THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 143/2021

In the matter between:

JOHANNES BRITS **APPELLANT**

and

KOMMANDANTSDRIFT CC **FIRST RESPONDENT**

NICO LE ROUX **SECOND RESPONDENT**

REGISTRAR OF DEEDS, CAPE TOWN **THIRD RESPONDENT**

Neutral citation: *Brits v Kommandantsdrift CC and Others* (143/2021) [2022] ZASCA 41 (05 April 2022)

Coram: SALDULKER, DLODLO and HUGHES JJA and MUSI and MATOJANE AJJA

Heard: 8 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 05 April 2022.

Summary: Contract – whether contracts of sale of land void due to common error relating to a material term by all the contracting parties – whether prescription applicable – whether issues agreed between the parties to be adjudicated were fully determined by the high court – matter remitted to the high court.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Parker J, sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The matter is remitted to the high court for the determination of the remainder of the issues.

JUDGMENT

Saldulker JA (Dlodlo and Hughes JJA and Musi and Matojane AJJA concurring):

[1] This appeal is against the decision of the Western Cape Division of the High Court, Cape Town (the high court), whereby Parker J held that two sale and purchase contracts in respect of land were void *ab initio*, due to a common error on the part of all the contracting parties, relating to a material term. Aggrieved by this decision, the appellant, Mr Johannes Brits (Brits), launched an application for leave to appeal, which was refused by the high court. This appeal is with the leave of this Court.

[2] It is important to contextualise the history of the land relevant to this appeal. The land was subdivided, consolidated, sold, and then repurchased, together with a portion, and which was ultimately sold to Brits. A short summary suffices. The original farm described in the proceedings is Onder Zandrift no: 119, which was registered in the name of the grandparents of three Le Roux brothers: Michael, Nico and Meyer Jnr. In 1962, the original farm was transferred to the father of the three brothers, Mr Meyer le Roux Snr. In 1993, Meyer Snr subdivided the original farm, which resulted in the separated and disputed land referred to in these proceedings as ‘the wedge’. Meyer Snr then transferred the wedge to his oldest son Michael and his wife. This piece of land – the wedge – was then consolidated with another piece of land that Michael and his wife owned, namely Portion 3 of Oude Zandrift no: 118. This consolidation created the farm that is now known as Oude Zandrift 446 (farm 446).

When Meyer Snr subdivided the original farm in 1993, he consolidated two pieces of the original farm and created what is now known as Middel Zandrift. In 1995, Meyer Snr transferred Middel Zandrift to the first respondent, Kommandantsdrift CC, a close corporation (the CC), which has Meyer Jnr as its sole member. Meyer Jnr conducts farming in the Kammanassie region near Uniondale in the Western Cape.

[3] In 1997, Michael and his wife transferred farm 446 to the CC, which then owned both Middel Zandrift and farm 446. In 2000, the CC sold farm 446 to Nico, the second respondent, who is Meyer Jnr's brother. Thereafter, in 2008, Nico then sold farm 446 to Brits, the appellant in this matter, which was then registered in the name of the appellant, and remains so registered to date. At the time, the sale from Nico to Brits was brokered by the estate agent, Mr Bennett van Rensburg. It is not in dispute that when Brits bought the land from Nico, all the parties were *ad idem* that the wedge was not part of the piece of land that was being purchased and sold.

[4] It is common cause that after the conclusion of both the contracts of sale (the 2000 sale of farm 446 by the CC to Nico and the 2008 sale by Nico to Brits), the wedge continued to be farmed by Meyer Jnr, on behalf of the CC, as part of its land on the farm known as Kommandantsdrift (the CC's farm), and Brits farmed on the parcel of land that was referred to by the respondents as Michael's farm. (For ease of reference this piece of land is referred to as Michael's farm in the judgment.) Brits has never farmed on the wedge. The wedge remained part of Kommandantsdrift CC in practice, and the latter not only farmed on the wedge, but also invested substantial amounts of money in establishing irrigated fruit orchards on the wedge from 2003 onwards.

[5] However, in 2010, for some unknown reason, Brits asked Mr van Rensburg for the diagram of farm 446 as reflected in the title deed, with which he was provided. Nothing appears to have happened thereafter, until 2013, three years later (and after five years of taking transfer of farm 446), when Brits then sued the CC for the occupation of the wedge. But, this litigation was not taken to its conclusion. It was superseded by the case now before this Court.

[6] In 2015, both the CC and Nico instituted two separate actions in the Western Cape Division of the High Court, Cape Town laying claim to the wedge, wherein both effectively sought a declaration that the respective sales of farm 446 (the 2000 contract concluded between the CC and Nico, and the 2008 contract concluded between Nico and Brits) were void. By agreement between the parties both the cases were consolidated with the action in the high court which forms the subject of this appeal. Nico le Roux elected to abide by the decision of the high court.

[7] As its main relief, the CC sought an order that it be declared that the CC is the owner of the farm Oude Zandrift 446, which was registered in the deeds office in Cape Town in the name of the appellant, and that consequently, the deed of transfer and other records of the Registrar of Deeds relevant to the farm Oude Zandrift 446, Uniondale be rectified to reflect the CC as the true owner thereof.

[8] The CC's causes of action in respect of its claim for the re-transfer of farm 446 into its name were based, inter alia, on the following grounds. There was a common error on the part of all the parties to the two contracts involving the wedge, which vitiated the contracts, namely the first contract concluded between the CC and Nico in 2000 (the 2000 contract), which was for the sale of Michael's farm to Nico; and the second contract concluded in 2008, which was for the sale of Michael's farm by Nico to Brits. The common error in both contracts of sale was the assumption on the part of all the contracting parties, at the time of the conclusion of the contracts, that the wedge formed part of the CC's farm (and not part of Michael's farm), and that it was not part of what was to be sold and purchased. Brits does not dispute that all of the parties involved in the two contracts had assumed that the wedge was not part of the *merx*. He, however, disputes that this common error vitiated the two contracts, and contends instead that it is an error in motive, which does not have that consequence.

[9] In response to the CC's claims for the re-transfer of farm 446 to it, the appellant raised a special plea of prescription contending that any claim for the re-transfer or rectification of the land would have prescribed in terms of the Prescription Act 68 of 1969, as the cause of action/debt would have arisen more than three years prior to the summons in this matter, which was issued in 2015. He further contended that if Meyer Jnr and Nico did not have knowledge of the facts, in addition to the

identity of the debtor, then they, through constructive knowledge, ought to have known these facts. He denied that the two contracts of sale were void. Brits also pleaded, inter alia, prescription in respect of the CC's enrichment claim. However, this did not feature in the trial.

[10] The matter came before Parker J, and in paras 7 and 8 of the high court's judgment he recorded that the parties had agreed during the pre-trial proceedings that the main issues of dispute between the parties in the proceedings would be as follows:

'7.1 Whether the transfers of the property from [the CC] to [Nico] (during 2000) through to [Brits] (during 2008) were void and concomitantly whether [the CC] is entitled to claim that the Deeds Office registries be amended in order to reflect [the CC] as the true and correct owner of the property (the wedge);

7.2 Whether in terms of [the CC]'s alternative claim, [Brits] has been unjustly enriched at [the CC]'s expenses due to the fact that the latter has effected necessary and useful improvements to the property; and

7.3 Whether in relation to [Brits]'s claim in reconvention he would be entitled to payment of an amount of damages pursuant to [the CC]'s occupation and use of the wedge, alternatively whether . . . [Brits] is entitled to payment of an amount in respect of [the CC]'s unjust enrichment pursuant to [Brits]'s occupation and use of the farm, excluding the portion occupied and used by [the CC].'

[11] And at para 8 of the judgment, Parker J recorded that:

'[8] In determining the above issues, the parties further agreed to a separation of issues, in that the issues referred to in paragraph 7.1 above as well as any plea of prescription first be decided separately and that all other issues shall stand over for later determination. In summary, the parties called upon the court to determine whether the transfers of the property/wedge in question are void in addition to determining the plea of prescription. Furthermore, the parties agreed that only the merits were to be determined at this stage and that the quantum would stand over for later determination.'

[12] Additionally, the high court said the following in para 9 of its judgment:

'In due course, [Brits] filed special pleas of prescription against the claims of [the CC and Nico] in both aforementioned matters pertaining to the declaratory relief and retransfer of the properties sought by [the CC and Nico]. [The CC and Nico] seek an order for such retransfer

of the properties on the basis that the contracts [deeds of sale] in respect of each of the two sales are void.'

[13] Despite the aforegoing recorded in the judgment of the high court, there appeared to be a dispute between the parties as to what the high court was called upon to adjudicate. The transcript of the court proceedings sheds some light as to what was to be determined by the high court. (It is common cause that there are pages of the transcript missing from the record.) The following appears in the opening address before Parker J:

'Mr Myburgh: . . . then void on that basis and also the question of prescription. The reason why prescription cannot be determined upfront is it involves the issue of whether there was knowledge and why there was not knowledge. That is my opening statement. I'm not sure if my learned friend wants to say anything in answer.

Court: Thank you, Mr Myburgh. Mr Van Der Merwe?

Mr Van Der Merwe Addresses Court: Thank you. My Lord. I haven't got much to add. My submission is, it's not only that the contracts were void because of the – but also the transfers, because as you know there's the [indistinct – break in recording] contract and the real agreement.

Court: Ja, I think that would follow, would it not?

Mr Van Der Merwe: Ja, that both of these should then – both of these issues are then void. That's that and basically then the issue of the prescription as far as the claim for the retransfer basically of the property is concerned. As the Court pleases.'

[14] From the aforegoing, it appears that the parties had agreed that the issues that were to be determined by the high court were indeed the issues as set out in para 7.1 of the high court's judgment. Namely, whether the transfers of the property from the CC to Nico through to Brits were void; and concomitantly whether the CC was entitled to claim that the deeds office registries be amended in order to reflect the CC as the true and correct owner of the wedge; as well as any plea of prescription first to be decided separately; and that all other issues shall stand over for later determination.

[15] In any event, despite what the high court stated to be the main issues to be decided in paragraphs 7 and 8 of its judgment, the high court made the following order:

‘1. Both the 2000 and 2008 contracts are void *ab initio* due to a common error on the part of all the contracting parties, relating to a material term.
2. [Brits] is ordered to pay the costs of the proceedings to date.’

[16] During the trial, the CC called four witnesses: Meyer Jnr; Nico; Mr Bennett van Rensburg, the estate agent who negotiated the 2008 sale; and Ms Stanford, a conveyancer. It is not necessary to traverse all of their evidence in any great detail, except its salient features. Brits called no witnesses, and elected not to testify against the evidence presented by the CC.

[17] It is trite that a party who raises prescription bears the onus of proving such. Thus, it fell upon Brits to allege and prove the date upon which Meyer Jnr, on behalf of the CC, became aware of the facts that underpinned its claim, as well as the identity of the debtor. Alternatively, Brits had to prove the date on which the CC would have acquired the relevant knowledge had it exercised reasonable care. (See *Gericke v Sack* [1978] 2 All SA 111 (A) at 115; *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore N O and others* [2015] ZASCA 37; [2015] JOL 33031 (SCA).)

[18] Brits did not present any evidence and neither did he establish an inception date during the proceedings. He did not plead a date upon which the CC became aware of the requisite facts, nor the identity of the debtor, nor did he plead a date upon which the CC should have acquired such knowledge. All that Brits pleaded was that the actual or constructive knowledge occurred more than three years prior to the service of summons. Thus, the inception date was not pleaded. In the circumstances, Brits did not make out a case for the prescription he relied upon.

[19] In contrast, the high court was faced with the direct evidence of both Nico and Meyer Jnr, who testified that they only became aware that the wedge was part of farm 446 when Brits issued summons against them for occupation of the land in 2013. Their evidence that they had been completely unaware of the wedge having been consolidated with other land to comprise farm 446 in 1993 was significant. Particularly since there was no evidence to gainsay this testimony. In my view, the high court correctly concluded at para 35 that:

‘In the premises, I am of the view that neither Nico nor Meyer could, as reasonable persons, acting reasonably and with the diligence of a reasonable person have established the facts

on which the debt and therefore their claims have arisen prior to 2013. It can, by no stretch of the imagination, be suggested that either one of them sat back and by supine inaction arbitrarily or at will postponed the commencement of prescription. . . The minimum facts necessary to institute an action only became known to them or more importantly could only have become known to them in 2013.'

Thus, the court a quo was correct that the plea of prescription raised by Brits had not been proved.

[20] It is common cause that at the time both contracts of sale (the 2000 and 2008 contracts) were signed, all the parties to the contracts were under the common error that the wedge was not part of farm 446, but rather part of the CC's farm. (See *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A), where the court held that the common mistake must have been vital to the transaction, in the sense that neither party would have agreed to the contract if they had known the true situation.) It is common cause in this case that all the parties to the contracts contracted on the understanding that the wedge did not form part of farm 446. This is supported further by the evidence of the estate agent, Van Rensburg. For example, the extent of the land was pointed out to indicate the farm's boundaries. The parties thought that the wedge was part of the CC's farm, and they thought that they were selling and buying only Michael's farm. Thus, this common mistake was fundamental to the material terms of the agreement as to the identity of what was being sold and bought. A common error as to a material term renders the contracts void. This was not a mistaken motive as the appellant contends.

[21] At the time of the contract, Brits was not aware that the title deed did not accord with what was bought and sold. Clearly, in 2000, Nico and Meyer Jnr contracted under the common misapprehension that the wedge formed part of Kommandantsdrift's farm. They were also unaware that the wedge had been consolidated with Michael's farm. In 2008, Nico and Brits also laboured under the same common misapprehension when they concluded the contract.

[22] It appears that the conduct of the parties pre-and post-conclusion of the contracts is indicative of their understanding of the position at the time of the conclusion of the contracts. Furthermore, by the time he served the summons, Meyer

Jnr had been actively farming the wedge, and had invested substantial amounts of money to establish fruit orchards on the wedge. The consequence must be that the contracts are void. Thus, the high court correctly found that both the 2000 and 2008 contracts were both void.

[23] As stated in paras 7 and 8 of the high court's judgment, the parties had agreed to a separation of issues, as set out in para 7.1 of the judgment, namely (i) whether the transfers of the property from the CC to Nico during 2000 through to Brits were void; and concomitantly (ii) whether the CC was entitled to claim that the deeds office registries be amended in order to reflect the CC as the true and correct owner of the wedge.

[24] In essence, what the high court adjudicated was only the issue of the voidness of the two contracts of sale and the issue of prescription. Regrettably, the high court failed to deal with the issue as to whether the CC was entitled to claim that the deeds office registries be amended in order to reflect the CC as the true and correct owner of the wedge. Furthermore, it is clear from the pleadings that the CC sought as its main claim not only a declaratory order that it is the owner of farm 446, but also that the deed of transfer and other records of the Registrar of Deeds relevant to farm 446 be rectified to reflect the CC as the true owner thereof. The Registrar of Deeds, who is the third respondent, was not ordered to effect the transfer. Thus, it is clear that there are live issues between the parties that have not as yet been resolved.

[25] The result of the high court's judgment is that even though the two contracts of sale have been found to be void, the land remains registered in the name of the appellant. There appears to be a disconnect between the title deeds and the de facto position, in that, in practice, the wedge forms part of the farm known as Kommandantsdrift (the CC's farm), while it also forms part of farm 446 in the formal title deeds, in the name of the appellant, Johannes Brits.

[26] This Court cannot adjudicate on the transfer issue, as it has not been determined by the high court which was seized with the issue, as per the agreement between the parties recorded in para 7.1 of its judgment.

[27] In view of all the aforegoing, the matter has to be remitted to the high court to decide this issue. In any event, there are other issues that were postponed for determination in paras 7 and 8 of the high court's judgment. In the result, the appeal falls to be dismissed. There is no reason why costs should not follow the result.

[28] In the result, the following order is made:

1 The appeal is dismissed with costs.

2 The matter is remitted to the high court for the determination of the remainder of the issues.

_____

H K SALDULKER

JUDGE OF APPEAL

APPEARANCES

For appellant:	D L van der Merwe
Instructed by:	Le Roux Lamprecht Incorporated, George Honey Attorneys, Bloemfontein
For first and second respondents:	P A Myburgh
Instructed by:	MacGregor Stanford Kruger Incorporated, Cape Town Phatshoane Henney Attorneys, Bloemfontein