

SOUTH AFRICA / JUDGMENT

George and Another v Dirk and Others (56949/21) [2023]

ZAGPJHC 1255 (27 October 2023)

[2023] ZAGPJHC 1255

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

56949/21

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case Number: 56949/21

In the matter between:

DESMOND

DOUGLAS GEORGE

First

Applicant

MYRTLE

MAUREEN GEORGE

Second

Applicant

And

DIRK

CORNELIS UYS N.O.

First

Respondent

CARL

ALEXANDER GREATOREX N.O.

Second
Respondent
HESTER
SOPHIA UYS N.O.
Third
Respondent
THE
CORNELIS FAMILY TRUST
Fourth
Respondent

JUDGMENT

STRYDOM, J

Introduction

- [1] This matter concerns two written agreements, both entered on or about 2 March 2018, between the applicants, Desmond Douglas George and Myrtle Maureen George (the applicants), and the respondents, the Cornelis Family Trust (the Trust), represented by its trustees. The first written agreement, on the face of it, is a sale agreement (the sale agreement) in terms of which the immovable property situated at [...], Roodepoort (the Property) was sold to the Trust for the sum of R600 000 (Six Hundred Thousand Rand). The second agreement was, on the face of it, a lease agreement (the lease agreement). The applicants also signed a power of attorney, on or about 15 March 2018, providing the Trust's representatives with authority to transfer the Property to the Trust.
- [2] The applicants claim the sale agreement was a simulated transaction and that the parties intended to enter into a loan agreement in terms of which the Trust undertook to advance a loan in the amount of R600 000 to the applicants against the collateral security of the Property. The applicants seek orders declaring, inter alia, the sale agreement to be void ab initio, and compelling the Trust to attend to the transfer of ownership of the immovable property back to the applicants, and costs.
- [3] The respondents oppose the application on the basis that the claims have no merit, as the agreements are what they purport to be, and the application should be dismissed. The respondents filed a conditional counterclaim that should the applicants succeed in their application then the Applicants must repay the amount of R611 190.90, plus interest based on the undue enrichment of the applicants.

Background

- [4] The applicants, an elderly married couple, purchased the Property 22 years ago. They were the registered owners and resided at the Property since then. In 2018 they ran into financial difficulties but could not obtain a loan. They were prepared to put up the Property as

security to obtain the loan. Eventually, through an agent, they were introduced to the Trust which was prepared to advance them a loan against security of the Property. Despite the structure of the transaction, the applicants maintain that it was at all relevant times their intention not to permanently relinquish ownership of the Property but rather to put it up as collateral security for the repayment of the loan.

- [5] According to the applicants the Trust was willing to provide them with the loan but on its proposed terms. In the founding affidavit, it was stated that they signed the sale and lease back agreements which entitled the Trust to perfect its security. This is also why the power of attorney was signed. They allege that this transaction was unlawful. It is common cause that the loan was not repaid.
- [6] The structure of the loan and security, according to the applicants, was that they would borrow R600 000 from the Trust, although they ended up only receiving R350 000, and to secure the loan they would sign the sale agreement in terms of which the Property was sold for R600 000 to the Trust. The Trust became entitled to take transfer of the Property, but it was never the common intention between the parties that the applicants would permanently divest themselves from their ownership of the Property.
- [7] In terms of the lease agreement, which was simultaneously entered into by the parties, the applicants could lease the Property for one year from the date of transfer to the Trust. The applicants had to pay R11 000.00 rental and R1 000.00 option fee, totalling R12 000 per month, from the date of transfer of the Property to the Trust. In terms of clause 25.1 of the lease agreement, the applicants were provided with an option to repurchase the Property for R700,000 during the lease period. According to clause 25.4 should the applicants want to exercise this option, any bond approvals and other conditions attached to the option must be in place and approved before the expiry of the initial lease period so that the option is unconditional at that time. The terms of the repayment of the loan are not clearly stipulated in the agreements but it appears that the loan could have been repaid by the applicants in the lump sum of R700 000, having regard to clause 25.1 of the lease agreement which provides for the repurchase of the Property. The repurchase of the Property would effectively have constituted the repayment of the loan.
- [8] The applicants averred that the Property was worth substantially more than R600 000 and attached a municipal account which reflects a valuation of R920 000.
- [9] As stated hereinbefore, it was argued on behalf of applicants that the true nature of the agreement was a loan, not a sale and that this was a simulated transaction. They understood it to be a loan agreement and so did the Trust. The parties knew all along that the written sale agreement was not intended to be a sale agreement but rather a loan agreement. The applicants further contend that there was no valid real agreement to transfer ownership, an essential requirement under the abstract theory of transfer for immovable

property. They deny intending to permanently relinquish ownership despite signing transfer papers. In sum, the applicant's case is that the sale agreement should be declared a simulated transaction, as it is not a sale agreement, and that they remained

the true owners of the property.

- [10] According to the Trust, the agreements are exactly what they purport to be, to wit, a sale agreement, which allowed the transfer of the Property to it, and a lease agreement in terms of which the Trust leased the Property to the applicants for one year from date of transfer of the Property to the Trust. It is denied that this transaction constituted a loan agreement.
- [11] The Trust countered the applicant's version on several grounds, in the main, it was argued that ownership was lawfully transferred to the Trust, but the applicants then defaulted on paying rent entitling the Trust to cancel the lease agreement. The dispute between the parties, therefore, relates to what the true intentions of the parties were when the sale agreement was entered into.
- [12] The respondents contended that the applicants should have realised when it elected to launch motion proceedings instead of an action, that a material dispute of fact whether the transaction was, as evidenced by the sale agreement, a sale, or a simulated loan agreement. For this reason, the court should dismiss the application since it should have been foreseen that this factual dispute was not capable of being decided on the papers before the court.
- [13] The applicants disputed this and submitted that the matter turns on a point of law regarding simulation which could be decided on common cause facts and does not require oral evidence.
- [14] The court must consider if this issue can be decided on the papers before the court.
- [15] The respondents submitted that the applicants must prove that both sides intended to conceal the truth, not just themselves, and that there is no evidence that the Trust meant to disguise a loan. The Trust denies entering into a loan agreement and says it planned to buy the property and rent it back, and none of the "features" raised by the applicants prove simulation. This can only be decided on trial.
- [16] Before a decision can be made whether this court can decide the matter on the papers the legal requirements for a finding that a transaction is simulated should be restated and considered.
- [17] In Amler's Precedents of Pleadings[1], the learned author, with reference to case law[2] defines a simulated transaction to be essentially a dishonest transaction because the parties to the transaction do not intend it to have the legal effect it purports to convey. The purpose of the disguise is to deceive by concealing the real transaction. In such a case, substance rather than form determines the nature of a transaction.

[18] The test for simulation is not simply whether there is an intention to give effect to a contract in accordance with its terms. Invariably,

when parties structure a transaction to achieve an objective, other than the one ostensibly achieved, they intend to give effect to the transaction on the terms agreed. The test requires an examination of the commercial sense of the transaction, of its real substance and purpose. In *Roshcon v Anchor Auto Body Builders*,^[3] the SCA found as follows:

“Whether a particular transaction is a simulated transaction is therefore a question of its genuineness. If it is genuine the court will give effect to it, if not, the court will give effect to the underlining transaction that it conceals. And whether it is genuine will depend on a consideration of all the facts and circumstances surrounding the transaction”

[19] To apply this test a court will have to consider the intention of the parties having not only regard to the terms of the agreements but also the broader factual context or surrounding circumstances in existence when these agreements were entered into, the genuineness of the transactions, the unusual features of the transaction, and the commercial sense it makes. There are indeed unusual features detectable when these agreements are jointly considered. Why was there a buy-back clause at all and why did it take one year and two months before the Property was transferred? These aspects point to a simulation but the court is not going to come to a final conclusion in this regard. Particularly, in circumstances where it appears that the applicants appeared to have at least agreed that transfer of the Property could have taken place, although not permanently. I also do not make a final decision in this regard. In my view, the best way to establish the facts pertaining to these issues is by way of oral evidence and cross-examination. Only then legal conclusions should be reached.

[20] It goes further. The applicant’s alleged that the sale and lease-back structure of this transaction is unlawful. It was submitted that the agreements of sale and lease together constituted impermissible credit agreements. The court was referred to the full court of the Gauteng Division, Pretoria, which matter involved the same Cornelis Family Trust. The full court sat in an appeal from a finding of the National Consumer Tribunal.

[21] In this matter cited as *National Credit Regulator v Cornelis Family Trust and 3 Others*^[4] the Tribunal found that the agreements for the sale and leaseback of the fixed property in that case were simulated transactions.

[22] The matter concerned an appeal by the trustees of the Cornelis Family Trust against sanctions imposed by the National Consumer Tribunal for violating the National Credit Act. The Trust had entered into agreements with consumers to purchase their properties below market value, with the consumers then leasing back the properties with an option to repurchase. The Tribunal found these agreements constituted unlawful credit agreements designed to disguise loans, as the consumers were essentially borrowing money with their properties as security.

[23] The Trust appealed mainly against the sanctions requiring them to reimburse all consumers and appoint an auditor to identify other

possible similar credit agreements. The High Court upheld the Tribunal's finding that the agreements violated the National Credit

Act as simulated credit transactions.[5]

[24] In my view evidence would be required not only on the simulation claim but also on the possibility of a finding of breaches of the National Credit Act. A factual finding after oral evidence is led is also important concerning the claim for cancellation of the deed of transfer and the reregistration of the Property in the name of the applicants. This pertains to the so-called real agreement between the parties.

[25] In the case of *Legator McKenna v Shea & Others*[6] Brand JA found as follows—

“In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or ‘saaklike ooreenkoms’. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see e.g., Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en ‘n andere 1980

(3) SA 917 (A) at 922E-F; *Dreyer and Another NNO v AXZS Industries (PTY) Ltd* supra at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlining contract, e.g., sale, ownership will not pass - despite registration of transfer-if there is a defect in the real agreement.”[7]

[26] The court was referred to the matter of *ABSA v Moore*[8] where the court with reference to the facts of that matter decided that the transaction was not a simulated transaction. The court found that the Moores and other victims of the so-called Brusson scam did not disguise their contracts as something they were not. The court further found as follows:

“On the contrary: they were hoodwinked as to the nature of the transaction. They believed them to serve some other purpose entirely.

The Brusson transactions, certainly the ones before the Free State High Court and the court a quo, were not simulated in the sense in which that term is properly used. The question is whether they were rendered invalid as a result of a fraud perpetrated on the victim client. And the further question is what the victim clients really intended to achieve by contracting with Brusson and so-called

investors.”[9]

[27] It was further held that –

“The distinction is an important one. Where a transaction pursuant to which property is to be transferred is simulated – where all parties intend to disguise the true nature of the transaction – the transferor and the transferee may well intend to transfer ownership. And since a valid transaction is not required for a transfer to be effected, the transfer itself may not be

impeached.”[10]

[28] I am of the view that the matter of ABSA v Moore is distinguishable on the facts as in that matter the rights of third parties were considered and not immediate parties to the transaction. Clearly, a finding on the facts is important to establish what the legal consequences are in this case before court. On the papers before the court, it is difficult to ascertain the intentions of the parties, particularly with reference to the transfer of the Property.

[29] Then there is also the conditional counterclaim for unjustified enrichment. Depending on the factual and legal findings this claim may be sustainable or not. The extent of enrichment will require evidence and the *condictio ob turpem vel iniustam causam* may become applicable. In my view, this can best be decided by a trial court.

[30] I intend to refer this matter to trial on the basis that cost to be cost in the cause. I have considered the respondent’s submission that a factual dispute should have been foreseen and that the application should be dismissed. I am of the view, that this matter is a rather complicated, one where a court might have decided that the intention of the parties to this transaction could have been inferred from the structure and terms of the agreements standing alone. However, this Court, decided not to draw inferences, especially where illegalities are averred, because it would, in my considered view, be just to refer this matter to trial where these issues can be properly ventilated.

[31] The following order is made:

Order

1. This matter is referred to trial.
2. The Applicant’s Notice of Motion will stand as a simple summons and the Respondent’s Answering Affidavit as a Notice to Defend.
3. Within 20 days of this Order, the Applicants must file their declaration. Thereafter the Uniform Rules of this Court would apply in relation to filing of further pleadings, discovery, and the conduct of the trial.
4. Costs to be cost in the cause.

R. STRYDOM, J

JUDGE OF THE HIGH COURT

For the Applicants: Mr. L. Mbale

Instructed by: LM and Company Attorneys Inc

For the Respondents: Mr. C. Bornman

Instructed by: Bester and Lauwrens Attorneys

Date of Hearing: 02 August 2023

Date of Judgment: 27 October 2023

[1] Harms Amlers Precedent of Pleadings 9 ed (LexisNexis, South Africa)

[2] See Zandberg v Van Zyl 1910 AD 302; Skjelbreds Rederi AS v Hartless (Pty) Ltd

[1982] 1 All Sa15 (A), 1982 (2) SA 710 (A).

[3] Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and others

[2014] 2 All SA 654 (SCA); 2014 (4) SA 319 (SCA) at para 27.

[4] National Credit Regulator v Cornelis Family Trust and 3 Others NCT/142671/2019/140.

[5] Id at para 6.

[6] Legator McKenna INC and Another v Shea and Others [2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009] 2 All SA 45 (SCA).

[7] Id at para 22.

[8] Absa v Moore [2015] ZASCA 171; 2016 (3) SA 97 (SCA).

[9] Id at para 26.

[10] ABSA v Moore above n 8 para 27.

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