

SOUTH AFRICA / JUDGMENT

Bauti and Another v Ngceshe NO and Others (1008/07) [2007] ZAECHC 146 (23 November 2007) [2007] ZAECHC 146

COURT

High Courts - Eastern Cape

BEFORE

Kroon

CASE / FILE NUMBER

1008/07

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Source record**FORM A****FILING SHEET FOR SOUTH EASTERN
CAPE LOCAL DIVISION JUDGMENT****PARTIES:**

DOREEN
BAUTI First Applicant
KHOLI
FRANSIE BAUTI Second Applicant
and
ZIZELE
FIKISELE NGCESHE NO First Respondent
KHATAZWA
LITTICIA NGCESHE NO Second Respondent
NOMATAMSANQA
ELIZABETH NGCESHE NO Third Respondent
Case

Number:

1008/07
High

Court:

SOUTH
EASTERN CAPE LOCAL DIVISION
DATE

HEARD:

22 November 2007
DATE
DELIVERED: 23
November 2007

JUDGE(S): KROON, J
LEGAL
REPRESENTATIVES –

Appearances: For
the Applicant(s): C
van Rooyen
for

the Respondent(s): S Potgieter
Instructing

attorneys:

Applicant(s): Masiza
Harker Inc

Respondent(s): Howard
Collen Attorney
CASE
INFORMATION -
Nature

of proceedings : Application

Topic: Rescission
Key

Words: REPORTABLE
IN
THE HIGH COURT OF SOUTH AFRICA
(SOUTH
EASTERN CAPE LOCAL DIVISION)
CASE
NO: 1008/07
IN

THE MATTER BETWEEN: DOREEN
BAUTI First
Applicant
KHOLI
FRANSIE BAUTI Second
Applicant
ZIZELE
FIKISELE NGCESHE NO First
Respondent
KHATAZWA
LITTICIA NGCESHE NO Second
Respondent
NOMATAMSANQA
ELIZABETH NGCESHE NO
Third Respondent

JUDGMENT**KROON J:**

- [1] This is an application for the rescission of an order granted by this court on 13 February 2007 in case no. 3568/2006.
- [2] In terms of the said order, granted at the instance of the three respondents in their capacities as trustees of the Ngceshe Family Trust, (“the Trust”), the two applicants were directed to pass transfer of Erf 1368, Kwadwesi, Port Elizabeth (“the property”) into the name of the Trust.
- [3] It may be recorded (i) that the order reflects that it was granted “by agreement” (an issue that will receive closer consideration below), and (ii) that no costs order was included.
- [4] The two applicants are married to each other in community of property.
- [5] The claim of the Trust in case no. 3568/2006 was founded on the conclusion of a written agreement between the Trust and the second applicant on 15 February 2006 which reflected the sale by the latter to the former of the property for the sum of R15 000,00, payable against registration of the property in the name of the Trust. The clause in the agreement making provision for the signature of the spouse of the seller, should they be married in community of property, was left blank.
- [6] Further allegations made on behalf of the Trust in the said case (per the founding affidavit, deposed to by the first respondent) included the following:
 - (a) The first applicant, as seller of the property, signed the documentation necessary for transfer to be effected into the name of the Trust, including an affidavit in which he reflected inter alia that his marital status was “Unmarried”.
 - (b) At all material times the Trust had no knowledge, and was in no manner made aware by the second applicant, that he was married (whether in or out of community of property).
 - (c) Whilst attending to the preparation of the documentation necessary for transfer of the property to be effected into the name of the Trust, the latter’s conveyancing attorneys ascertained that subsequent to the conclusion

of the written agreement referred to above, the second applicant had concluded a further written agreement in terms of which he purported to sell the property to a Mr Jakavula (who was cited by the Trust as a further respondent in case no. 3568/2006 on the basis that he was an interested party).

- (d) The attorneys accordingly approached the second applicant who responded by favouring the former with a document signed by him and dated 26 August 2006 which recorded a cancellation of the deed of sale concluded with Jakavula (annexure N7 to the first respondent's

affidavit). (It should be noted, however, that in his answering affidavit filed in the present proceedings the first respondent

stated that he personally secured the second applicant's signature to the document).

- (e) However, in the course of correspondence between the Trust's attorneys and Messrs Friedman Scheckter, the attorneys engaged to attend to the transfer of the property to Jakavula, the latter attorneys (per Mr Spruyt) advised the former that it was contended that the agreement between the second applicant and the Trust was null and void on the grounds that the second applicant was married in community of property and the agreement did not comply with the provisions of s 15 (2)(a) read with s 15(5) of the Matrimonial Property Act 88 of 1984 ("the Act").
- (f) At their request the Trust's attorneys were further favoured with
- (i) a copy of the applicants' marriage certificate, which reflected that the marriage had been solemnized on 24 July 2001, and (ii) a copy of the written agreement concluded between the applicants, as sellers, and Jakavula, as purchaser, reflecting that on 29 July 2006 the former sold the property to the latter for the sum of R40 000,00.
- (g) The Trust contended, however, that the stance adopted by the applicants, as set out in (e) above was invalid in law, having regard to the provisions of s 15(9) of the Act and the circumstance that the Trust was a bona fide purchaser of the property, against whom the fraudulent representations of the second applicant could not be invoked.
- [7] The Trust accordingly approached the court to secure the order which the applicants now seek to have rescinded.
- [8] It may be added that the first respondent further alleged that on an earlier occasion, 8 January 2004, the Trust had entered into a similar agreement with the second applicant for the purchase of the property, but (for reasons not then disclosed by the first respondent) this sale was not implemented and was replaced by the agreement of 15 February 2006.
- [9] In her founding affidavit in the present proceedings the first applicant confirmed that she and the second applicant had concluded the agreement with Jakavula on 29 July 2006 in terms of which they sold the property, an asset in their joint estate, to him for the sum of R40 000,00, which sale had been facilitated through the offices of an estate agent, Mr Mpofu. Her further allegations included the following:

- (a) During August 2006 the applicants were taken by Mpofu to the offices of Friedman Scheckter to seek an advance of R10 000,00 on the purchase price payable by Jakavula. An agreement by the attorneys to advance the sum was not implemented. The second applicant later explained to her that a problem had arisen, but she did not enquire any further and left the matter there.
- (b) The next occasion on which she and the second applicant attended at the offices of the attorneys was on the morning of 13 February 2007, when she met Spruyt for the first time. He advised them that the Trust had that morning secured an order for the transfer of the property into its name in implementation of the sale of the property to it by the second applicant. She was dumbfounded by this intelligence. Spruyt further advised them that they should co-operate with the Trust's attorney in the matter of the transfer into the Trust's name.
- (c) She thereafter taxed the second applicant with his sale of the property to the Trust, but he refused to favour her with an explanation.
- (d) After the meeting with Spruyt on 13 February she and the second applicant laboured under the impression that the Trust's entitlement to transfer could not be undone. At Mpofu's instigation, however, he having said that Jakavula wished to take the matter further as the first respondent was causing difficulty at the property, they sought further legal advice.
- (e) It was during their consultation with their present attorneys that she learnt for the first time of the second applicant's underhand dealings with the sale of the property to the Trust. The latter explained that he had wished to keep the sale secret, for personal gain, as he had owned the property prior to their marriage. He also stated that the first respondent had given him the assurance that the transaction could be implemented without her knowledge as her name would not feature therein.
- (f) She recalled having met the first respondent at her residence on two earlier occasions, but she was uncertain as to the dates thereof. On the first occasion the second applicant, after having held a conversation with the first respondent (to which, apparently, she was not privy), merely told her that the first respondent was interested in purchasing the property. On the second occasion the first respondent called at the house wanting to speak to the second applicant, but he would not tell her why.
- (g) The first respondent was throughout aware that she was married to the second applicant.
- (h) The sale of the property to the Trust took place behind her back.
- (i) At no stage was any consultation held with her concerning the Trust's application in case no. 3568/2006, or any opposition thereto, and her instructions thereanent were never obtained; accordingly, Friedman Scheckter never held her mandate to consent to the order of 13 February 2007. She therefore further denied the contents of a letter addressed by Friedman Scheckter to the Trust's attorney on 25 January 2007, in which it was stated that a consultation had been held with her and that she had been advised that the Trust's claim

was unassailable. The full text of that letter, penned by Spruyt, read as follows:

“Z F NGCESHE AND 2 OTHERS // K F BAUTI AND 2 OTHERS CASE NO: 3568/06

OUR TRANSFER BAUTI TO JAKAVULA

YOUR TRANSFER BAUTI TO NGCESHE FAMILY TRUST

We have consulted with the Respondents in this matter and advised them that they have no defence and that the deal between the Respondents and the Applicants must proceed.

We are willing to withdraw our Notice of Opposition but will however only do so on the basis that the Respondents are not to pay the costs thereof. The fact of the matter is that we were unaware of the Affidavit (Annexure “M5”)(sic, the reference should be to annexure N5, the affidavit in which the second applicant declared that he was unmarried). Had you brought that Affidavit to our attention in response to our letter of the 20th of September 2006, the matter would not have gone further. The fact of the matter is that Bauti was acting on our instructions which we were giving him in accordance with the information at our disposal. Once you confirm that you will not be applying for a costs Order we will file a Notice of Withdrawal of the Opposition.”

- (j) She accordingly contended, on legal advice received, that the property could not have been validly sold without her written permission; that, as appeared from the second applicant’s supporting affidavit, he and the first respondent intended to effect the transfer of the property without her knowledge; that the first respondent who was throughout aware that she and the second applicant were married, could not advance that he, and accordingly the Trust, had been misled by the second applicant concerning his marital status; that in terms of s 15(2)(a) and (b), (4), (5) and (9)(a) the sale to the Trust was a nullity and unenforceable.
- (i) She accordingly sought the rescission of the court order at issue and leave to defend the Trust’s application in case no 3568/2006.

[10] In his supporting affidavit the second applicant confirmed the factual allegations made by the first applicant insofar as they related to him. Specifically, he confirmed that no consultations were ever held with them concerning the Trust’s application in case no 3568/2006 and that the first applicant’s allegations as to the events on 13 February 2007 in the offices of Friedman Scheckter were correct; that his dealings with the first respondent were, by agreement between them, kept secret from the first applicant because he wished to benefit himself and because the first respondent had assured him that the transaction could be implemented without her knowledge as the property was registered in his, the second applicant’s, name and the first applicant would not be called upon to sign any transfer documents; that he only revealed his collusive dealings with the first respondent when he and the first applicant consulted with their present attorneys; that the first respondent, who throughout was aware that he was married, was not misled by him as to his marital status. He added the following:

- (a) The first agreement with the first respondent was signed on 8 January 2004 after the first respondent had approached him to sell the property; when no payment was forthcoming for a period of two years he contacted the first respondent and the second agreement of 15 February 2006 resulted; when again no payment was forthcoming he lost interest and, after the intervention of Mpofu, he and the first applicant sold the property to Jakavula; when he told Mpofu of the earlier sale to the Trust but added that no payment had been received, Mpofu told him that they could then sell to Jakavula.
- (b) He accordingly considered the sale to the Trust as a thing of the past and this was confirmed when the first respondent presented him with a document for his signature, assuring him that the document effected the cancellation of his sale to the Trust. He now noted, however, that the document (the reference being to annexure N7 to the first respondent's affidavit in case no 3568/2006, referred to in para [6](d) above) purported to be a cancellation of the sale to Jakavula. The references in the document to "Mr Jakavula" and the date "29 July 2006" were not contained therein when he signed same and he assumed that the first respondent would complete the document by filling in the details relating to the sale of the property to the Trust. (The implication is that the document was fraudulently completed by the first respondent). He had throughout intended to implement the sale to Jakavula.
- (c) He accordingly aligned himself with the stance of the first applicant in the matter.
- [11] A further supporting affidavit, deposed to by Mpofu, was filed on behalf of the applicants. In broad outline he confirmed the allegations of the applicants concerning his introduction to them of Jakavula as a purchaser of the property and the latter's purchase thereof. He added the following. He obtained possession, apparently during early December 2006 (in circumstances which do not require to be set out), of a copy of the papers issued by the Trust in case no 3586/2006, handed same in at the offices of Friedman Scheckter and telephonically attempted to explain to the first applicant the import thereof, but there were language communication problems between them, and he was not sure whether she grasped his explanation. In the new year he was requested by the office of Friedman Scheckter to contact the applicants and bring them to the office. He did so on 13 February 2007. He confirmed the allegations of the applicants concerning what Spruyt conveyed to them on that occasion. He subsequently approached the applicants to advise them that Jakavula wished to take the matter further, and they agreed to seek further legal advice.
- [12] The answering affidavit of the first respondent in the present proceedings proceeded *inter alia* as follows:

In respect of the applicants' allegations as to their dealings with Spruyt, he referred to the supporting affidavit of the latter thereanent.

He denied the allegation that he had been party to any underhand or collusive dealings with the second applicant vis-à-vis the first applicant, nor had he stated to the second applicant that the transaction between them could go through without the first applicant's knowledge or her signing

any documentation by reason thereof that the property was only registered in the second applicant's name. In this latter regard he pointed out that as far as he was aware the Deeds Office, when attending to the registration of a property, would investigate and ascertain whether the seller is married in community of property. He further denied that he had been aware that the second applicant was married in community of property to the first applicant and, pointing out that no advantage would have accrued to either him or the Trust from his acting as the applicants alleged, averred that had he been so aware he would have insisted that the first applicant be a party to the transaction. He further denied that he had met the first applicant on two earlier occasions and averred that after having secured the order of 13 February 2007 he called on the applicants on 21 February 2007 to require them to sign the transfer documentation, and that was the first time for him to meet the first applicant. All his negotiations with the second applicant had been conducted telephonically and he had been unaware of the first applicant's existence. His only visit to the residence of the applicants had been on 8 September 2006 when he handed to the second applicant a letter from his attorney which, in effect, made a demand for the implementation of the agreement concluded between them.

On his visit to the applicants on 21 February 2007 both of them signed a power of attorney for the transfer of the property to the Trust, a copy of which was annexure A to his answering affidavit.

He did not deny the allegation that in selling the property to the Trust the second applicant acted without the knowledge of the first applicant and for his own benefit, but he did not admit that she had no such knowledge.

The inability to implement the first agreement of sale concluded with the second applicant was occasioned by the fact that ABSA Bank, which held a mortgage bond over the property, would not give its approval for the transaction to go through. For the same reason the implementation of the second agreement was delayed.

He denied that he had fraudulently secured the second applicant's signature to the document purporting to be a cancellation of the agreement with Jakavula. Having been advised by his attorney that ABSA Bank had informed him that the figures for the cancellation of the bond had been forwarded to Friedman Scheckter he telephoned the second applicant to inquire into the matter. The latter in fact told him that he was not aware of another sale of the property and that he had signed documentation relating thereto on the assumption that same related to his agreement with the Trust. He acceded to the first respondent's request that he sign a cancellation document in respect of the sale to Jakavula and when the first respondent called upon him for such signature the document in question was complete in all respects.

He stressed that, as reflected in Mpofu's affidavit, the latter had already in December 2006 advised the first applicant of the application brought by the Trust in case no. 3286/2006. (It should, however, be repeated that Mpofu intimated that because of language difficulties he was not sure whether the first applicant grasped what he conveyed to her).

[13] In his affidavit Spruyt stated:

that his firm attended to the proposed transfer of the property by the applicants to Jakavula;

that because of that involvement a copy of the application papers in case no. 3568/2006 was served on his firm on 20 November 2006;

that he filed a notice of opposition in the matter on 7 December 2006;

that he consulted with the applicants on 19 January 2007 as well as an estate agent (who may have been Mpofo);

that the details of what was discussed between him and the applicants could not be disclosed because same was subject to attorney and client privilege;

that, from his notes of the consultation prepared shortly thereafter, he could confirm, however, that he fully explained the legal position to the applicants including that they had no defence to the application and would have to withdraw their opposition thereto; he would, however, endeavour to persuade the attorney acting for the Trust not to pursue an order for costs; although unhappy with the turn of the events the applicants instructed him to proceed accordingly;

that pursuant to those instructions he addressed the letter to the Trust's attorney referred to in para [9](i) above, which

letter was dated 25 January 2007; and the matter was settled on the basis set out therein;

that he accordingly refuted the allegation by the applicants and Mpofo that the consultation was held on 13 February 2007 and the allegation that he advised the applicants that the Trust had taken an order earlier that morning.

[14] In a replying affidavit the applicants responded as follows to the first respondent's allegations as to how they came to sign the power of attorney to transfer (referred to in para [12] (c) above):

On 21 February 2007 an unknown man (not the first respondent) called on them at their home and advised them that he had been sent by Jakavula, who wished them to sign a document in connection with the property.

He exhibited to them a document which bore Jakavula's name, but he used same to cover the greater portion of the document which he wished them to sign.

Because he said he was sent by Jakavula and showed them a document bearing the latter's name, they signed the other document, without its contents being explained to them and without either of them perusing same as they urgently had to visit a sickly aunt.

The document bearing Jakavula's name was left with them, but this document, too, the first applicant did not peruse and merely put it in a drawer. It was in fact a copy of the order sought to be rescinded. It was only after receipt of the first respondent's answering affidavit in the present matter that it was realised that the document signed on 21 February 2007 was the power of attorney to transfer the property to the Trust. Had they been aware at the time of the nature of the document they would not have signed same.

[15] It bears mention:

that the order of court bears the common heading reflecting the names of the parties ie the three applicants (now respondents) and the three respondents (the present two applicants and Jakavula);

that the power of attorney to pass transfer was not only signed by the two applicants on the second page, but was also initialled by them at various places on the first page.

[16] (a) It is trite law that to succeed in an application for rescission of an order the applicant must show:

good cause (which includes a consideration of the question of whether the applicant's conduct was wilful in failing to oppose the proceedings in question, or the reasonableness of the explanation proffered of the circumstances in which a consent judgment was entered);

the bona fides of the application;

the bona fides of the defence ie that a triable issue is raised with prima facie some prospect of success (but without the applicant having to show a balance of probability).

These factors must be considered in conjunction with each other, and with the application as a whole, but without placing undue emphasis on any one of them.

(b) Where the order is sought to be set aside on the grounds of fraud the applicant must allege and prove:

that the successful litigant was a party to the fraud; that the evidence was in fact incorrect; that it was given fraudulently and with intent to mislead; that it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have issued an order other than that which it was induced by the incorrect evidence to give.

[17] Were I called upon in the present application to decide whether the defence now invoked by the applicants against the cause of action relied upon by the Trust for its entitlement to transfer of the property, as revealed in the papers filed in case no. 3568/2006 and the papers filed in the present proceedings, should in fact be upheld, I might, on an analysis of the conflicting

versions put forward by the respective sides and on the principles applicable to disputes of fact revealed in the papers filed in motion proceedings, have held against the applicants. I do not, however, have to consider that inquiry. That is not the decision that I have to make in this matter nor the approach to be applied. What does fall to be decided are the issues referred to in para [17] above.

[18] Of cardinal importance in this matter are certain provisions of the Act. For reasons that will appear below it is necessary to refer also to certain provisions that have no direct application to the present matter. The Act reads inter alia as follows:

“14. Subject to the provisions of this Chapter, a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act.

15. (1) Subject to the provisions of subsections (2), (3), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.
- (2) Such a spouse shall not without the written consent of the other spouse —
 - (a) alienate any immovable property forming part of the joint estate;
 - (b) enter into any contract for the alienation of immovable property forming part of the joint estate;
 -
 - (h) bind himself as surety.
- (3) A spouse shall not without the consent of the other spouse —
 - (c) donate to another person any asset of the joint estate.
- (4) The consent required for the purposes of ... 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.
- (5) The consent required for the performance of the acts contemplated in paragraphs (a),(b) and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.
- (6) The provisions of paragraphs (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.
- (9) When a spouse enters into a transaction with a person contrary to the provisions of subsection

(2) or (3) of this section, , and —

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions,

it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection

(2) or (3),;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection

(2) or (3), and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.”

[19] In *Bopape and Another v Moloto* 2000 (1) SA 383 (T) Maritz J correctly observed that s 14 did away with the erstwhile marital power, and that s 15(1) was in similar vein.

[20] The issues in the appeal in *Amalgamated Banks of South Africa Bpk v De Goedere en ‘n Ander* 1997

(4) SA 66 (SCA) concerned the applicability of s 15(2)(h) and (6) to the facts of the case. The respondents, each holding a 12% interest

in a close corporation, had stood surety for the obligations of the close corporation to the appellant bank. The respondents were both married in community of property and neither of their spouses had given the written consent for the suretyship as required by s 15(2)(h). Two questions had arisen for decision: (i) whether the exception contained in s 15(6) applied to the transactions, and (ii) whether non-compliance with s 15(2)(h) meant that the deeds of suretyship were invalid. The Provincial Division had answered the first question in the negative and the second in the affirmative. It accordingly non-suited the bank in its claim against the respondents for payment of the debt owed to it based on the suretyships. The bank appealed against the first finding. The appeal was upheld, the majority of the court finding that the first question ought to have been answered in the affirmative. In view of that finding it was unnecessary for the court to consider the second question.

[21] In the Provincial Division (*Amalgamated Banks of South Africa v Lydenburg Passasiersdienste BK en Andere* 1995

(3) SA 314 (T) Kirk-Cohen J founded his affirmative answer to the second question on the following reasoning (at 322F-I):

'Namens die eiser is betoog dat die aangaan van 'n borgakte teenstrydig met die bepalings van subarts (2)(h) en (5) nie nietig is nie, veral in die lig van die feit dat die Wet nie so bepaal nie en ook omdat daar geen strafbepaling vir so 'n handeling in die Wet is nie.

Die beginsels wat toegepas moet word, word uiteengesit in *Swart v Smuts* 1971

(1) SA 819 (A) te 829 in fine

- 830C. Sien ook Metro Western Cape (Pty) Ltd v Ross 1986

(3) SA 181 (A) te 188F.

Die bewoording van art 15(2) is gebiedend: 'So 'n gade mag nie . . .' ('such a spouse shall not . . .'). Uitsonderings word in subarts (5) en (6) geskep; wat subart (5) betref, word formele vereistes neergelê om die ander gade te beskerm. Subartikel (6) bepaal dat, in sekere besondere omstandighede wat om die een gade wentel, hy 'n borgakte kan onderteken sonder die vereiste toestemming van die ander gade. Om te betoog dat die nie-nakoming van subart (2)(h) nie tot nietigheid lei nie, sal die gevolg hê dat subarts (5) en (6) irrelevant is, wat nooit die bedoeling van die Wetgewer kon gewees het nie.

Die feit dat die verbod in subart (2)(h) in die negatief gestel is en dat daar ook geen strafbepaling vir oortreding daarvan is nie, kan nie tot 'n ander uitleg lei nie. Die bewoording en die bedoeling van art 15 in die geheel is voor-die-hand-liggend: 'n borgakte deur 'n gade aangegaan waar subarts (5) en (6) nie van toepassing is nie is nietig. Hierdie nietigheid is nie alleen gemik op borgaktes nie maar 'n heel reeks aktiwiteite wat 'n gemeenskaplike boedel nadelig kan affekteer (vergelyk art 15(2)(a) - (g) en ook art 15(3)).

Daar bestaan geen twyfel dat, behoorlik uitgelê, 'n handeling teenstrydig met die bepalings van art 15(2) nietig is."

[22] The facts in Bopape were that the second plaintiff, who was married in community of property to the first plaintiff, had during an illicit relationship

with the defendant, made certain donations to the latter, without the consent of the first plaintiff. The plaintiffs sued for recovery of the amount of the donations on the basis that they were invalid in terms of s 15(3)(c). It was argued on behalf of the defendant that a donation without the required consent had no effect other than between the spouses; that in terms of s 15(9)(b) the aggrieved spouse had his or her remedy: should the joint estate suffer a loss as a result of a transaction without the required consent, an adjustment could be effected in favour of the other spouse upon the division of the joint estate. It was further pointed out that a division of the joint estate could be sought in terms of s 20 of the Act. A further argument was that the fact that in terms of s 15(4) consent could be given by way of ratification indicated that the alienations were not void ab initio for want of consent. Maritz J, relying inter alia on the Provincial Division decision in ABSA rejected the argument on the basis encapsulated in the headnote as follows:

"Held, that there was no sound reason why an aggrieved spouse should suffer prejudice pending the possible eventual division of the joint estate, which might or might not come about. It could also have been prejudicial to an aggrieved spouse to seek a division of the joint estate in terms of s 20 of the Act. To accommodate a lawful donation or alienation without value, the consent of both spouses was required. When it was clear that such consent was absent, the alienation could not be lawful. It followed of necessity that such alienation was void.

Held, further, that the Legislature had merely provided for the manner in which informal consent could be given. The particular juristic act was incomplete without the consent of the other spouse and therefore without any force or effect. Section 15(4) merely provided that the juristic act could be completed by later consent. Once it was clear that the required consent had neither been sought nor given, illegality followed and the particular juristic act could not survive.

Held, further, that the moment the causa for the acquisition fell away, it followed of necessity that the particular asset or assets had to be returned whence it or they came, being the joint estate. The defendant had no right to retain what she had received and the plaintiffs had every right to recover it.”

[23] With respect, I agree with the approach in Bopape in respect of the issues that arose in that case. It requires to be pointed out, however, that in that case there was no dispute that the defendant had throughout been fully aware that the two plaintiffs were married in community of property and that the requisite consent of the first plaintiff to the donations had not been obtained. There was accordingly no room for a consideration of the applicability of the provisions of s 15(9)(a).

[24] Joubert, Law of South Africa, First Reissue, devotes a paragraph to the interpretation to be placed on s15(9)(a): paragraph 73, at 98 et seq. He points out that except in one case the Act makes no direct pronouncement on the validity of acts requiring the consent of the other spouse which are entered into without such consent, except in one case. A distinction can be drawn between three scenarios:

instances where a third party does not know and cannot reasonably know that he is entering into a transaction without the consent of the other spouse as required;

instances where he does know;

instances where he does not know but can reasonably be expected to know that is the position.

He comments that in the firstmentioned instance the Act deems the transaction to be one entered into with the required consent. I agree with the comment. The result is that despite the absence of the required consent the transaction is valid and enforceable.

In the other two instances the learned author observes that the Act is silent on the issue, but records, in common with other writers

referred to by him and despite the contrary view expressed in other works, that the better view is that the transaction is void and that the transaction certainly cannot be enforced against the joint estate or against the spouse who performed the act. He adds that where there has been an alienation, it should be possible for one of the spouses to reclaim the property alienated without relying on common law remedies, and that where payments have been made there appears to be no reason why the spouse entitled to payment should seek his or her remedy against the other spouse only and not claim from the third party, leaving it to the third party to claim on the basis of enrichment from the spouse who received the payment. He points out that any other

interpretation would remove the protection afforded to the other spouse, because the third party could ignore the provisions with impunity and leave the spouses to settle the dispute between themselves even when they know the payment was not due.

Again, I align myself with the learned author's approach, which is in accordance with the approach in Bopape.

The further observation of Joubert is that it appears therefore that a party who enters into one of the transactions mentioned in the legislation is put on his/her enquiry. The extent of the enquiry to be undertaken is, however, uncertain and he goes on to deal with the views of other writers thereanent. For present purposes I will content myself with the comment that there is merit in the stance that the third party is put on some enquiry, but it is unnecessary to express a view on the extent thereof.

- [25] I turn now to deal with the three requirements referred to in para [17] above, and will do so in reverse order.
- [26] The only aspects relating to the issue of whether a bona fide defence has been shown which will be dealt with are, firstly, the question of the first respondent's knowledge at the relevant time that the two applicants were married (which I consider would certainly have put him on his enquiry in respect of the nature of the matrimonial property regime, and a failure to embark on that enquiry could be found to visit him with knowledge that the requisite consent had not been given). The second question, allied to the first, is whether he was a party to fraudulent conduct in colluding with the second applicant to exclude the first applicant from the transaction, and pursuing same in the content of his founding affidavit in the earlier application.
- [27] If the decision relating to the first question merely required a consideration of an allegation that the first respondent knew of the marriage together with the factual averments founding that allegation and counter-allegations denying same, a finding that a triable issue had been raised would not present any difficulty. Mrs Potgieter, for the respondents, however, made the following submissions. There were aspects appearing from the papers offering support for the denials by the first respondent of the allegations made by the applicants. Secondly, there were aspects that pointed strongly to the two applicants not being credible witnesses and she went so far as to contend that their credibility was compromised to such an extent that no credence could be attached to their evidence at all. The first submission was correct and, in accordance with what I have already intimated, *prima facie* the evidence of the applicants attracts cognizable strictures. Again, however, I must not lose sight of the test to be applied at this stage: without the necessity of showing a balance of probability have the applicants raised a bona fide defence having *prima facie* some prospect of success? Despite the submissions of counsel I answer that question in the affirmative.

- [28] Similarly, in respect of the reliance on alleged fraud, whatever strictures are prima facie to be passed on the credibility of the second applicant in respect of his allegations that the first respondent colluded with him, I find that a bona fide defence with prima facie some prospect of success has been raised.
- [29] On the issue of the bona fides of the application to rescind Mrs Potgieter again sought to stress the compromised credibility of the applicants on material aspects, which she contended for. The submission was misplaced. The question is whether the applicants bona fide have the intention of relying on the defence they have raised if the order in question is rescinded. The answer to that question must also be in the affirmative. There can be no suggestion that the present proceedings are to be ascribed to delaying tactics on the part of the applicants. On the contrary, their obvious motive in seeking the rescission – to enable them to secure the higher price offered by Jakavula, or if he is no longer a purchaser, from some other purchaser – underlines the genuineness of the applicants' intention to see this matter through to its termination on the basis of the defence they have raised.
- [30] The requirement of “good cause” embraces, but is not limited to, the existence of a substantial defence. *Silber v Ozen Wholesalers (Pty) Ltd* 1954
- (2) SA 345 (A) at 352. It also includes a bona fide presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the order in question being rescinded. *Galp v Tansley NO and Another* 1966
- (4) SA 555 (C) at 560B. Both of these elements of the concept “good cause” have already been found to be present.
- [31] What counsel debated further was the circumstances under which the order sought to be rescinded came to be made by consent.

On the papers it is in dispute whether Spruyt was mandated to consent on the applicants' behalf to the order sought by the respondents. It was especially on this score that Mrs Potgieter contended that the applicants had revealed their mendacity and that this was one of the extreme cases where, even on the test presently

applicable, it should be held that a respondent's averments are conclusive of the factual dispute. I do not propose to enter into a consideration of that issue and I will for present purposes assume, without deciding, that Spruyt did indeed receive a mandate to consent on the applicant's behalf to the order sought.

That is, however, not the end of the matter. The question still remains whether in the circumstances the consent was valid or, more accurately, whether the applicants have raised such validity as a triable issue. In this regard I propose to refer only to Spruyt's evidence. Because of his invoking of attorney/client privilege there is no information of the details of what transpired at the consultation, save that he consulted with the applicants, explained the legal position to them and secured their acceptance that they had no defence and agreement that the order be consented to.

Without anything more, it cannot be excluded that Spruyt was not given full instructions on matters having a bearing on the applicability of s 15(9)(a). Whatever fingers might be pointed at the second applicant on this score, who for reasons of his own might not have been as frank and forthcoming as he should have been, it cannot be found in respect of the first applicant – and that would be sufficient for present purposes – that she, a lay person in legal matters, acted unreasonably in not giving full instructions. The result would be that Spruyt's advice to them would have been founded on incomplete instructions. If that were so, then, an explanation for the consent to the order has been furnished which, albeit subject to criticism, passes muster.

If on the other hand, the allegations now made by the applicants were in substance conveyed to Spruyt, it would appear that his advice to the applicants was then based on a misinterpretation of the law or a misapplication thereof to the facts. Again, a sufficient explanation for the consent to the order would be there.

While the above approach might be considered by some as being too accommodating to the applicants, I am persuaded that the interests of justice are served thereby.

[32] It follows that, in my judgment, the applicants have satisfied the requirements for the rescission of the order.

[33] I do not consider it necessary to consider certain of the arguments presented on the question of costs. Suffice it to say that the result of the reopened application in case no. 3568/2006 could have a bearing on the appropriate order to be made in respect of the costs of the present proceedings.

[34] The following order will accordingly issue:

The order made on 13 February 2007 in case no. 3568/2006 is rescinded.

The costs of the application are reserved for decision by the court determining the reopened case no. 3568/2006.

F. KROON

JUDGE OF THE HIGH COURT

Date of hearing: 22 November 2007

Date of judgment: 23 November 2007

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