

SOUTH AFRICA / JUDGMENT

3 Tanners Properties CC v Trustees for the time being of the Atlantic Seaboard Trust (9478/2008) [2011] ZAWCHC 51 (22 March 2011)

[2011] ZAWCHC 51

COURT

Western Cape High Court, Cape Town

BEFORE

Cloete

CASE / FILE NUMBER

9478/2008

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT,

CAPE TOWN)

Case No 2947B/2008

In the matter between:

THE 3
TANNERS PROPERTIES CC
.....Plaintiff
and
THE TRUSTEES FOR THE TIME
BEING
OF THE
ATLANTIC SEABOARD TRUST
.....Defendant

Court:

Cloete, AJ

Heard:

8 March
2011

Delivered:

22 March
2011

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] This is an exception taken by the defendant (excipient) to the plaintiff's (respondent's) amended declaration filed on 5 December

2008. In this judgment I will refer to the parties as plaintiff and defendant respectively.

[2] In its amended declaration the plaintiff relies for its claim upon an oral agreement entered into between the parties on 3 May 2005 in terms of which a height restriction servitude is to be registered over the defendant's immovable property.

[3] The defendant's immovable property adjoins the plaintiff's immovable property. The material terms of the oral agreement relied upon by the plaintiff are that (a) the plaintiff would not lodge any objections to the defendant's building plans pertaining to the latter's property with the local authority; (b) the defendant would register a servitude over its property in favour of the plaintiff's property whereby the height of any building to be erected on the defendant's property would be restricted to the height depicted on the defendant's amended building plans as they existed at the time of the agreement, being a height of 75.8m above mean sea level; (c) the defendant's attorneys would attend to the preparation of the necessary documentation for the registration of the servitude; and (d) the servitude would be registered once the building depicted on the amended plans had been completed.

[4] The plaintiff pleads that although it has performed its obligations in terms of the agreement and the building depicted on the amended plans has been completed, the defendant has breached its obligations by (a) failing and/or refusing to have its attorneys attend to the preparation of the necessary documentation for the registration of the servitude; and

(b) refusing to register the height restriction servitude over its property in favour of the plaintiff's property.

[5] The plaintiff seeks an order declaring that the parties have concluded an agreement in terms of which the height restriction servitude is to be registered over the defendant's property, together with ancillary relief for specific performance and costs.

[6] The exception filed by the defendant is to the effect that the plaintiff's amended declaration lacks averments which are necessary to sustain a cause of action.

[7] In essence, the defendant contends that an oral agreement of servitude is unenforceable by virtue of the provisions of s 2(1) as read with the definitions of "alienate" and "land" referred to in s 1(1) of the Alienation of Land Act No 68 of 1981 ("the Act"), which are as follows:

'2. Formalities in respect of alienation of land. -

- (1) No alienation of land after the commencement of this section shall ... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

"alienate", in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and "alienation" has a corresponding meaning."

"land" -

- (b) includes ... any interest in land, other than a right or interest registered or capable of being registered in terms of the Mining Titles Registration Act. 1967 (Act No. 16 Of 1967)!

ISSUE TO BE DETERMINED

- [8] The parties are ad idem that the oral agreement relied upon by the plaintiff is not a sale as envisaged in s 1(1) of the Act. Accordingly, the narrow issue which I am called upon to determine is whether the agreement as pleaded constitutes a donation or an exchange since, if this is so, the agreement is unenforceable against the defendant because it is not contained in a written deed of alienation as provided for in the Act.

TEST ON EXCEPTION

- [9] A 'cause of action' was defined in *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 23, with reference to the earlier case of *Cook v GUI* (L.R. 8 CP 107) to be;

every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact (the *facta probantia*), but every fact which is necessary to be proved (the *facta probanda*)'.

- [10] An exception is a legal objection to an opponent's pleading. It complains of a defect inherent in the pleading; admitting for the moment that all of the allegations in a pleading are true, it asserts that even with such admission the pleading does not disclose a cause of action. Courts are reluctant to decide by way of exception, questions concerning the interpretation of a contract. The onus rest on the excipient to persuade the court that the pleading is excipiable on every interpretation that it can reasonably bear. (My emphasis.) See; Erasmus: Superior Court Practice B1-151 and 152A-153 and the cases cited therein.

DEFENDANT'S ARGUMENT

- [11] The defendant's two main avenues of attack are the following.

- [12] The first is that the declaratory order sought by the plaintiff amounts to a donation by the defendant of a right in land in favour of the plaintiff. The terms of the order sought by the plaintiff do not provide for any counter-performance by the plaintiff in favour of the defendant. Inasmuch as what is being donated is a right in land, ie the registration of a praedial servitude, the agreement would have had to have been in writing in order to not fall foul of the provisions of the Act
- [13] The second (alternative) is that the agreement pleaded by the plaintiff constitutes an exchange in that the plaintiff is giving up a right arising from its ownership of the dominant tenement (ie the right to object to plans, whether in terms of s 7 of the National Building Regulations and Building Standards Act No 103 of 1977 or the applicable title deed conditions) in return for the defendant given up a right arising from its ownership of the servient tenement (ie the right to build higher than the agreed limitation). Accordingly the agreement would likewise have had to have been in writing in order to not fall foul of the provisions of the Act.

WHETHER THERE IS A DONATION

- [14] In Law of South Africa 2nd edition vol 8

(1) at para 301, a donation is defined as follows:

'an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something (this includes the gratuitous release or waiver of a right) to another person, called "the donee", with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage.'

- [15] In *Ovenstone v Secretary for inland Revenue* 1980

(2) SA 721 (AD) at 736H-737A the court put it thus:

'In a donation the donor disposes of the property gratuitously out of liberality or generosity, the donee being thereby enriched and the donor correspondingly impoverished, so much so that, if the donee gives any consideration at all therefore. it is not a donation (see *The Master v Thompsons Estate* 1961

(2) SA 20 (FC) at 24F026C. 48F-49C, where all the authorities are collected). It can therefore be regarded as a unilateral contract in the sense that the donor is the only party upon whom any obligation lies.'

- [16] In my view, the agreement as pleaded by the plaintiff does not constitute a donation, since the plaintiff agreed not to lodge any objections to the defendant's building plans. There is thus no reason to assume at the exception stage, without having had the benefit of hearing evidence in this regard, that the defendant was impelled by pure benevolence or sheer liberality.

- [17] Further, the defendant has erred in logic in asserting that the order sought does not provide for any counter-performance by the plaintiff and that therefore the agreement for the creation of the servitude constitutes a donation which would be an alienation as contemplated by the Act. This is so since the defendant contends that because the agreement (as pleaded) does not provide for any counter-performance, the agreement would constitute a donation. I agree with plaintiffs counsel that the conclusion arrived at by the defendant does not follow from its premise. The absence of any counter-performance does not entail an absence of an expectation of any future advantage, nor does it mean that the defendant was acting out of pure benevolence or sheer liberality.
- [18] Accordingly, if the defendant wishes to assert that this was a donation, it must do so in its plea, and the question of whether or not it was a donation can then properly be canvassed at trial.
- [19] I am thus not persuaded that on this ground the amended declaration is excipiable on every interpretation that it can reasonably bear.
- [20] Accordingly, this ground must fail. WHETHER THERE IS AN EXCHANGE
- [21] The defendant argues that the acquisition of a servituted right by the owner of the dominant tenement gives rise to a corresponding diminution of the rights of the owner of the servient tenement; there is accordingly an alienation of an interest in land, being the right in question. The defendant also contends that the agreement as pleaded constitutes an exchange as contemplated in the Act because one interest in land is being exchanged for another.
- [22] I cannot agree that the right to object to plans constitutes an interest in land. Further, and as pointed out by plaintiff's counsel, the defendant did not provide any authority for this proposition.
- [23] To my mind, the agreement as pleaded by the plaintiff reflects that each party would forego a right; neither is transferring a right to the other. In *Hoeksma and Another v Hoeksma* [1990] ZASCA 41; 1990

(2) SA 893 (AD) at 897A-C the court put it thus:

The oral agreement was clearly not a sale or donation. The question, indeed the only real question in this appeal, is whether it entailed an exchange. 'Exchange' is not defined in the Act. It therefore bears its ordinary meaning. In its most rudimentary form, exchange (barter, 'ruil', permutatio) marks a transaction between two people whereby each gives to the other, as his own, one thing in return for another. (De Groot int 3.31.6; Voet 19.4.1.) Exchange differs from sale, historically its precursor and now its counterpart, in the nature of the reciprocal consideration which is promised for the res sold or exchanged: with sale the agreed co-ordinate is essentially the payment of money; with exchange it is the delivery or transfer of another asset.' (My emphasis.)

- [24] Simply put, what the parties agreed in the instant matter is not that either would transfer a personal right, but that each would abandon a personal right, and what the plaintiff seeks is an order to confirm the abandonment of that personal right by the defendant. In my view, whether this leads ultimately to the registration of a servitude over the defendant's property in favour of the plaintiff's property (which would create a real right) does not affect the nature of the agreement as pleaded by the plaintiff. It is simply not a transfer of a right in land by the one party in exchange for the transfer of a right in land by the other.
- [25] As contended by plaintiffs counsel, the oral agreement cannot be an exchange since the defendant will not receive a thing in exchange for the servitude. This contention falls squarely within the reasoning of the court in *Leonard Light Industries (Pty) Ltd v Wright and Others* 1991

(4) SA 628 (W) at 632J-633F:

'Mr Vermeulen . who appeared for the respondents, submitted that the respondents undertook to transfer three units to the applicant in exchange for the applicant undertaking to advance money to the respondents; that the units were therefore exchanged for a loan and that the transaction therefore constituted an alienation of land in terms of the Alienation of Land Act 1981, which alienation should have been contained in a deed of alienation, signed by the parties or their agents acting on their written authority, in order to be valid He referred to Van Rensburg and Treisman *The Practitioner's Guide to the Alienation of Land Act* 2nd ed at 34, where the authors say:

'In view of the foregoing, it is submitted that "exchange" in the definition of "alienate" includes every contract in terms of which a party undertakes to transfer land to another in return for some other thing or things, whether movable or immovable, corporeal or incorporeal: but excluding a sum of money since that would bring the contract within the ambit of sale.'

At common law, 'exchange' is a contract for the transfer by one person of property in a thing to another in return for a similar agreement by the latter See Mackeurtan *Sale of Goods in South Africa* 5th ed at 271; DVoet 19.4.1; Grotius 3.31.6; Scholtens 1960 *South African Law Journal* at

403. The Legislature, by enacting that an exchange of land should be contained in a deed of alienation in order to be valid and

enforceable, changed the common law and. if it intended the word 'exchange' to have a meaning other than the meaning of the word at common law, could have made its intention clear. It did not do so and must therefore have intended the word to have the meaning that it has at common law.

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

[26] The fundamental point of the Leonard Light judgment is that one cannot speak of an exchange, for purposes of the Act, where there is no undertaking by party B to transfer a thing to party A in return for the transfer by party A of a thing to party B. The fact that the agreement as pleaded by the plaintiff is a servitude creating agreement is irrelevant

[27] Defendant's counsel argued that the decision in the Leonard Light case is wrong and at variance with the purposes of the Act which are legal certainty, reducing litigation and the prevention of perjury and fraud: see *Felix & Another v Nortier NO & Others* [1996] All SA 143 SE at 1531. I disagree. The premise from which the defendant appears to have reached this conclusion is that any contract pertaining to immovable property must be in writing, and that "alienation" should therefore be construed in such a way that all contracts pertaining to immovable property fall within its ambit. The Act does not define "alienate" as including to sell, exchange or donate; it specifically defines "alienate" to mean sell, exchange or donate. It is thus not so that the Act intended to cover all transfers of rights in land. And as stated by the learned author AJ Kerr in *The Law of Sale and Lease* (2^d edition) at pages 78-79;

'The Act does not apply to a promise in a service contract to transfer land as a bonus in lieu of an annual thirteenth salary cheque. The reason is that such a contract is not a "sale", "exchange" or "donation" of the land within the meaning of these words in the definition section of the Act. It is also not an exchange if one party undertakes to transfer property to another in consideration of a loan of money received from that other, nor is it a sale or donation of the property

Similarly, where a will bequeathing land is not clear and the beneficiaries enter into an agreement to adjust their respective claims to make better sense of the will and to avert litigation about its terms the agreement is not an exchange. Again, if a partnership is to be dissolved and shares transferred, a consequential transfer of land does not fall within the terms of Act. And if there is an agreement concerning payment in kind as part of the administrative process of winding up an insolvent estate the Act does not apply. Even if the contract uses the word "price" the Act does not apply if the payment is compensation for transference of assets under a *sui generis* contract.'

[28] I am thus also not persuaded that on this ground the amended declaration is excipiable on every interpretation that it can reasonably bear.

[29] Accordingly, this ground must also fail

COSTS

[30] As the plaintiff has been successful, it follows that the defendant should effect payment of its costs.

[31] In the result, I order that the defendant's exception is dismissed with costs.

J I CLOETE

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Prepared on 11 October 2026 · Esheria