

SOUTH AFRICA / JUDGMENT

Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd and Others (15914/2012) [2015] ZAGPPHC 683 (23 September 2015)

[2015] ZAGPPHC 683

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Fourie

CASE / FILE NUMBER

15914/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: 15914/2012

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

NUANCE

INVESTMENTS (PTY)

LTD

Plaintiff

and

MAGHILDA

INVESTMENTS (PTY)

LTD

First Defendant

JONATHAN

BRUCE SANDLER

N.O.

Second Defendant

GEOFFREY

ALAN WEST

N.O.
Third Defendant
CHRISTOPHER
HARDY BOULE
N.O.
Fourth Defendant
THE
REGISTRAR OF
DEEDS
Fifth Defendant
CENTURUS
(PTY)
LTD
Sixth Defendant
INVESTEC
BANK
LIMITED
Seventh Defendant
BARKOROX
INVESTMENTS (PTY) LTD
Third Defendant in Reconvention

JUDGMENT

D S FOURIE, J:

- [1] The plaintiff has sued the first defendant and the second to fourth defendants as trustees of the Sanjont Trust for the repayment of a purchase price of R60 million against transfer of three portions of farmland back to the said defendants. The action is essentially based on the common law claim for unjust enrichment in terms of the *condictio ob turpem vel iniustam causam*, alternatively the *condictio indebiti*, resulting from partial performance in terms of an illegal sale agreement and two other related agreements.
- [2] There is also an alternative claim based on the *rei vindicatio*. This claim has been instituted on the supposition that ownership of the disputed properties has indeed passed to the plaintiff and will not be transferred back to the first defendant and Sanjont. On that premise the plaintiff claims by way of a vindicatory action the eviction of the first defendant from those portions of land which it occupies. There was also a claim for the reimbursement of the plaintiff for the payment of certain rates and taxes in respect of the three portions of land, but this claim has been withdrawn at the commencement of the trial.

- [3] The first defendant and Sanjont have raised a special plea of prescription against the plaintiff's claim for the repayment of the purchase price of R60 million. There is also a counterclaim in terms whereof the first defendant and Sanjont seek rectification of the Deeds Registry in respect of the registration of transfer of all three portions of land. It is averred that since the sale agreement was null and void from the outset, there was no passing of ownership to the plaintiff in respect of the said registrations of transfer.

BACKGROUND:

- [4] In summary, the plaintiff's claim arises out of three agreements that were entered into between the plaintiff, the first defendant and the trustees who represented Sanjont. These three agreements were all part of one overall scheme in pursuit of a proposed development of land. These agreements are:

- a sale agreement entered into on or about 21 November 2007 between the plaintiff, the first defendant and the trustees who represented Sanjont in terms whereof five portions of farmland were sold to the plaintiff;
- a development agreement entered into on or about 21 November 2007 between the first defendant, the trustees of Sanjont, the plaintiff and the sixth defendant in terms whereof a certain development structure of the land in question was agreed upon;
- a long term lease agreement entered into on or about 15 January 2008 between the plaintiff and the first defendant in terms whereof it was agreed to replace the first defendant as lessor with the plaintiff whilst Sanjont would remain to be a lessee.

- [5] On 13 May 2008 and in terms of the sale agreement three of the five properties sold, being the remaining extent of Portion 4 of the Farm Elandsdrift (Portion 4), the remaining extent of Portion 6 of the Farm Elandsdrift (Portion 6) and the remaining extent of Portion 39 of the Farm Elandsdrift (Portion 39) were transferred by the first defendant and Sanjont into the name of the plaintiff by registration in the Deeds Office, Pretoria.

- [6] Simultaneously with the transfer of the properties referred to above, a mortgage bond 847166/2008 was registered over Portions 4, 6 and 39 in favour of the seventh defendant whereas a second covering mortgage bond 847412/2008 was registered over Portions 4, 6 and 39 in favour of the first defendant and Sanjont. It is common cause that pursuant to the sale, transfer of the said properties and registration of the mortgage bonds the total amount of R60 million was paid by the plaintiff to the first defendant and Sanjont.

THE PLEADINGS:

- [7] It is common cause on the pleadings that the sale agreement, development agreement and lease agreement were inextricably interlinked and formed part of one indivisible transaction. It is also common cause that these agreements were null and void from the outset with no legal force and effect, because:

- the sale agreement was entered into in contravention of section 3(e)(i) of the Subdivision of Agricultural Land Act No 70 of 1970 in that some of the land concerned (Portion 5, Portion 39 and Portion 46) were in fact undivided portions of agricultural land which were sold without the written consent of the Minister of Agriculture;
- the sale agreement did not comply with the formalities required by section 2(1) of the Alienation of Land Act No 68 of 1981 in that the description of Portions 39 and 46 was so defective that these properties could not properly be identified;
- the development agreement was dependent on and connected to the sale agreement and as a result of the sale agreement being null and void, the development agreement is also null and void;
- the long term lease agreement (with regard to Portion 39 and which was also dependent on and connected to the sale agreement) was entered into in contravention of section 3(d) of the Subdivision of Agricultural Land Act No 70 of 1970 in that it was in respect of an undivided portion of agricultural land for which there was no consent in writing by the Minister of Agriculture.

- [8] It is also common cause between the parties that the plaintiff is a subsidiary of the sixth defendant, Centurus (Pty) Ltd which has the same principal place of business as the plaintiff at the Irene Dairy Farm, Centurion. As was pointed out above, a mortgage bond was registered over Portions 4, 6 and 39 in favour of the seventh defendant (Investec Bank Ltd). Although the relief sought was initially opposed by the seventh defendant, it has since (on 21 January 2015) filed a notice of withdrawal. This means that the only parties actively involved in this litigation are the plaintiff, first defendant and Sanjont.
- [9] The main issues between the parties, as they appear from the pleadings, are the special plea of prescription with regard to the monetary claim of R60 million and the counterclaim in terms whereof rectification of the Deeds Registry with regard to the registration of the immovable properties, is sought. As far as the special plea of prescription is concerned, the first defendant and the trustees of Sanjont have accepted that they bear the burden to prove their plea of prescription, including the date on which the plaintiff obtained actual or constructive knowledge of the debt in question. Mindful of this onus, the only person who testified during this trial was Mr Sandler, a witness who was called by the first defendant. The plaintiff closed its case without calling any witness.

THE EVIDENCE:

- [10] Mr Sandler testified that he is a director of the first defendant and also one of the trustees of Sanjont. According to him Centurus (sixth defendant) had been chosen for purposes of the proposed development and for their expertise in doing larger developments and their vast experience in property development. The directors and shareholders of Centurus were Messrs Hendry van der Bijl, Trevor Glass and Mahin Naidoo. Mr Glass was the managing director and Mr Naidoo the chief financial officer. According to the witness Mr Glass and Mr

Naidoo were also the managing director and chief financial officer respectively of the plaintiff as well. He also said that Mr Glass is an attorney and a specialist in property development. They started their negotiations with Mr Hendry van der Bijl and later also had profile discussions with Mr Trevor Glass and Mr Mahin Naidoo. According to the witness everybody knew that the land in question constituted agricultural land. He explained it as follows:

“The Centurors Farm was farmland that was agricultural farmland and that was being developed and that is why they had a dairy farm and, our land because it was clearly agricultural and everybody understood that, we were discussing the fact that the majority ... at least 40% of the land would have to remain agricultural for us to get the development rights.”

- [11] The witness also referred to a document known as “Ingwenya Country Estate” (Exh B/3, p 211). He testified that the author of this document was Mr Naidoo. The purpose of the document was to outline a transaction and legal structure that could be adopted by Centurus and Sanjont to pursue the development of the land (par 1 thereof). In paragraph 3.1.2 it was recorded that one of the objectives and desired outcomes, seen from the viewpoint of Mr Sandler, was to “realise a higher value for the land than is achievable for unimproved agricultural land”. The proposed land transaction is set out in paragraph 4 thereof where reference is made, inter alia, to a purchase price and a non-refundable deposit. In a letter dated 5 October 2007 and signed by Mr Naidoo certain amendments to

the current offer were proposed (Exh B/3, p 215). In paragraph 7 of this letter it was recorded that “payment on transfer of R60 million not to be pro-rated due to inability to transfer pioneer property”. The witness explained that this property constituted the property known as Portion 5 which was an integral part of the proposed development, but that it had not yet been transferred to the first defendant, “because we had applied to the Minister of Agriculture for the actual subdivision of that piece of property” and that “Naidoo, Glass everybody knew about it”.

- [12] When asked whether Mr Naidoo or anyone else had suggested that they were unaware of the land classification, the witness replied as follows:

“No M'Lord, everybody that we interacted with was well aware that this was agricultural land. Hendry van der Bijl, even before the transactions were contemplated or signed, and certainly the chief executive officer Trevor Glass understood that this was agricultural land ... and so did Mahin Naidoo, as they themselves were developing agricultural land at Irene Farm which was owned by the Van der Bijls and themselves.”

- [13] The witness was then referred to a letter dated 13 May 2008 written by Plan Practice and addressed to the Department of Agriculture. The response of the department is contained in another letter dated 28 July 2008 which reads, inter alia, as follows:

“According to our records the abovementioned land, the Farm Elandsdrift ... is still agricultural land in terms of the Subdivision of Agricultural Land Act 1970 (Act 70 of 1970). A formal application must be lodged for the subdivision/township development thereof.”

Reference was also made to a special power of attorney signed by Mr Glass on 13 May 2008 in terms whereof Mr Peter Dacomb of Plan Practitce was appointed as the plaintiff s lawful agents.

[14] Reference was then made to a letter dated 23 June 2009 addressed by the plaintiff s attorneys to the defendants' attorneys (Exh C/7, p 666). In paragraphs 3 and 4 of this letter the following is stated:

“It appears from the agreement of sale that these two properties (to be subdivided portions of Portion 46 and 5 of Elandsdrift 527 J Q respectively) were at the time of conclusion of the agreement, and in fact still are, portions of agricultural land and subject to the provisions of Act 70 of 1970.

As you are aware any agreement of sale of a portion of agricultural land entered into prior to having obtained the Minister of Agriculture's consent for such subdivision, is void.”

[15] In cross-examination the confusion as to whether the witness had his initial discussions with Hendry or Adrian van der Bijl was clarified when he explained that it was Mr Adrian van der Bijl, as he only had met Mr Hendry van der Bijl at a much later stage. When asked whether he and Mr Adrian van der Bijl had a discussion about Act 70 of 1970, he replied that “no Acts and no reference to any of these laws were articulated”, but he added that “the principle was articulated, that it needed to happen and we needed experts to advise us accordingly”. The witness also explained that prior to the development in question, he had been involved in the transfer of three other portions of land which required the Minister's consent. According to him he was aware at all times “that you needed the Minister's permission in order to transfer farmland and these were farm portions and therefore, you would need the Minister's permission”.

[16] He later also gave the following explanation in cross-examination:

“The part of this transaction was Portion Five, and Portion Five was subject at that particular time to an application to the Minister. So in all the negotiations with the respective parties, which boil down to two in the end, they were patently aware that one of the key portions, constituting about 22 hectares was already subject to the process of Ministerial ... seeking Ministerial consent, because it needed to be subdivided ... so it (w)as patently clear to everybody that we engaged in, in this process and it was disclosed to all of them, exactly what the status of all the respective properties were and as I referred to earlier, Adrian van der Bijl was patently aware and so was Trevor Glass, the CEO and so was Mahin Naidoo, that they were dealing with agricultural land. It was common knowledge to all of us. “

[17] It was also put to him in cross-examination that during May/July 2007 “you were happy that you do not need prior Ministerial consent because you could go the DFA route (a reference to the Development Facilitation Act No 67 of 1995) and there at the DFA Tribunal, the Minister will get a chance to state his case” to which the witness replied as follows:

“Well respectfully, we prepared documents for professional development companies, to investigate, to do their own due diligence before they would tender, and the amounts as you know, about R130 to R150 million, so nobody would enter into transactions of that magnitude without doing their own due diligence ... I think that is a summary of our understanding at that particular time, subject to due diligence from the parties.”

THE SPECIAL PLEA OF PRESCRIPTION:

- [18] It was contended on behalf of the first defendant and Sanjont that, on the basis of the illegality of the agreements in question, prescription had begun running on the date that those agreements were concluded, i.e. 21 November 2007 in respect of the sale and development agreements and 15 January 2008 in the case of the long term lease agreement. It was argued in the alternative that any cause of action had arose, by the very latest, on 13 May 2008 being the date upon which the payment in terms of the illegal agreements were made (which is also the date of transfer of the said properties into the name of the plaintiff). Having regard to the fact that summons was served on the defendants by no later than 19 March 2012, it was submitted that the plaintiff had actual knowledge of the facts giving rise to its claim more than three years prior to this date or, in the alternative, that the plaintiff could have acquired such knowledge by the exercise of reasonable care.
- [19] In its replication to the special plea of prescription the plaintiff stated that it had no knowledge of the facts from which the claim or debt arose prior to 9 June 2009 and that the plaintiff's claim for repayment, alternatively for enrichment is reciprocal to or conditional upon the return of ownership in Portions 4, 6 and 39 to the defendant and that Sanjont. Put differently, repayment of the R60 million would only become due after return of the three properties because only from that moment would the one party be enriched and the other be impoverished.
- [20] It was further contended on behalf of the plaintiff that there is no proof on a balance of probabilities that the plaintiff had the actual or potential knowledge of the facts from which the debt arises. Three propositions were advanced. First, there is no proof that the plaintiff had actual or potential knowledge with regard to the legal classification or legal status of the land in question, namely that of “agricultural land” as defined in section 1 of Act No 70 of 1970. Second, there is no proof that the plaintiff had actual or potential knowledge concerning the absence or lack of any prior written consent by the Minister of Agriculture as required by section 3(d) and (e)(i). Third, there is no proof that the plaintiff had actual or potential knowledge of the fact that the description of the land in the sale agreement was so defective that such land was not properly identifiable.
- [21] In terms of section 11(d) read with section 12(1) of the Prescription Act No 68 of 1969, ordinary civil debts (referred to as “any other debt”) prescribed three years from the date on which the debt is due.

Section 12(3) provides as follows in this regard:

“A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

[22] The provision in section 12(1) that “prescription shall commence to run as soon as the debt is due”, means that the debt must be immediately claimable by the creditor in legal proceedings and that the debtor must be under an obligation to perform (*Benson v Walters* 1984 (1) SA 73 (A) at 82C-E). Having regard also to the provisions of section 12(3), the party raising prescription must therefore allege and prove the date on which the creditor acquired knowledge of the debtor's identity and the date on which the creditor acquired knowledge of the facts from which the debt arose. This can conveniently be referred to as actual knowledge. However, the defendant may, in the alternative, also allege and prove the date on which the creditor could, with the exercise of reasonable care, have acquired the relevant knowledge. This can be referred to

as constructive or deemed knowledge. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises. (*Drennan Maud & Partners v Town Board of the Township of Pennington* [1998] ZASCA 29; [1998] 2 All SA 571 (A) at p 575(i) and 580(e)-(f)).

[23] In *Minister of Finance & Others v Gore* 2007 (1) SA 111 (SCA) par 17 it was emphasised that time begins to run against a creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor

until the creditor has evidence that would enable it to prove a case comfortably. In short, the word “debt” does not refer to a cause of action, but more generally to a “claim” (*Drennan Maud & Partners v Pennington Town Board*, *supra*, at 583 c-d in a separate concurring judgment by Harms JA).

[24] What are the minimum facts that were necessary to enable the plaintiff to formulate a claim and to institute action? The parties are *ad idem* that the relevant facts for determining the issue of prescription are:

- that the formal and legal status of Portions 5, 39 and 46 were at all material times agricultural land as defined in Act 70 of 1970;
- that the Minister of Agriculture did not give his prior written consent for the sale of the portion or subdivision of the said portions of the Farm Elandsdrift as required by section 3(e)(i) of Act 70 of 1970;
- that the Minister of Agriculture did not give his prior written consent for a long term lease agreement over a portion or subdivision of Portion 39 as required by section 3(d) of Act 70 of 1970; and

· that the descriptions of a portion of Portion 39 and a portion of Portion 46 in the agreement of sale, were too vague as to identify the property sold.

[25] It should immediately be pointed out that according to this exposition it appears that the parties have in mind two separate “claims” in the broad sense of the meaning of that word, i.e. a claim based on the provisions of Act 70 of 1970 and a claim based on the provisions of section 2(1) of the Alienation of Land Act, No 68 of 1981 (description of property too vague). I do not understand this proposition to mean that for purposes of determining the issue of prescription knowledge of the facts relating to both claims should be a requirement. In my view knowledge of the facts (either actual or deemed) with regard to any one of the two claims, whichever became known first, would be sufficient. Put differently, the one claim is not dependent on the other, although both of them ultimately give rise to the same legal conclusion, i.e. that the sale agreement is null and void from the outset.

THE RECIPROCAL ARGUMENT

[26] I shall first consider the so-called reciprocal argument that the plaintiff's claim for repayment is conditional upon the return of ownership in the land to the first defendant and Sanjont whereafter the claim for repayment of the purchase price would become due. In this regard it is important to point out again that the word “debt” referred to in section 12(1) and (3) of the Prescription Act refers to the claim and not the cause of action (*Drennan Maud & Partners v Pennington Town Board*, supra, at 583 c-d). A complete cause of action would require restoration (if there was indeed a transfer of ownership), but the right to claim payment or to institute action is not dependent on actual restoration which must have had already taken place, as long as there is an offer to restore in the pleadings. In other words, actual restoration is not a precondition to a successful claim or

action. Furthermore, if the position were indeed as contended for by the plaintiff, it would mean that a creditor would be able to control the running of prescription to the detriment of his debtor as he or she deems fit, which will be contrary to the principles of the Prescription Act (cf. *Lydenburg Voorspoed Ko-operasie v Els* 1966 (3) SA 34 (TPD) at 37H-38A). Having regard to these considerations, I am of the view that there is no merit in this argument.

ACTUAL OR DEEMED KNOWLEDGE

[27] It was also contended that there is no proof that the plaintiff had actual or potential knowledge about the fact that Portions 5, 39 and 46 were at all material times agricultural land as defined in Act 70 of 1970 or that Mr Sandler had not obtained the required ministerial consent to enter into the agreements before they were signed. Counsel for the plaintiff argued in this regard that although Mr Sandler testified that everyone had known that the land in question was agricultural land, it is far from clear what his understanding (and by implication that of everyone else) of the term “agricultural land” was. Reference was made, inter alia, to the actual use, zoning and classification of the land in question and it was also argued that reference to a lack of ministerial consent was for the first time made in the letter of 23 June 2009 (by the plaintiff's attorneys to the defendants' attorneys).

- [28] Before considering the evidence of Mr Sandler, it is not only appropriate but also necessary to say something about the credibility and reliability of this witness. Counsel for the plaintiff criticised the demeanour of the witness by contending that he was evasive and sometimes also unreasonable. By doing so his reliability and perhaps even his credibility have been questioned. An assessment of the credibility and reliability of a witness has to take into account the general context, the witness' intelligence, memory and the ability to express him- or herself properly. It is a well-known fact that sometimes witnesses do make mistakes. For instance, in this case the witness erroneously referred to Mr Hendry van der Bijl when it was in fact intended to be a reference to Mr Adrian van der Bijl. One should therefore distinguish between bona fide errors and intentional untruths. I have had the opportunity to observe the demeanour of the witness and to listen carefully to his evidence and I have no reason to conclude that he was untruthful. There is, in my view, no reason to make a finding against him with regard to his reliability or credibility. This is a matter that should be decided on the evidence before me and the probabilities.
- [29] According to the evidence of Mr Sandler, Mr Glass was the managing director and Mr Naidoo the chief financial officer of not only Centurus, but also of the plaintiff in those capacities. He also testified that Mr Glass is an attorney and a specialist in property development. They started their negotiations with Mr Adrian van der Bijl, but later also had profile discussions with Mr Glass and Mr Naidoo. Those discussions took place, as I understand his evidence, before any of the agreements were signed. According to the witness everybody knew that the land in question constituted agricultural land and that "at least 40% of the land would have to remain agricultural for us to get the development rights".
- [30] The witness also referred to a document known as "Ingwenya Country Estate". He testified that the author of this document was Mr Naidoo. In paragraph 3.1.2 thereof it was recorded that one of the objectives and desired outcomes, seen from the viewpoint of the witness, was to "realise a higher value for the land than is achievable for unimproved agricultural land". He also referred to Portion 5 which was an integral part of the proposed development, but which had not yet been transferred to the first defendant, "because we had applied to the Minister of Agriculture for the actual subdivision of that piece of property". According to the witness Mr Glass and Mr Naidoo were aware of it. As far as the land classification is concerned, he testified that "everybody that we interacted with was well aware that this was agricultural land ... as they themselves were developing agricultural land at Irene Farm which was owned by the Van der Bijls and themselves".
- [31] During his evidence reference was also made to a letter dated 13 May 2008 written by Plan Practice and addressed to the Department of Agriculture. It is common cause that Plan Practice, who were practising as town planners, were the duly appointed agents of the plaintiff. The response of the department to their letter is contained in another letter dated 28 July 2008 in which it was confirmed that the Farm Elandsdrift "is still agricultural land in terms of the Subdivision of Agricultural Land Act 1970" and that a formal application "must be lodged for the subdivision/township development thereof". It is only thereafter, in a letter

dated 23 June 2009, that the plaintiff's attorneys pointed out to the defendants' attorneys what the legal position is with regard to the agreement of sale if no prior written consent by the Minister had been obtained.

- [32] When the witness was asked in cross-examination whether he and Mr Adrian van der Bijl had a discussion about Act 70 of 1970, he replied that “no Acts and no reference to any of these laws were articulated”, but he added that “the principle was articulated, that it needed to happen and we needed experts to advise us accordingly”. The witness also explained that prior to the development in question, he had been involved in the transfer of three other portions of land which required the Minister's consent. As far as this issue is concerned, he later also gave the following explanation in cross-examination:

“The part of this transaction was Portion 5, and Portion 5 was subject at that particular time to an application to the Minister. So in all the negotiations with the respective parties, which boil down to two in the end, they were patently aware that one of the key portions, constituting about 22 hectares was already subject to the process of ministerial ... seeking ministerial consent, because it needed to be subdivided ... so it (w)as patently clear to everybody that we engaged in, in this process and it was disclosed to all of them ...”.

- [33] When considering the evidence of Mr Sandler I have to take into account the fact that no witness was called by the plaintiff. It is trite that a defendant bears the burden (“onus probandi” or the overall onus) to prove a plea of prescription, including the date on which a plaintiff obtained actual or deemed knowledge of the debt (*Gericke v Sack* 1978 (1) SA 821 (A) at 826 and 827). However, if the defendant has established a prima facie case an evidentiary burden will come into existence in terms whereof the plaintiff will have the duty to adduce evidence in rebuttal. If the plaintiff fails to do so, it runs the risk that the evidence for the defendant may become conclusive.
- [34] In my view it is clear, from a conspectus of the evidence, that there was little doubt that Mr Sandler, Mr Glass and Mr Naidoo knew precisely what was meant by the term “agricultural land” as referred to in section 1 of the Subdivision of Agricultural Land Act. That is borne out by the evidence that they themselves were developing agricultural land at the Irene Farm as well as the reference in paragraph 3.1.2 of the document known as “Ngwenya Country Estate” (prepared by Mr Naidoo) to “unimproved agricultural land”. The attempt to distinguish between use, classification and zoning did not take the matter any further as the evidence of Mr Sandler of what he, Mr Glass and Mr Naidoo understood in this regard, is clear and there is no other evidence to contradict him. I therefore conclude that Mr Glass and Mr Naidoo as representatives of the plaintiff were at all material times before entering into the sale agreement on 21 November 2007 aware that the formal and legal status of Portions 5, 39 and 46 were agricultural land as referred to in Act 70 of 1970.
- [35] It was also contended that reference to a lack of ministerial consent was for the first time made in the letter of 23 June 2009 (by the plaintiff's attorneys to the defendants' attorneys). I cannot agree with this submission. Mr Sandler also referred to Portion 5 which was an

integral part of the proposed development, but which had not yet been transferred to the first defendant, “because we had applied to the Minister of Agriculture for the actual subdivision of that piece of property”. According to the witness Mr Glass and Mr Naidoo were aware of it. Later, in cross-examination, the witness again referred to Portion 5. He testified that “they were patently aware that one of the key portions, constituting about 22 hectares was already subject to the process of ministerial ... seeking ministerial consent, because it needed to be subdivided ... so it (w)as patently clear to everybody.” Furthermore, when the witness was asked in cross-examination whether he and Mr Adrian van der Bijl had a discussion about Act 70 of 1970, he replied that “no Acts and no reference to any of these laws were articulated”, but he added that “the principle was articulated, that it needed to happen and we needed experts to advise us accordingly”.

- [36] There is also no dispute that Plan Practice were the duly appointed agents of the plaintiff. They acquired actual knowledge that the land is agricultural land as defined in terms of section 1 of Act 70 of 1970 by the very latest during July 2008 when it was confirmed in writing by the department that the Farm Elandsdrift “is still agricultural land in terms of the Subdivision of Agricultural Land Act 1970” and that a formal application “must be lodged for the subdivision/township development thereof”. It is an established principle that knowledge acquired by an agent must be imputed to his principal where such knowledge is acquired by the agent in the course of his employment and where there is a duty upon the agent to communicate the information to his principal (*Willkins v Potgieter & Another* 1996
- (4) SA 936 (T) at 939F-G).
- [37] No doubt, this knowledge was acquired in the course of their employment and they had a duty to communicate this information to their principal for mainly two reasons: this information related to the essence of their mandate and a multimillion rand development was at stake. One should accept that, on the probabilities, they did convey this information to their principal. However, even if I have misdirected myself in this regard, the information contained in the letter dated 28 July 2008 should be deemed to have been acquired by Mr Glass and/or Mr Naidoo, as it could have been acquired by them with the exercise of reasonable care. They only had to consult with Plan Practice, bearing in mind that Mr Glass is an attorney and according to the evidence of Mr Sandler, also a specialist in property development.
- [38] Taking into account all the evidence in this regard, and the fact that no evidence was led by the plaintiff, I have to conclude that the representatives of the plaintiff not only had actual knowledge (or at least deemed knowledge) about the formal status (i.e. agricultural land) of the land in question, but also of the fact that the Minister of Agriculture did not give his prior written consent for the sale of the portion or subdivision of the said portions of the Farm Elandsdrift as required by section 3(e)(i) of Act 70 of 1970. I also conclude that such knowledge (with regard to the status of the land in question and the absence of written consent) had already been acquired by Mr Glass and/or Mr Naidoo when the agreement of sale was entered into during November 2007, but in any event not later than July 2008.

Taking into account that summons was served on the defendants by no later than 19 March 2012, it should follow that the plaintiff's claim for the repayment of the purchase price in the amount of R60 million has become prescribed. It is therefore not necessary to consider the argument with regard to the lack of knowledge in respect of the inadequate description of the land, as it is common cause that all three agreements (sale agreement, development agreement and long term lease agreement) were part of one overall scheme and were inextricably interlinked as one indivisible transaction with the result that they both suffered the same fate as that of the sale agreement.

THE COUNTERCLAIM:

- [39] It is convenient to deal both with the defendants' counterclaim as well as the alternative claim of the plaintiff based on the *rei vindicatio*. I shall first consider the counterclaim and if necessary, thereafter the vindicatory action for the eviction of the first defendant from those portions of land which it occupies.
- [40] In the counterclaim the first defendant and Sanjont seek rectification of the Deeds Registry in respect of the registration of transfer of all three portions of land (Portion 4, Portion 6 and Portion 39 of the Farm Elandsdrift). It was contended on behalf of the defendants that this is not a claim for delivery, but for rectification to reflect the true state of affairs, as there was no passing of ownership to the plaintiff in respect of the land in question.
- [41] It was contended on behalf of the plaintiff that the “real agreement” (also referred to in Afrikaans as “die saaklike ooreenkoms”) was not invalid by virtue of section 3 of Act 70 of 1970 because it did not pertain to a “portion of agricultural land”. All three portions of land as transferred were each cadastral units of land and the whole cadastral unit (in contrast with a portion thereof, which would require prior ministerial consent) was transferred. Therefore, so goes the argument, transfer of ownership to the plaintiff in respect of the said portions of land did in fact take place upon registration in the name of the plaintiff.
- [42] The legal position with regard to the underlying contract (e.g. a sale) and the so-called “real agreement” has been authoritatively dealt with by the Supreme Court of Appeal in *Leqator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) at par 20-22. It was pointed out that according to the abstract theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction such as, in this case, the contract of sale. It was also emphasised that, 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”. However, in that judgment it was also pointed out that “although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass - despite registration of transfer
- if there is a defect in the real agreement”.

[43] In *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188A the following was stated with regard to something done contrary to a direct prohibition of the law:

“It is a principle of our Jaw that a thing done contrary to the direct prohibition of the Jaw is generally void and of no effect; the mere prohibition operates to nullify the act ... If therefore on a true construct of s 3 the contracts in question are rendered illegal, it can make no real difference in point of law what the other objects of the ordinance are. They are then void ab initio and a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not.”

[44] In *Quartermark Investments (Pty) Ltd v Mkhwanazi & Another* 2014 (3) SA 96 (SCA) transfer of immovable property had taken place in circumstances where the real agreement was tainted by fraud. The SCA held that despite registration, ownership had not passed to the transferee (at par 25). See also in this regard *Gainsford v Tiffski Property Investments (Pty) Ltd* 2012 (3) SA 35 (SCA) at par 38 where it was emphasised that no legal consequences flow from a void act.

[45] The abstract theory of transfer (as referred to in *Legator McKenna Inc v Shea*, (supra, par 21) applies not only to movable but also to immovable property. According to that theory, the validity of the transfer of ownership is not dependent on the validity of the underlying transaction. However, the abstract theory does not apply in circumstances where the underlying transaction is illegal as opposed to one which is invalid. In *Legator's* case (at par 29) the SCA confirmed the principle that the abstract theory would apply where the underlying transaction was invalid (i.e. the failure to comply with a statutory requirement) but not where it was illegal (“prohibited by law”).

[46] In the present case the underlying transaction was not only invalid (failure to comply with the formalities required by s 2(1) of the Alienation of Land Act No 68 of 1981), but the sale agreement is also illegal as it was entered into in contravention of s 3(e)(i) of Act 70 of 1970. As pointed out above, the legal principle is clear - the abstract theory does not apply in casu where the underlying agreement is illegal. This also applies to the argument that the so-called real agreement was not invalid because it did not pertain to a portion of agricultural land. The purpose of the Act is not only to prevent alienation of undivided portions of agricultural land, but also to prohibit advertisements for sale. It is clear that the Legislature intended to prohibit any sale of an undivided portion of farmland, whether conditional or not, unless and until the subdivision has actually been approved by the Minister (cf. *Geue & Another v Van der Lith & Another* [2003] ZASCA 118; 2004 (3) SA 333 (SCA) at 344A-C).

[47] The real difficulty however is that the Subdivision of Agricultural Land Act is not aimed at prohibiting the transfer of cadastral units, but is aimed at prohibiting sales of undivided portions of agricultural land without the consent of the Minister. Portion 39, which was transferred to the plaintiff, was subject to the retransfer of the “excluded portion of Portion 39”. That term was defined to be “a portion of Portion 39 represented by the figure A on the sketch plan measuring 0.9 hectares”. (See in this regard the agreement of sale, clause 28.2 read with the definition in clause 1.2.2). The prohibition therefore still applies to the

transaction in question as, inter alia, it contemplates the retransfer of an undivided portion of Portion 39. There could thus be no “real agreement” to justify the transfer of ownership, as the real agreement itself was not only defective, but also illegal. For these reasons I conclude that there was no passing of ownership to the plaintiff in respect of Portion 4, Portion 6 and Portion 39 of the Farm Elandsdrift. This conclusion also implies that the plaintiff cannot succeed with its vindicatory claim for the eviction of the first defendant from any of these portions of land.

ORDER:

In the result I grant the following order:

1. The plaintiff's claim is dismissed with costs;
2. The first to fourth defendants' counterclaim is upheld with costs and an order is granted in terms of prayers I and 2 thereof;
3. The order for costs referred to above (in par 1 and 2) shall include the costs consequent upon the employment of two counsel.

D S FOURIE

JUDGE OF THE HIGH COURT PRETORIA

Date: 23 September 2015

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