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**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable
Case no: 339/2024

In the matter between:

F[...] O[...]

APPELLANT

and

T[...] K[...]

RESPONDENT

Neutral citation: *O[...] v K[...]* (339/2024) [2025] ZASCA 139 (29 September 2025)

Coram: MAKGOKA, GOOSEN, SMITH and KEIGHTLEY JJA and MODIBA AJA

Heard: 15 August 2025

Delivered: 29 September 2025

Summary: Property law – whether appellant established co-ownership of immovable property – Alienation of Land Act 68 of 1981 – right to claim transfer of immovable property based on oral agreement not enforceable.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble, Dolamo and Nuku JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Smith JA (Makgoka, Goosen and Keightley JJA and Modiba AJA concurring):

[1] This is an appeal against the order of the Full Court of the Western Cape Division of the High Court (the Full Court). That court upheld an appeal against an order of a single Judge (the high court). The appeal is with the special leave of this Court. The issue in the appeal is whether the appellant, Mr F[...] O[...] (Mr O[]), had established that he is a co-owner with the respondent, Ms T[...] K[...] (Ms K[]), of an immovable property known as Erf 2[], situated at 1[] R[] Drive, P[], Cape Town (the property). The parties were initially married to each other in terms of Muslim Law, and were joint owners of the property until 2019, when Mr O[] transferred his half share in the property to Ms K[]. The circumstances under which this transfer occurred form the crux of the dispute between the parties. The parties assert divergent versions as to the motive behind the transfer.

[2] The basic facts are as follows. The parties were married by Muslim rites on 6 December 2009 and jointly purchased the property in July 2015. Part of the purchase price was secured by a bond registered over the property in favour of Standard Bank of South Africa Ltd. During 2017, Mr O[] experienced financial difficulties, prompting some of his creditors to threaten to attach his half-share in the property. The parties explored several options to prevent this. Ultimately, they agreed that Mr O[]'s half-

share would be sold and transferred to the respondent. They signed a Deed of Sale on 15 February 2017, recording that Ms K[...] had paid Mr O[...] R1,200,000 as the purchase price for his half-share of the property. It is common cause that no purchase price was paid as recorded in the Deed of Sale.

[3] Mr O[...]’s half-share was subsequently transferred and registered in Ms K[...]’s name on 29 January 2019, making her the registered sole owner of the property. The parties separated in July 2019. In November 2019 Ms K[...] vacated the property, leaving Mr O[...] behind. They dissolved their marriage in March 2020. Thereafter, Ms K[...] brought an application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 for Mr O[...]’s eviction from the property. She based the application on her sole ownership of the property.

[4] In resisting the application, Mr O[...] claimed that he could not be evicted from the property as he was a co-owner thereof. He alleged that the Deed of Transfer did not reflect their true intention. He argued that the real intention was for him to remain a joint owner and that Ms K[...] would hold his half-share until it was less risky, after which she would re-transfer it to him. Ms K[...] denied these claims, asserting that the Deed of Sale and the subsequent transfer of the property into her name reflected their true intentions. Faced with these allegations, the judge seized with the eviction application referred the application for oral evidence, ostensibly to establish whether Mr O[...] was a joint owner. After hearing oral evidence, the high court dismissed the eviction application but did not decide whether Mr O[...] was a joint owner of the property. On appeal, the Full Court set aside the high court’s order.

[5] Both the high court and the Full Court made extensive credibility findings to support their respective determinations on probabilities. This was unnecessary, as whether Mr O[...] was the co-owner of the property is a question of law. No amount of evidence could resolve that issue based on the allegations made in the affidavits. To illustrate the point, suppose either of the two courts preferred Mr O[...]’s version. The logical order would be to declare him the owner of the property. But in the face of

registration of the property in the name of Ms K[...], such an order would be incompetent and amount to a *brutum fulmen*. This seems to have escaped the Judge who referred the matter for oral evidence, the high court and the Full Court.

[6] Mr O[...]'s insurmountable difficulty is that he has not sought to set aside or vary the Deed of Sale, or to reverse the transfer of his half-share of the property to Ms K[...]. Until this is done, the Deed of Sale stands in his way to assert co-ownership of the property. This is because the Deed of Sale unequivocally records that the parties have agreed that Mr O[...] relinquished his ownership in the property in favour of Ms K[...]. What Mr O[...] seeks is an impermissible oral variation to the Deed of Sale, which contains a non-variation clause to the effect that any variation thereof 'shall be of no force and effect, unless in writing and signed by the parties or their representatives.' As this Court held in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere (Shifren)*,¹ any purported variation of the terms of a written contract that does not comply with the formalities prescribed in a non-variation clause, will be void.

[7] It is only where the contract is sought to be impeached based on fraud or it is alleged to be contrary to public policy that courts will refuse to give effect to such a clause.² Mr O[...] does not rely on either of these grounds. He instead seeks to vary the terms of the agreement by introducing a material term which has not been reduced to writing. He is barred from doing so on the authority of *Shifren*. Mr O[...] cannot, in the face of the written document divesting him of ownership, lay claim to an alleged unwritten agreement in terms of which that ownership was retained.

[8] Related to the principle enunciated in *Shifren*, is the parol evidence or integration rule, in terms of which Mr O[...] is precluded from adducing any extrinsic evidence to

¹ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) 760 (A) at 765C; [1964] 4 All SA 520 (A).

² *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) para 90.

redefine, add to or modify the terms of the written agreement.³ The rule was explained as follows by this Court in *Union Government v Vianini Ferro-Concrete Pipes*:⁴

‘Now the Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.’

[9] The rule remains part of our law even though its operation has been reduced in recent times.⁵ It applies only where the written agreement was intended to be the exclusive memorial of the agreement between the parties.⁶ The Deed of Sale concluded by the parties in this matter manifestly satisfies this requirement. It states in explicit terms that the written agreement ‘sets out the whole of the agreement regarding the sale and there are no other agreements, guarantees or representations whether verbal or in writing.’

[10] The exceptions to the general rule, namely where a party asserts that the contract is not enforceable because it is conditional upon the happening of some event which has not occurred, or seeks to establish that the contract is invalid and unenforceable,⁷ do not apply in this matter. Mr O[...] does not seek to have the sale agreement set aside as invalid nor did he apply for its rectification. He instead contends for an additional term which would have the effect of redefining the terms of the written agreement. It is manifest that he adduced the extrinsic evidence pertaining to the alleged oral agreement regarding the retransfer of the property to alter or add to the terms of the Deed of Sale. He was not entitled to do so. Shorn of the inadmissible extrinsic evidence, the Deed of Sale, on a reasonable and contextual construction,

³ *Johnston v Leal* 1980 (3) SA 927 (A) at 938 D-G; [1980] 2 All SA 366 (A) at 371g-372b.

⁴ *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47.

⁵ *Traxys Holding Africa Ltd and Another v Westbrook Resources Ltd* [2021] ZASCA 122 para 58.

⁶ *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* [2008] ZASCA 127; 2009 (1) SA 196 (SCA) para 14.

⁷ *Philmat (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (SCA) at 23 C-F; [1996] 1 All SA 296 (A) at 301 d-g.

establishes a clear intention by Mr O[...] to transfer his half share in the property to Ms K[...].

[11] Our property law has adopted the abstract theory of ownership. In terms of this theory ownership depends on two elements, namely a real agreement (a mutual intention to transfer and acquire ownership) and a formal act of transfer, such as registration in the Deeds Registry. If these two elements are satisfied, ownership would vest in the transferee even though the underlying agreement (the Deed of Sale) may be defective.⁸

[12] Furthermore, in the Power of Attorney authorising the transfer, which Mr O[...] signed two months after the conclusion of the Deed of Sale, he stated that he renounced 'all right, title and interest' in the property. Therefore, even on Mr O[...]’s own version, there was mutual intention to transfer ownership of his half share in the property and for Ms K[...] to acquire it. Accordingly, in terms of the abstract theory of ownership, full ownership of the property vested in Ms K[...]. This remains the legal position until the contrary is declared by a competent court.

[13] The alienation of immovable property is regulated by the Alienation of Land Act 68 of 1981 (the Act). In terms of s 2(1) of the Act, all agreements to sell, exchange or donate land must be in writing (a deed of alienation) and signed by both the seller and purchaser or their duly authorized representatives. Any alienation of land that does not comply with those requirements shall be 'of no force or effect'. Properly analysed, Mr O[...]’s contention is that he has a right to demand transfer of his half share in the property based on an oral agreement that '[they] would put the house into [Ms K[...]’s] name temporarily, until [his] stuff was sorted out'. Section 1 of the Act defines 'land' as including 'any right to claim transfer of land'. Therefore, apart from the fact that Mr O[...]’s contended agreement is fatally vague and lacking in the requisite *essentialia* that would render it enforceable, it is not in writing and is thus of no force or effect.

⁸ *Legator McKenna Inc and Another v Shea and Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009] 2 All SA 45 (SCA) paras 21 and 22; *Nedbank Ltd v Mendelow and Another NNO* [2013] ZASCA 98; 2013 (6) SA 130 (SCA) paras 13 and 14; *ABSA Bank Ltd v Moore and Another* [2015] ZASCA 171; 2016 (3) SA 97 para 36.

[14] In the result the following order is made:
The appeal is dismissed with costs.

J E SMITH
JUDGE OF APPEAL

Appearances:

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