

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Amien and Others (24878/2012) [2016] ZAGPJHC 180 (24 March 2016)

[2016] ZAGPJHC 180

COURT

South Gauteng High Court, Johannesburg

BEFORE

Modiba

CASE / FILE NUMBER

24878/2012

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 24878/2012

DATE:

24 MARCH 2016

ABSA

BANK

LIMITED.....APPLICANT/PLAINTIFF

And

AMIEN,

NHAZLEE.....FIRST

RESPONDENT

HARRISON,

ROWAN.....SECOND

RESPONDENT

MEYER,

GEORGE.....THIRD

RESPONDENT

THE
REGISTRAR OF DEED,
JOHANNESBURG.....FOURTH
RESPONDENT
THE
SHERIFF OF THE COURT
FOR
THE DISTRICT OF
ROODEPOORT.....FIRTH
RESPONDENT
CITY
OF
JOHANNESBURG.....SIXTH
RESPONDENT

JUDGMENT

MODIBA J:

- [1] The applicant has applied for an order declaring a notarial tie agreement that ties two properties owned by the first respondent to be of no force of effect. The notarial tie agreement is registered against the properties as a condition of title. As a result, the two properties are held under one title deed, being title deed number: T.....
- [2] In the title deed, the properties are respectively described as HOLDING 3..... A..... A..... H.....

REGISTRATION DIVISION I.Q., THE PROVINCE OF GAUTENG IN EXTENT 2,59209 (TWO COMMA FIVE NINE TWO ZERO) HECTERS (referred to herein as ‘the first property’) FIRST TRANSFERRED BY DEED OF TRANSFER NO.T 1..... WITH DIAGRAM ANNEXED THERETO AND HELD BY DEED OF TRANSFER NO T1..... and PORTION 1 OF HOLDING 3..... A..... A..... H.....
REGISTRATION DIVISION I.Q., THE PROVINCE OF GAUTENG IN EXTENT 2,192 (TWO THOUSAND ONE HUNDRED AND NINETY TWO) SQUARE METERS; FIRST TRANSFERRED BY DEED OF TRANSFER NO 5..... WITH DIAGRAM SG NO A 7..... ANNEXED THERETO (referred to herein as ‘the second property’).

- [3] The importance of untying these two properties for the applicant is that it has sold them in execution to separate purchasers to recover payment of a judgment debt owed to it by the first respondent. The applicant was hamstrung to approach this court for the relief prayed for in the notice of motion because the Registrar of Deeds would not effect separate transfer of registration of the two properties without an order of court, despite the applicant’s contention that the notarial tie agreement has lapsed.
- [4] It is common cause that prior to the promulgation of the Abolition of Certain Title Conditions Act 43 of 1999 (‘ACTC Act’), a notarial tie agreement could only be cancelled with the consent of the Administrator of the Transvaal. This official has been superseded by the

MEC of the Gauteng Provincial Government, Department of Development Planning and Local Government ('the MEC').^[1] The applicant contends that the ACTC Act, which came into effect on 24 November 1999, has rendered the notarial tie agreement to be of no force or effect. The ACTC Act was promulgated to waive the consent of the MEC required to cancel certain conditions of title. The notarial tie agreement in dispute falls within the scope of the ACTC Act. The applicant has premised its contention on section 1 read with the preamble to the ACTC Act.^[2]

- [5] The first respondent vehemently disagrees with the applicant. She contends that section 2 of the ACTC Act excludes the notarial tie agreement from the scope of the ACTC Act. Therefore the relief sought by the applicant is misplaced. The consent of the MEC is still required to cancel the notarial tie agreement in dispute. In terms of section 2 (a), (b) and (c) of the ACTC Act, the consent of the MEC is still required if the condition of title sought to be cancelled:

"(a) is imposed under any town planning scheme;

- (b) is imposed under a land use control mechanism having the effect of a town planning scheme;

- (c) affects rights to minerals."

- [6] The Registrar of Deeds (the Registrar) has filed a report, expressing his constraint by the notarial tie agreement to transfer the two properties as separate lots to separate owners. Such a transfer will result in a contravention of section 5 of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919 (ACT 22 of 1919) in that the two properties were tied to allow them to be registered as a single property and as such qualify as an agricultural holding as defined in that Act. [3] If transferred separately, the second property will lose its qualification as an agricultural holding because it measures less than one Morgan in extent. However, the Registrar did not object to the relief sought by the applicant.

- [7] Rather than approach the MEC for consent to cancel the notarial tie agreement, the applicant opted to approach this court for an order declaring the notarial tie agreement to be of no force and effect.

- [8] The legal question to be determined between the parties is whether the ACTC Act applies to the relevant notarial tie agreement. If I find that it does not apply, then the applicant is not entitled to the relief sought.

- [9] Before I consider the merits of this application, it is apposite that I first pay attention to three preliminary issues that arose between the parties, one raised by the first respondent in her answering affidavit, one raised by the applicant at the commencement of the hearing and the last one raised by Counsel of the applicant when he argued in reply. These issues are as follows:

9.1 whether the deponent to the applicant's founding affidavit, Kyle Vilakazi (Vilakazi) lacks the requisite legal authority and personal knowledge of the facts set out in the founding affidavit. If so, the first respondent contends that the application stands to be dismissed.

9.2 an opposed interlocutory application by the applicant to amend paragraphs 1 and 2.1 of the notice of motion.

9.3 whether the first respondent may rely on legislation for which no facts laying the basis for such reliance have been set out in her answering affidavit. If not, the applicant contends that such facts stand to be ignored.

[10] The first respondent contends that Vilakazi lacks the requisite authority and personal knowledge to depose to the applicant's

affidavits. In the affidavits deposed to by Vilakazi, she alleges that she is duly authorised by the applicant to depose to affidavits

on behalf of the applicant and that she has personal knowledge of the facts contained therein. The first respondent denies this. She contends that Vilakazi was never involved with her matter. In *Rees and Another v Investec Bank Limited*[4], the Supreme Court of Appeal held that "[a]s stated in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*.' Furthermore, notwithstanding the dictum in *Rees* and in *Maharaj*, for the first respondent to raise this issue in an application such as this where the facts between the parties are common cause and the issue to be decided is a question of law is inconsequential. In light of the above dictum, the point in limine raised by the first respondent stands to be dismissed for lack of merit.

[11] At the commencement of the hearing, Counsel for the applicant sought from the bar two amendments to the notice of motion and handed up a draft order reflecting these amendments. The first amendment seeks to amend prayer 1 of the notice of motion which reads: "That the notarial tie agreement K223/1993S be of no force or effect" to be amended to read: "the notarial tie agreement K223/1993S is cancelled." The second amendment seeks to correct the description of the first property in prayer 2 of the notice motion, where the property is incorrectly described as "Holding 33 Amorosa Agricultural Holdings."

[12] The first respondent objected to the first amendment on the basis that the case that the applicant brought her to court to meet is premised on the order as set out in paragraph 1 of the notice of motion. A prayer for the cancellation of the notarial tie agreement is a completely different case not borne from the applicant's papers.

[13] It is trite that a litigant may amend his or her pleadings at any stage of the proceedings before judgment (Rule 28(10)). A court hearing an application for an amendment has the discretion to grant it. Such discretion must be exercised judiciously. The general approach to amendments is that they should be allowed unless the application is made in bad faith and would cause an injustice which cannot be compensated by an order for costs.[5] I agree with the first respondent that the first amendment is not borne out of the applicant's case as set out in the founding

affidavit. For that reason if granted, the amendment would cause an injustice to the first respondent which cannot be compensated with an order for costs. Therefore the application for the amendment of prayer 1 stands to fail.

[14] There is no opposition to the second amendment. It merely seeks to amend an error in the description of the first property. It is apparent from the title deed annexed to the applicant's founding affidavit that the correct description of this property is "Holding 32 Amorosa Agricultural Holdings". Allowing this amendment will not cause the respondents any injustice that cannot be remedied by a cost order. Therefore this amendment stands to succeed.

[15] The determination of the third preliminary issue requires an examination of the first respondent's opposition as set out in her answering affidavit and as argued by her Counsel. In her answering affidavit, the first respondent contends that the notarial tie agreement is an agreement between the first respondent and the Gauteng Government. It cannot be ignored by simply registering the two properties separately. Furthermore, registering the two properties separately will result in the second property losing its qualification as an agricultural holding. She made no reference to any legislation in the answering affidavit. In argument her Counsel submitted that the MECs consent to the separate registration of these two properties was not waived by section 1 of the ACTC Act. To sustain this argument, her Counsel relied in his heads of argument and in oral argument on section 1 and 2 of the ACTC and on other provisions contained in various other legislation such as the Subdivision of Agricultural Land Act 70 of 1970 (Act 70 of 1970) and the Agricultural Holdings (Transvaal) Registration Act Amendment Act 19 of 1929 (Act 70 of 1929).

[16] It is indeed so that no legislation was specifically referred to in the first respondent's answering affidavit. However, facts in support of the first applicant's reliance on sections 1 and 2 of the ACTC Act clearly appear from her answering affidavit. Reference to Act 70 of 1970 and Act 19 of 1929 made in argument by Counsel for the first respondent was made in respect of secondary submissions in support of her contention that ACTC Act is not applicable. Furthermore, the facts in question are common cause because they relate to the conditions of title which clearly appear ex facie the title deed. Therefore, the objection to the first respondent's reliance on the relevant legislation lacks merit. Heed stands to be given to the legislative provisions sought to be relied on by the first respondent.

[17] I now turn to deal with the merits of the application.

[18] The following conditions of title that appear ex facie the title deed are relevant to the dispute between the parties:

“B. All rights to minerals and precious stones together with all rights which may be or become vested in the freehold owner to share in the proceeds which may accrue to the state from the disposal of the undermining rights of the land including the share of claim license moneys and any share of rentals or profits which may accrue to any owner under any mining lease granted in respect of the land, covered by the agricultural holdings, and the like, are reserved in favour of JOHANNES DU TOIT (born on the 6th September

1882) as will more fully appear from Certificate of Rights to Minerals No. 195/1959 RM issued in respect of Portion 244 (a portion of portion 13 of the North Western Portion) of the said farm, now known as AMOROSA AGRICULTURAL HOLDINGS.

C

(a) The holding is held as an agricultural holding and it may be used only for the purposes contemplated by the definition of that term contained in the Agricultural Holdings (Transvaal) Registration Act

1919. That definition reads:-

“Agricultural holding shall mean a portion of land not less than 8565 square meters in extent used solely or mainly for the purpose of agriculture or horticulture or for the breeding or keeping domestic animals, poultry or bees.”

....

(c)

(i) The holding may not be subdivided nor may any portion of it be sold, leased or disposed of in any way without obtaining the written approval from the Board.

(ii) The holding shall not be sold to or held jointly by two or more persons.

D. By virtue of Notarial Tie Agreement K223/1993S dated 4th November 1992 the within mentioned property and portion 1 of Holding 33 Amorosa Agricultural Holdings shall be tied together and regarded as one property for all intents and purposes and that none of the constituent properties shall, on its own, be sold, exchanged,

hypothecated or alienated or transferred in any way otherwise than jointly to the same transferee or mortgagee without the written

consent of Administrator of Transvaal first being obtained and the said Administrator shall have the absolute discretion to grant or withhold such consent as will more fully appear from the abovementioned Notarial Tie Agreement.”

[19] The two properties are evidently subject to conditions that fall within the purview of section 2 (a) and (b) of the ACTC Act. They are registered as agricultural holdings and therefore subject to a condition of title imposed under a town planning scheme.[6] They are subject to a title imposed under a land use control mechanism having the effect of a town planning scheme in that they

are registered as agricultural holdings. They are also subject to a condition of title that affects mineral rights, bringing them into the purview of section 2(c). The contentions by Counsel for the applicant that de facto, the properties do not comply with the pertinent requirements for the relevant conditions of title for example, that the properties are not solely used for agricultural purposes which is a requirement for qualification as an agricultural holding and that the condition regarding mineral rights may have been superseded by the Minerals and Petroleum Resources Development (MPRD) Act 28 of 2002 are in my view not cogent.[7]The MPRD Act came into operation on 30 April 2004. It may be that de facto, the properties no longer qualify for classification as agricultural holdings and that the mineral rights condition of title may have been superseded by the MPRD Act. However, the existence of these conditions of title cannot be ignored. As matters stand, despite how they are currently being used, the two properties are not registered as erven. Therefore their registration as agricultural holdings remains legally valid. The condition of title in respect of mineral rights may have well been affected by promulgation of the MPRD Act. The MPRD Act has merely changed the status quo in respect of the holder of mineral rights and not the existence of the right. The notarial tie agreement was registered in 1993. The properties were transferred to the first respondent as a single property on 16 August 2007 with the minerals rights condition of title, despite the enactment of MPRD Act. These contentions by Counsel for the applicant may be factors for consideration by the MEC when faced with an application for the cancellation of the notarial tie deed. The factors are of no value in persuading this court to declare the notarial tie agreement to be of no force or effect.

[20] This court is not best placed to usurp the powers of the MEC in circumstances where the applicant has failed to follow the applicable statutory cancellation procedure and where the MEC is not cited as a party to the application. As argued by Counsel for the first respondent and as opined by the Registrar of Deeds, untying the two properties will result in the second property becoming less than 1 Morgan and therefore losing its qualification as an agricultural holding. Furthermore, the first property is subject to a praedial servitude in that it is subject to a proclamation for the building of road PW5 in the future. It is unknown what effect will untying the two properties have on this servitude. In addition to these town planning factors, there may well exist other factors to be brought to bear when considering whether conditions of title that fall within the purview of section 2 should be cancelled. This court may not be aware of such additional factors and is certainly not placed to consider them. This could be the reason why the legislature excluded such conditions from the scope of the ACTC Act.

[21] The applicant has not succeeded in persuading this court that there is a legal basis to declare that the notarial tie agreement

K223/1993S is of no force or effect as set out in prayer 1 of its notice of motion. The statutory cancellation procedure as set out in section 6 of the Agricultural Holdings Act 22 of 1919 (Act 22 of 1919) ought to be followed to cancel the notarial tie agreement.

[22] In the premises, I make the following order:

ORDER

1. Prayer 2.1 of the notice of motion is amended to read as follows:

“Holding 32 AMOROSA AGRICULTURAL HOLDINGS REGISTRATION DIVISION I.Q to and in the name of the Second Defendant.

2. The application stands to be dismissed with costs.

L MODIBA

JUDGE OF THE HIGH COURT

APPEARENCES

Counsel for the Appellant: WB Pye

Instructed by: Tim Du Toit & Co Inc.

Counsel for the Respondent: Clayton T Vetter

Instructed by: Y Johnson Incorporated

Date of appearance: 01 March 2016

Date of Judgment: 24 March 2016

- [1] In terms of section 6 of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919, conditions of title contained in a

title deed may only be cancelled with the consent of the Administrator of Transvaal. According to the decision of the Supreme

Court of Appeal in *Gerber and others v MEC of the Gauteng Provincial Government, Department of Development Planning and Local Government and Another* [2002] 4 All SA 518 (SCA) at par 2, the MEC is the successor to the administrator of Transvaal.

- [2] "PREAMBLE “Preamble To provide for the abolition of certain conditions in terms which the consent or permission of the holder of an office under the Republic, the former Union of South Africa or any dominium, colony or republic which preceded the former Union of South Africa, is required for the alienation or transfer of immovable property from one person to another; and to provide for matters connected therewith. Section 1 Abolition of conditions (1) Notwithstanding anything to the contrary contained in any law, but subject to section 2, any condition registered against any title before the commencement of this Act,

whereby the consent or permission of the holder of an office under the Republic, the former Union of South Africa or any dominium, colony or republic which preceded the former Union of South Africa is required for the alienation or transfer of immovable property from one person to another, is hereby abolished.”

[2]

"PREAMBLE

“Preamble

To provide for the abolition of certain conditions in terms which the consent or permission of the holder of an office under the Republic, the former Union of South Africa or any dominium, colony or republic which preceded the former Union of South Africa, is required for the alienation or transfer of immovable property from one person to another; and to provide for matters connected therewith.

Section 1 Abolition of conditions

- (1) Notwithstanding anything to the contrary contained in any law, but subject to section 2, any condition registered against any title before the commencement of this Act, whereby the consent or permission of the holder of an office under the Republic, the former Union of South Africa or any dominium, colony or republic which preceded the former Union of South Africa is required for the alienation or transfer of immovable property from one person to another, is hereby abolished.”
- [3] See the definition of agricultural holding in the quotation in paragraph 18 below under C (a).
- [4] Unreported judgment (330/13) [2014] ZASCA 38 (28 March 2014) at para
15. See also *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); and *Stamford Sales & Distribution v Metraclark* (676/2013) [2014] ZASCA 79 (29 May 2014)
- [5] See *Moolman v Estate Moolman* 1927 CPD 27 at page 29.
- [6] Act 70 of 1970 defines ‘scheme’ as “a town planning scheme prepared in terms of a provincial ordinance by an authority referred to in paragraph
- (a) of the definition of ‘agricultural land’, envisaging the co-ordinated and harmonious development of the area to which such scheme relates. The same Act defines ‘agricultural land’ as any land, except: (a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee, and land forming part of, in the province of the Cape of Good Hope, a local area established under section 6 (1) (i) of the Divisional Councils Ordinance, 1952 (Ordinance No. 15 of 1952 of that province), and, in the province of Natal, a development area as defined in section 1 of the Development

and Services Board Ordinance, 1941 (Ordinance No. 20 of 1941 of the last-mentioned province), and in the province of the Transvaal, an area in respect of which a local area committee has been established under section 21 (1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance No. 20 of 1943 of the Transvaal), but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act; (b) land— (i) which forms part of any area subdivided in terms of the Agricultural Holdings (Transvaal) Registration Act, 1919 (Act No. 22 of 1919); or (ii) which is a township as defined in section 102 (1) of the Deeds Registries Act, 1937 (Act No. 47 of 1937), but excluding a private township as defined in section 1 of the Town Planning Ordinance, 1949 (Ordinance No. 27 of 1949 of Natal), not situated in an area of jurisdiction or a development area referred to in paragraph (a); (c) land of which the State is the owner or which is held in trust by the State or a Minister for any person; (f) land which the Minister after consultation with the executive committee concerned and by notice in the Gazette excludes from the provisions of this Act; Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such.

[6] Act 70 of 1970 defines 'scheme' as "a town planning scheme prepared in terms of a provincial ordinance by an authority referred to in paragraph

- (a) of the definition of 'agricultural land', envisaging the co-ordinated and harmonious development of the area to which such scheme relates. The same Act defines 'agricultural land' as any land, except:
- (a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee, and land forming part of, in the province of the Cape of Good Hope, a local area established under section 6 (1) (i) of the Divisional Councils Ordinance, 1952 (Ordinance No. 15 of 1952 of that province), and, in the province of Natal, a development area as defined in section 1 of the Development

and Services Board Ordinance, 1941 (Ordinance No. 20 of 1941 of the last-mentioned province), and in the province of the Transvaal, an area in respect of which a local area committee has been established under section 21 (1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance No. 20 of 1943 of the Transvaal), but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act;

(b) land—

- (i) which forms part of any area subdivided in terms of the Agricultural Holdings (Transvaal) Registration Act, 1919 (Act No. 22 of 1919); or

- (ii) which is a township as defined in section 102 (1) of the Deeds Registries Act, 1937 (Act No. 47 of 1937), but excluding a private township as defined in section 1 of the Town Planning Ordinance, 1949 (Ordinance No. 27 of 1949 of Natal), not situated in an area of jurisdiction or a development area referred to in paragraph (a);
- (c) land of which the State is the owner or which is held in trust by the State or a Minister for any person;
- (f) land which the Minister after consultation with the executive committee concerned and by notice in the Gazette excludes from the provisions of this Act;

Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such.

- [7] Section 3(1) of Act 28 Of 2002 provides that minerals and petroleum resources are the common heritage of all South Africans and that the State is the custodian thereof for the benefit of all South Africans.

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