed these affidavits without demur, and the title deed for the sale of this property duly reflected the Schleichs as being married in community of property.

[8] During April 2018, the Schleichs exchanged emails with their architects. It appears that the design for the Nthombeni Way property included a family wing with bedrooms for children, guest accommodation, and staff quarters for a housekeeper. Regarding the projected cost of the house, in one email Mr Schleich noted that 'we have a line in the sand at R15m, but this is a guide'. At about the same time, on 10 May 2018, Mr Schleich made an additional payment of R3 million to Mr Lanton as part of the purchase price.

[9] In due course the Schleichs were granted South African permanent residence permits; Mr Schleich on 28 August 2018, and Ms Kühn-Von Burgsdorff on 19 February 2019. A dispute subsequently emerged between the parties regarding an alleged breach of the sale agreement. Mr Schleich stopped making payments and adopted the position that Mr Lanton had repudiated the agreement. On 16 March 2020, he purported to cancel the agreement and subsequently, on 5 October 2020, he commenced an action under case number 14208/20 in which he sought to void the sale of the property and to recover the amounts paid to Mr Lanton. A few months later, Mr Lanton delivered a plea and counterclaim in which he elected to abide by the sale and tendered to give transfer.

[10] On 31 January 2023, more than two years later, Mr Schleich did an about-turn. He withdrew the action under case number 14208/20 and accepted Mr Lanton's tender of transfer. This gave rise to a dispute between the parties regarding the interest payable by Mr Schleich on the purchase price. On 3 July 2023, Mr Schleich paid over R9 million into a trust account for the balance of the purchase price and interest and demanded transfer. A further demand was made on 14 September 2023.

[11] Mr Lanton did not accede to this demand, and on 4 October 2023, Mr Schleich commenced an application under case number 16999/23 to compel transfer. Mr Lanton delivered a notice of intention to oppose, and on 13 December 2023, the application was postponed for hearing in June 2024. In the meantime, on 17 April 2024, an order was granted in terms of which Mr Lanton was directed to extend the subdivision approval. The costs associated with this order are the subject of a separate judgment to be handed down together with this judgment. Subsequently, on 4 June 2024, argument was heard in case number 16999/23 and Cloete J granted an order in terms of which Mr Lanton was directed to implement the sale agreement ('the Cloete order'). It is not disputed that when this order was granted, the parties to the application, and the court, all believed that the sale agreement was valid.

[12] Mr Lanton accepted the Cloete order and took steps to comply with it, which included instructing his legal representatives to prepare the necessary transfer documentation, and directing a building professional to apply for an extension of the validity period in respect of the conditions of subdivision. The subdivision application was granted by the City on 19 August 2024.

[13] On 10 June 2024, the conveyancers attending to the transfer sent an email to the Schleichs' attorneys, confirming that they were attending to the registration of the transfer, and enquiring amongst other things where Mr Schleich was domiciled at the time of the marriage. Mr Schleich stated that he had been domiciled in South Africa, and this response was conveyed, without comment, by his attorneys to the conveyancers. On the face of it, this information raised a potential difficulty. In terms of the common law, the proprietary consequences of a marriage are governed by the husband's

domicile at the time of the marriage.¹ If Mr Schleich was indeed domiciled in South Africa at the time of the marriage, then it is presumed that the marriage is in community of property.² This presumption would be fortified by the absence of an antenuptial contract. Critically, if the marriage is in community of property, then spousal consent would be required for certain transactions, including the conclusion, as purchaser, of a contract as defined in the Alienation of Land Act 68 of 1981 (the sale agreement being such a contract).

[14] Having regard to Mr Schleich's response, Mr Lanton obtained legal advice regarding the consequences of Mr Schleich having been domiciled in South Africa at the time of his marriage. He was advised by senior counsel that, given the absence of Ms Kühn-Von Burgsdorff's written consent, attested by two competent witnesses, the sale of the Nthombeni Way property was a nullity in terms of s 15(2)(g) of the Matrimonial Property Act 88 of 1984. Subsequent enquiry revealed that the title deed for the sale of the first property recorded the Schleichs as having been married in community of property.

[15] Armed with this information and advice, on 22 August 2024, Mr Lanton's attorneys sent an email to the Schleichs' attorneys recording that the sale of the Nthombeni Way property was a nullity because it had not been signed by Ms Kühn-Von Burgsdorff. They asserted that the Cloete order must be reversed. Thereafter, correspondence was exchanged between the parties and on 9 September 2024, Ms Kühn-Von Burgsdorff signed a document recording that she consented to and ratified the sale. This notwithstanding, on 19 September 2024, Mr Lanton commenced proceedings under case number 20377/24 for the rescission of the Cloete order on the basis that the

¹ *Sperling v Sperling* 1975 (3) SA 707 (A). Although the constitutionality of this rule is questionable (see *LE v LA* 2024 (5) SA 539 (GJ) para 40 and see also CF Forsyth *Private International Law* 5 ed (2012) (*Private International Law*) at 295-6 and 300-1), it was not challenged in these proceedings.

² *Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (AD) at 10A.

parties and the court had erroneously believed that the purported sale was valid, and therefore the order had been granted as a result of a common mistake, alternatively, as a result of a *justus error*, alternatively in the absence of a valid agreement between the parties ('the rescission action'). The Schleichs consider that the rescission action is an abuse of process, prompting them therefore to launch the application which is the subject matter of this judgment.

Abuse of Process - Relevant Legal Principles

[16] In the matter of *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*³ the Constitutional Court identified three categories of abuse of process case.

- a. First, there are cases where there is gross abuse by the procedure employed by a litigant, to the extent that the court, as a rare instance, will dismiss the claim, without any regard to the merits.⁴
- b. Second, there are cases concerning frivolous and vexatious litigation. There, self-evidently, the merits of the cases, both past and present, are germane in order to determine whether the court is being assailed by a further frivolous claim or something with arguable merits.⁵ In relation to this category, the court referred to *Maphanga*⁶ where the Supreme Court of Appeal held that it had to be shown that the respondents had habitually and persistently instituted vexatious legal proceedings without reasonable grounds, and that legal proceedings were vexatious and an abuse of the

³ 2023 (2) SA 68 (CC) ('*Mineral Sands*').

⁴ Ibid para 52.

⁵ Ibid para 53.

⁶ *MEC, Department of Co-operative Governance and Traditional Affairs v Maphanga* 2021 (4) SA 131 (SCA).

process of court if they were 'obviously unsustainable as a certainty and not merely on a preponderance of probability'.

- c. The third class of case concerns criminal proceedings, public and private. Here the enquiry is whether the prosecution is being brought in the public interest and not to pursue some private objective.⁷

[17] This is not a case where there has been a gross abuse of the procedure such that the application can be dismissed without any regard to the merits (the first class). This is also not a case where a litigant has habitually and persistently instituted vexatious legal proceedings without reasonable grounds (one aspect of the second class). Since this is a civil claim, the third class of case is also not applicable. This case only falls into a limited part of the second category, namely where legal proceedings are said to be vexatious and an abuse of the process of court because they are obviously unsustainable. The essential enquiry in this matter is whether the rescission action is 'obviously unsustainable as a certainty'.⁸

[18] The court has a discretion whether or not to dismiss the action on account of abuse of its process.⁹ In cases such as this, the court's power must be exercised with very great caution, and only in a clear case. The rationale behind this is that courts of law are open to all, and it is only in very

⁷ *Mineral Sands* para 54.

⁸ In *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* (SA 23 of 2010) [2012] NASC 15 (13 August 2012); 2012 JDR 1357 (NmS) (*Aussenkehr*) para 39, the Namibian Supreme Court held that the statement regarding 'certainty' should not be read as suggesting that the standard for deciding civil disputes, namely, preponderance of probabilities, is not applicable in an application to dismiss an action on the ground that it is vexatious. Rather, the word merely emphasises the degree of clarity required before the plaintiff's claim can be summarily dismissed for lack of merit. The judgment was written by the former Chief Justice of South Africa, who was acting as a judge of appeal in Namibia. See also *Golden International Navigation SA v Zeba Maritime Co Ltd*; *Zeba Maritime Co Ltd v MV Visvliet* 2008 (3) SA 10 (C) para 26. But compare *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*; *Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 275C.

⁹ *Aussenkehr* para 26.

exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action.¹⁰ The circumspect approach adopted by our courts for over a century is now buttressed by s 34 of the Constitution which guarantees everyone the right to access the courts.¹¹

[19] There appear to be very few cases where a claim is struck out as an abuse of process merely on the ground that it is obviously unsustainable. Many of the cases mentioned in argument are distinguishable in so far as they relate to persistent litigators (*Corderoy*¹²), misuse of court procedures (*Beinash*¹³), private prosecutions (*Maughan*¹⁴ and *Nedcor*¹⁵) and the Vexatious Proceedings Act 3 of 1956 (*Cohen*¹⁶). Of those that are not distinguishable, most were dismissed.¹⁷ One exception is *African Farms*.¹⁸ But even here, it was a minority judgment which found, on the facts, that the cause of action was ‘built on a foundation of sand’.¹⁹

[20] In *Aussenkehr Farms* Ngcobo AJA held that abuse connotes ‘improper use, that is, use for ulterior motives’, and the term ‘abuse of process’ connotes that ‘the process is employed for some purpose other than the attainment of the claim in the action’.²⁰ To my mind, the primary and immediate objective of the rescission action is to reverse the Cloete order. The process is therefore being employed to achieve the claim in the action, and not for some ulterior purpose. The fact that success in this action may carry with it some broader strategic or commercial advantage, does not render the action improper. It is

¹⁰ *Fisheries Development Corporation of SA Ltd v Jorgensen and Another* 1979 (3) SA 1331 (W) (*Jorgensen*) at 1338G-H.

¹¹ Compare in the Namibian context, *Aussenkehr Farms* para 42.

¹² *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 (*Corderoy*).

¹³ *Beinash v Wixley* 1997 (3) SA 721 (SCA).

¹⁴ *Maughan and Another v Zuma* 2023 (5) SA 467 (KZP).

¹⁵ *Nedcor Bank Ltd and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE).

¹⁶ *Cohen v Cohen and Another* 2003 (1) SA 103 (CPD).

¹⁷ I have in mind cases such as *Western Assurance Co v Caldwell's Trustee* 1918 AD 262, *Jorgensen, Bisset and Others v Boland Bank Ltd and Others* 1991 (4) SA 603 (D) and *Maphanga*.

¹⁸ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (AD).

¹⁹ *Ibid* at 569G-H.

²⁰ *Aussenkehr* para 21. See also *Phillips v Botha* 1999 (2) SA 555 (SCA) at 565E.

also relevant that Mr Lanton initially set out to comply with the Cloete order. It was only after information came to light, and he received advice from a senior counsel, that he embarked on the rescission action. It will only be in very unusual cases that a litigant who follows legal advice will be said to be acting in bad faith.²¹ I therefore do not think a finding of ulterior motive may be made against Mr Lanton.

[21] To what extent are the motives of the plaintiff relevant in an application to strike out for abuse of process? Mr Lanton's counsel submitted that purposes and intentions are of crucial importance to any finding of vexatiousness, abuse or frivolity. On this line of argument, a finding that there is no ulterior purpose may be fatal to the application. A survey of the authorities reveals that the subjective element has played a varying role in abuse of process cases.²² In some cases, it is a critical factor. In other cases, the subjective element and the merits of the case both feature in the court's assessment. There are also cases where it appears that the court has only had regard to the merits of the claim. For the purposes of this matter, I will assume in favour of the Schleichs that they do not need to prove any malicious or improper intent on the part of Mr Lanton. Instead, I will assess the matter on the basis that they need show only that the rescission action is obviously unsustainable as a matter of certainty.

[22] The Schleichs submit that the action is unsustainable for both factual and legal reasons. On the facts, they submit that Mr Schleich did not have the requisite intention to remain in South Africa at the time of the marriage, and therefore, he was not domiciled in South Africa at that particular time. It follows, on this argument, that the Schleichs were not married in community of property and the Matrimonial Property Act is inapplicable. On the law, they

²¹ *HEG Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others* 2000 (1) SA 507 (C) is one such exceptional case. Compare *Moyo v Old Mutual* 2022 JDR 1248 (GJ) where the court found that a litigant who acted pursuant to good faith legal advice was not in contempt.

²² See the detailed discussion of motives and merits in *Mineral Sands* and the summary at para 76.

submit that Mr Lanton cannot rely on the provisions of ss 15(2), (4) and (5) of the Matrimonial Property Act, as these provisions do not afford a cause of action to third parties to a marriage. Rather, the provisions are designed for innocent spouses requiring protection from the maladministration of a joint estate to which they are a party. In any event, they say that the problem was cured when Ms Kühn-Von Burgsdorff ratified the transaction. It is convenient to discuss the factual and the legal points separately as, in my view, different considerations apply. Before doing so, I address the application to admit the affidavit of Ms Alexander.

The affidavit of Ms Alexander

[23] Mr Lanton's answering affidavit was delivered on 2 March 2025. Although it anticipated an affidavit from Ms Alexander, and summarised the contents thereof, it was not accompanied by any such affidavit. The Schleichs delivered their replying affidavit on 17 March 2025. On the same day, Ms Alexander deposed to a supporting affidavit, although, it was only some ten days later, on 27 March 2025, that this affidavit was delivered. At the time, Mr Lanton did not provide any explanation for the late delivery of Ms Alexander's affidavit, nor did he apply for condonation.

[24] The Schleichs' attorney addressed an email to Mr Lanton's attorney on 7 July 2025, in which she recorded that her clients would object to Ms Alexander's affidavit on the basis that the affidavit fell to be treated as *pro non scripto* (as if it had not been written). It appears that she had in mind judgments such as *Sewpersadh*²³ and *Hano Trading*²⁴ which established that a litigant who wishes to file a further affidavit must make formal application for leave to do so. Thereafter, on 17 July 2025, the Schleichs delivered an application in which they sought condonation for the late filing of a supplementary replying

²³ *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) para 13.

²⁴ *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) paras 7-14.

affidavit, and a confirmatory affidavit. The purpose of these two affidavits was to reply to the allegations made in Ms Alexander's affidavit, in the event of it being admitted. Still no condonation application was brought by Mr Lanton.

[25] At the hearing, counsel for the Schleichs requested that I make a ruling on the admissibility of Ms Alexander's affidavit. Reliance was placed on *James Brown & Hamer*.²⁵ I indicated that I wished to hear argument on the merits of the matter before deciding whether to admit this affidavit. After the lunch break, Mr Lanton's counsel handed up a formal application in which condonation was sought for the late filing of Ms Alexander's affidavit. The application was supported by an affidavit from Mr Lanton's attorney in which he attributed the delay to the fact that Ms Alexander was moving house at the time, and he encountered communication difficulties with her in South Korea.

[26] I am inclined to accept the affidavit for the following reasons. First, having regard to the nature of the application, which is potentially fatal to Mr Lanton's action, I am reluctant to exclude any evidence which may be relevant. Second, the contents of Ms Alexander's affidavit were foreshadowed in Mr Lanton's answering affidavit. The description of her evidence in the answering affidavit was replicated, almost word for word, in the supporting affidavit. The function of her affidavit is therefore not to introduce new evidence, but to confirm the hearsay allegations contained in the answering affidavit. Third, the affidavit was delivered several months before the hearing and the Schleichs had ample time to respond, and in fact, did so.

[27] In *James Brown & Hamer*, it was held that the general rules regarding the sequence and timing of affidavits should not be implemented in a rigid

²⁵ *James Brown & Hamer (Pty) Ltd (Previously Named Gilbert Hamer & Co Ltd) v Simmons*, NO 1963 (4) SA 656 (A) (*James Brown & Hamer*).

manner. There must be a degree of flexibility, which is regulated by the presiding Judge's exercise of discretion in relation to the facts of the case.²⁶ Having regard also to the approach adopted in the recent judgment of Mabindla-Boqwana JA in *De Kock*,²⁷ and the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute, I am confident that it is in the interests of justice to permit Ms Alexander's affidavit. Although I do not think a proper and satisfactory explanation was provided, this is outweighed by the absence of prejudice that will be caused by the admission of the affidavit (other than costs) and the relevance and importance of the evidence.

[28] As regards the costs of Mr Lanton's condonation application, he seeks an indulgence and should therefore pay the Schleichs' costs, including the costs of two counsel. With respect to the costs of the Schleichs' condonation application, their further replying affidavits were necessitated by the late filing of Ms Alexander's affidavit. The Schleichs only sought costs if Mr Lanton opposed the application. He did not do so, and therefore, I make no order regarding the costs of their application.

[29] In the next section I assess the factual basis for Mr Lanton's claim. On this issue, the central question is whether Mr Lanton's averment that Mr Schleich was domiciled in South Africa at the time of the marriage (and therefore the Schleichs are married in community of property), is obviously unsustainable.

Was Mr Schleich domiciled in South Africa at the time of the marriage?

[30] Mr Lanton relies upon the fact that in relation to the sale of the first property in 2018, the Schleichs deposed to affidavits in which they state that they are married in community of property. Pursuant to this declaration, the title deed

²⁶ At 660E-F.

²⁷ *De Kock v Du Plessis and Others* 2024 JDR 3115 (SCA) paras 24ff.

described them as married in community of property. Reliance is also placed on the affidavit of Ms Alexander, who says that she was meticulous in preparing the 2018 affidavits and other transfer documents and she spent a great deal of time and trouble ensuring that the status of the parties was correctly reflected. According to Ms Alexander she saw the Schleichs personally and would have explained the contents of the documents to them and she would have been careful to ensure that they were correctly described, given their foreign connections, as well as those of the purchasers. Furthermore, and in connection with the transfer of the Nthombeni Way property, Mr Lanton points to the fact that, in answer to the question as to his marital status and domicile at the time of his marriage, Mr Schleich answered 'married, domiciled in RSA at time of marriage'.

- [31] The Schleichs, on the other hand, rest their case on various facts. Mr Schleich's domicile of origin is Australia. At the time of their marriage, Mr Schleich was in South Africa on a temporary exceptional skills work visa that would expire in 2016. His residence in South Africa at the time of the marriage was thus temporary as his visa had an expiry date. For her part, Ms Kühn-Von Burgsdorff was in South Africa on a 90-day tourist visa. Therefore, at the time of their marriage neither of them was permitted to reside in South Africa for an indefinite period. Moreover, they were together in South Africa for a particular purpose, namely, to get married. It was only four years after their marriage, in 2018, that the Schleichs applied for permanent residency. Having regard to the temporary nature of Mr Schleich's visa, they submit that he could not have intended (a) permanently to reside in South Africa and (b) to abandon his domicile in Australia, and furthermore this disclosed a contemplation of a certain future event upon which his residence would end.²⁸ Consequently, South Africa could not, in those circumstances, have been his domicile of choice. It follows, so the argument ran, that Mr Schleich did not have the requisite intention to stay in South Africa after the wedding

²⁸ Reference was made to *Johnson v Johnson* 1931 AD 391 (*Johnson*) at 398.

ceremony. To the contrary, the couple intended to reside in Belgium. Indeed, the marriage register reflected a Belgian address as the '(p)ermanent residential address of married couple after marriage'.

[32] The Schleichs blame Ms Alexander for the statement in the 2018 affidavits that they are married in community of property. They emphasise that she was aware that the first property was acquired by them as non-residents without a visa, and that Mr Schleich had only been a resident of South Africa for 11 months in the six years prior to 2018. The Schleichs' attorneys attempted to consult with Ms Alexander to discuss this apparent difficulty, but she declined their request. The Schleichs criticise her reticence. As to the recent statement that he was domiciled in South Africa at the time of the marriage, Mr Schleich contends that he gave this answer in ignorance of the legal definition of 'domicile'. He understood it to mean 'residence'.

[33] The question is whether, on these facts, I can conclude, with certainty, that Mr Schleich was not domiciled in South Africa at the time of the marriage. Section 2(1) of the Domicile Act 3 of 1992 provides that a domicile of choice shall be acquired by a person who is lawfully present at a particular place and intends to settle there for an indefinite period. The intention to settle indefinitely is less than the intention to settle permanently.²⁹ According to Forsyth,³⁰ relying upon the formulation by Pollak, the intention to reside in a particular place for an indefinite period means that the person intends to stay 'until and unless something, the happening of which is uncertain, occurs to induce the person to leave'.³¹ Forsyth describes the formulation in the Domicile Act as the 'weak' test for intention which he contrasts with the 'strong' test which would consider nothing less than 'the intention to reside

²⁹ *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP) at 631F.

³⁰ *Private International Law* at 141.

³¹ This formulation was cited with approval by Cloete J, for the majority in *OB v LBDS* 2021 (6) SA 215 (WCC) para 36.

forever' as sufficient to acquire a domicile of choice.³² Is it conceivable that Mr Schleich, at the time of his marriage, intended to stay in South Africa unless some uncertain circumstance occurred that compelled him to leave?

[34] The fact that Mr Schleich was in South Africa on a temporary visa is a relevant factor which operates in favour of the Schleichs. However, I do not believe it is decisive. It has been held that '(t)he power of a higher authority to terminate a person's residence in a particular area cannot affect the question whether that person intended to make his permanent abode there'.³³ In *Toumbis* the court found that the respondent was domiciled in South Africa, even though he was in the country on a temporary visa and his presence was 'precarious and permissive'.³⁴ At the time of the marriage, Mr Schleich's visa was valid for more than two years. It is conceivable that he intended making every effort to remain in South Africa. It is possible that his intention was to remain in South Africa unless he was unable to secure an additional visa. With the benefit of hindsight, we now know that he was in fact granted a permanent residence permit. At what point in time did he start thinking that he would like to stay indefinitely in South Africa? This is a question which ought to be explored after discovery has taken place, and through cross-examination.

[35] Counsel for Mr Lanton submitted that it would be premature to reach a conclusion in circumstances where the parties have not made discovery and the witnesses have not been subjected to cross-examination. I agree. Discovery and cross-examination have been described as two of the great engines for exposing the truth.³⁵ A court will, therefore, be very slow to reach

³² Counsel for the Schleichs relied upon *Johnson*. Forsyth describes the decision in this case as having come down strongly in favour of the strong test (at 142), and he criticises the 'tenaciousness of the domicile of origin' manifest in this case (at 159).

³³ *Van Rensburg v Ballinger* 1950 (4) SA 427 (T) at 427C-E; see also *Toumbis v Antoniou* 1999 (1) SA 636 (W) (*Toumbis*) and *Alam*.

³⁴ *Toumbis* at 639E-F.

³⁵ *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C) at 513G-H.

a factual finding, without the benefit of these truth-exposing instruments. Relying upon the *KPMG* case,³⁶ counsel for the Schleichs argued that Mr Schleich could not be cross-examined on his domicile as this was a legal conclusion, and any such evidence would be inadmissible. In my view Mr Schleich could be cross-examined on the factual circumstances surrounding his intentions at the time of his marriage.³⁷ This evidence would be relevant to the determination of the legal question and would be admissible.

[36] Although the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court, this jurisdiction should be sparingly exercised and only in very exceptional circumstances. The discretion should not be exercised because the story told in the pleadings is highly improbable, and one which may be difficult to believe could be proved.³⁸

[37] In addition to the statements made by Mr Schleich under oath and in response to enquiries from the conveyancers, the couple had purchased a property in South Africa prior to their marriage. They invested significantly in this first property. They were married in South Africa. Mr Schleich was employed by a South African company at the time. On their own telling, they loved South Africa and planned to spend a lot of time in South Africa in the future. Following their marriage, they began planning the construction of a family home in South Africa for which they envisaged spending roughly R15 million, and they both became permanent residents of South Africa. These factors do not inherently indicate that Mr Schleich had the requisite intention to stay in South Africa indefinitely. They do suggest, however, that this is a triable issue.

³⁶ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA).

³⁷ Factors which may be relevant to the enquiry are set out in *HGW v MW* (A207/2024; RCC/MOS 84/23) [2025] ZAWCHC 65 (26 March 2025) para 35.

³⁸ *Ravden v Beeten* 1935 CPD 269 (*Ravden*) at 275, citing Lord Herschell in *Lawrence v Norreys* (15 AC 210 at 219). See also *Aussenkehr Farms* para 45.

[38] I agree with the approach described in *Ravden*. It is not for this court, in an application of this nature, to discuss the probabilities of the anticipated case, with the exception of determining whether the case is altogether beyond the realm of probability and becomes vexatious due to its impossibility.³⁹ I do not consider that the court can, at this early stage, exclude the possibility that on the day of his wedding Mr Schleich intended to stay in South Africa unless some uncertain event intervened which compelled him to leave. It is therefore possible that he was domiciled in South Africa, and the Schleichs were married in community of property. Consequently, Mr Lanton's case does not stand outside the realm of probability altogether such that it is vexatious because it is impossible. The Schleichs have therefore not demonstrated that, on the facts, the rescission application is obviously unsustainable as a certainty. This brings me to the legal issues raised by the Schleichs.

The Matrimonial Property Act

[39] In general, a spouse married in community of property is permitted to perform any juristic act with respect to the joint estate without the assent of the other spouse, as outlined in section 15(1) of the Matrimonial Property Act. However, a spouse is prohibited from entering into a contract as defined in the Alienation of Land Act, which is subject to the provisions of that Act, without the written consent of the other spouse, in accordance with section 15(2)(g). In their plea in the rescission action, the Schleichs admit that the sale agreement is a contract as defined in the Alienation of Land Act, and the provisions of this Act apply to the contract. In terms of section 15(4) of the Matrimonial Property Act, the consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.

³⁹ *Ravden* at 276.

[40] In support of their application to strike out the rescission action, the Schleichs raise two points which are substantially legal in nature. First, they say that Mr Lanton cannot rely on ss 15(2), (4) and (5) of the Matrimonial Property Act, as these provisions only afford a cause of action to the parties to a marriage. Second, they maintain that the issue was resolved by Ms Kühn-Von Burgsdorff's ratification of the transaction, even if a third party were to invoke these provisions.

[41] Regarding the first point, counsel for the Schleichs noted that the purpose of s 15(2) of the Matrimonial Property Act is to protect innocent spouses from the maladministration of their joint estate, whereas s 15(9)(a) seeks to protect the interests of a bona fide third party. It was submitted that Mr Lanton, who is not a party to the marriage, enjoys no cause of action to set aside the sale pursuant to the provisions of section 15(2)(g) of this Act. The riposte from Mr Lanton's counsel was that no clear authority was provided for this submission. Although reference was made to *Marais*⁴⁰ and *Visser*,⁴¹ these cases did not have to decide whether a third party is precluded from relying upon the provisions of the Matrimonial Property Act. They also point to the finding in *Marais* that the consequence of entering into a sale of land without written and attested consent of the innocent spouse is that 'the transaction is unlawful, and is void and unenforceable'.⁴² To this authority may be added *Bopape and Another v Moloto* which held that '(o)nce it is clear that the required consent was neither sought nor given, illegality followed and the particular juristic act cannot survive'.⁴³ Counsel submitted

⁴⁰ *Marais and Another NNO v Maposa and Others* 2020 (5) SA 111 (SCA) (*Marais*) – the applicant sought to set aside the transfer by her deceased husband of 75% of the members' interest in a corporation.

⁴¹ *Visser v Hull and Others* 2010 (1) SA 521 (WCC) – the applicant sought to set aside an agreement of purchase and sale purportedly concluded by her deceased husband.

⁴² *Marais* para 26. See in this regard *Steenkamp and Others v Edcon Ltd* 2016 (3) SA 251 (CC) paras 182-3 and the cases cited there. The use of the word 'shall' in a statutory provision does not necessarily mean that anything done contrary to such a provision is a nullity. It depends on a proper interpretation of the statute.

⁴³ 2000 (1) SA 383 (T) at 388E-F.

further that if a purchase of land by a spouse married in community of property without the written and attested consent of the other spouse is void, it must be void for all purposes. It cannot depend on the identity of the party asserting that voidness.

[42] To my mind the legal point raised by the Schleichs could have been taken by way of an exception. If it is a valid point, it is fatal to Mr Lanton's cause of action. The exception procedure is the appropriate method for resolving points of law such as this. In the Schleichs' heads of argument, concern is expressed regarding the costs of a trial and the waste of scarce judicial resources. However, if the legal point is sound, these could have been avoided by means of an exception. Even now, the question of whether a third party may invoke s 15(2) of the Matrimonial Property Act is a question which could possibly be separated and determined prior to the other questions in terms of uniform rule 33(4). I agree with the view expressed in *Aussenkehr* that the procedure whereby an action may be dismissed for want of merit 'was never intended to replace the special plea or exception as a test of the plaintiff's case. Nor was it intended to provide the defendant with a unilateral advantage of testing the soundness of the defendant's defences prior to trial.'⁴⁴ Where other established procedures are available to a litigant, it would only be in very rare cases, if at all, that a court would intervene summarily and strike out an action. This is especially so where there is no ulterior motive.

[43] On behalf of the Schleichs, it was submitted that their complaint had to be pursued by way of this application. It is correct that an abuse of process complaint should be brought by way of an application.⁴⁵ However, this is not to say that the underlying legal issue could not have been addressed in the usual way. In any event, I am not persuaded that the legal point will inevitably

⁴⁴ Paras 46-7.

⁴⁵ *Corderoy* at 517.

succeed. There appears to be no authority one way or the other on the point, and I do not consider this to be the forum in which this issue should be considered and decided. To my mind, this is one of those circumstances where a court is not required to make a definitive decision on a legal point.⁴⁶ In my view, on this legal point, Mr Lanton's case is not manifestly groundless. This suffices for present purposes.

[44] As to the second point, in the rescission action Mr Lanton pleads that Ms Kühn-Von Burgsdorff was not entitled to provide her consent by way of ratification, as it was required for the registration of a deed in the deeds registry. Additionally, or alternatively, any purported ratification was not provided by her within a reasonable time after the conclusion of the purported sale. The Schleichs issued a simple denial in response to this allegation.

[45] Section 15(4) of the Matrimonial Property Act provides that: 'The consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.' Two questions arise: (a) was Ms Kühn-Von Burgsdorff's consent required for the registration of a deed in a deeds registry? – in which case s 15(4) is inapplicable; and (b) if the section does apply, did she ratify the transaction within a reasonable time?

[46] In relation to (a), counsel for the Schleichs submitted at the hearing that having regard to the Deeds Registries Act 47 of 1937 and the Registration of Deeds Regulations of 1963, all that is required to make a transfer is a power of attorney from the seller. It was submitted further that the deed of sale is not something which is required for the registration of a deed. This document

⁴⁶ See in this regard *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC) para 251.

remains in the conveyancer's file.⁴⁷ In my view, notwithstanding this practice, it may still be argued that the spousal consent is required, albeit indirectly, for the registration of a deed. It could plausibly be contended that the conveyancer would not submit the documents required for the registration of the deed unless he or she was satisfied that the spousal consent had been provided. Furthermore, in *Visser* the court noted that 'in the case of an immovable property, the husband will normally not be able to effect a transaction with a third party without his wife's consent, since her written consent will be required by the registrar of deeds before he will register the relevant real right on the title deed of the property'.⁴⁸ Given the circumstances, I do not think I can find, at this stage, that Mr Lanton's argument is so patently untenable that it could not possibly succeed.

[47] As to (b), there is scant authority regarding the 'reasonable period' allowed for ratification. For instance, is it a reasonable period from the date that the party realises that ratification may be required (as suggested by counsel for the Schleichs), or is it a reasonable period from the date of the impugned transaction? The section provides that the ratification must be within a reasonable time 'after the act concerned'. It seems to me that the act concerned is the conclusion of a contract, as defined in the Alienation of Land Act, as contemplated in s 15(2)(p) of the Matrimonial Property Act. Therefore, in this case the ratification must be within a reasonable period of the conclusion of the sale agreement on 13 October 2017. The ratification was almost seven years later, on 9 September 2024. I do not think that I can exclude the possibility that a trial court would find that the ratification was not provided within a reasonable period. Once again, it is not inevitable that Mr Lanton will fail.

⁴⁷ Reliance was placed on *Bester NO and Others v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125 (SCA).

⁴⁸ Para 10.

[48] In conclusion, it would only be in a very exceptional case that an action would be struck out as an abuse of process merely because it is legally defective. To my mind, this is not such an exceptional case. In any event, I am not persuaded that either of the Schleichs' legal points will succeed as a matter of certainty. It follows that the Schleichs have not established a basis for this court to strike out the rescission action.

Conclusion

[49] In the circumstances, I do not consider that I should exercise my discretion by striking out the rescission action. The application therefore falls to be dismissed.

[50] It is unfortunate that this outcome does not bring the underlying dispute any closer to resolution. It is particularly troubling that the Schleichs have now been out of pocket in an amount exceeding R5 million for over seven years. Nonetheless, I do not consider the abuse of process remedy to be the way to resolve the dispute. Counsel for the Schleichs expressed disquiet regarding the time it will take for this matter to be brought to trial. If the parties co-operate there will not necessarily be a long wait before the matter is declared trial ready, and a hearing date is allocated. In any event, it is open to the Schleichs to approach the Judge President with a request for an expedited hearing, either of a separated issue, or of the whole trial.

[51] As regards costs, although normally costs follow the result, in my view the trial court will be in a better position to assess who should pay the costs of this application. Costs will therefore be reserved for determination in the rescission action.

Cooke AJ:

DJ COOKE
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicants: RG Patrick SC and H Beviss-Challinor
Instructed by: Clyde & Co.

For first respondent: E Fagan SC and A Price
Instructed by: Slabbert Venter Yanoutsos Inc.