

SOUTH AFRICA / JUDGMENT

Scholtz v Scholtz (4958/2008)

[2011] ZAWCHC 125; 2012 (1)

SA 382 (WCC) (2 February 2011)

[2011] ZAWCHC 125

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

4958/2008

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IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case number: 4958/2008

In the matter between:

ELZE SCHOLTZPlaintiff

and

THEODORUS ERNST SCHOLTZDefendant

JUDGMENT:

2 FEBRUARY 2011

Le Grange, 3:-

- [1] In this matter the Plaintiff instituted an action against the Defendant for specific performance in terms of a donation deed. The legal question for determination in terms of Rule 33(4) of the Uniform Rules is whether a donation stante matrimonio of property encumbered by a mortgage bond may validly be donated to another party, even though no reference is made to the mortgage bond in the deed of donation.
- [2] It is common cause that the parties in November 2007, whilst still married, entered into a written agreement. The relevant portions of this agreement, which forms part of the Plaintiff's particulars of claim as n aanhangsel A", records the following:-

"1. Die skenker (Defendant) skenk aan die begiftigde (Plaintiff), as 'n skenking inter vivos sy halwe aandeei in 'n sekere erf no 1809, Bakkerhoogte, wat die skenker se eiendom is kragtens Transportakte No T27151/2004 ("die eiendom").

2.1. Die skenker onderneem om onmiddelik al sodanige handefinge te verrig as wat nodig mag wees om die eiendom aan die begiftigde oor te dra.

2.2. ...

3. Die begiftigde sal die oordragkoste, met inbegrepe van hereregte, betaal.

4. Die begiftigde aanvaar die skenking met dank..."

[3] The Defendant in paragraph 9 of his amended plea raised the following legal defence

"In ieder geval is die eiendom Erf 1809 Bakkershoogte gehou kragtens transportakte T2715/2004 verbind by wyse van 'n eerste verband ten gunste van Nedbank Beperk tot 'n bedrag van ongeveer R2 miljoen. Geen voorsiening word gemaak in aanhangsel 'A' met betrekking tot Nedbank Beperk se regie en hoe ditgeraak word nie en is aanhangsel A' om hierdie rede ook onafdwingbaar,"

[4] Mr. A C Oosthuizen, SC, assisted by Mr. P van der Heever, appeared for the Plaintiff. Mr. A S de Villiers appeared for the Defendant.

[5] In *Sawides v Sawides* 1986(2) SA 325 (T), a similar question was considered at 332 G - 333 F. For the present purpose, it is perhaps necessary to refer to all the relevant paragraphs:-

"The further consideration is whether a property which is subject to a real right of the bondholder, being the building society, can be donated without reference in the deed of donation. Special deed of donation which specifies how the bond is to be paid before effect can be given to the donation. The obligations of the bond certainly cannot be transferred to the children. The applicant was the registered owner of the property but subject to the encumbrance of the real right of the building society. In the special power of attorney she gave no indication that she is donating to her children only a part of her ownership of the property, by saying that "I donate my house" means that I give unqualified ownership in the property to the donee.

Mr Woudstra has argued that because no time was stipulated when transfer had to take place the existence of the first mortgage bond was not a suspensive condition to the donation and he contended that the bond could be discharged out of the respondent's own resources or the respondent as guardian could discharge the bond out of the minor's resources, the Court could have been approached to substitute the minors as debtors or that the donor could have discharged the bond herself. That is so. Those are possibilities. But the point is this that in terms of this s 5 the terms had to be stipulated in the deed. That is the meaning of the words "unless the terms thereof are embodied in the written document". In my view merely to say she donated the property presupposes that she was the absolute owner thereof which she was not. A donor can donate a defined limited right in a property provided that he is the absolute owner of that limited right which he wishes to donate. In *Joubert Law of South Africa* vol 8 para 124 the following is said:-

What may be donated? Everything which is in commercium may be the subject of a donation. If the promise to donate involves the property of a third party, dominium will not be passed on transfer to the donee unless the third party acquiesces in the gift. If the third party has not granted permission then the donee can only acquire ownership by means of prescription. It is not only single articles which may form the subject of a donation but also a universitas rerum which has accrued to the donor. One may donate all one's goods, both present and future. The donation of all one's goods may be made either by way of a donatio mortis causa or donatio inter vivos. Where the gift of all one's goods is made inter vivos there will be a presumption that only present goods (and not future goods) are intended. The gratuitous release from a debt may amount to a donation but not a renunciation of a right which has not yet accrued to the donor. Not only ownership but also limited real rights in property, such as a mortgage bond or the ownership of land subject to a usufruct may be donated'. The last sentence is authority for my saying that she could have donated her unrestricted right of a portion of the ownership of the property but not as it was done in the present case. In the present case no effort was made to define the extent of her ownership in the property which she donates. One must be mindful of the fact that she is not the absolute owner (the words "absolute owner" also come from the description in Law of South Africa) of the property. The whole of her ownership is subject to the real right of the bond holder. In my view "the terms of the donation" were not reduced to writing as required by s 5." [6] The substratum of Mr. Oosthuizen's argument is that the dictum in the Sawides case is obiter in nature as it omitted to consider the fundamental principles of a donation and should not be followed. Moreover, the provisions of Section 5 of the General Law Amendment Act No 50 of 1956 cannot be more onerous than Section 2 (1) of the Alienation of Land Act 68 of 1981 and should be interpreted similarly. Furthermore, the failure or omission to specify in the deed of the donation the real rights of bondholders cannot render a donation invalid as this is not even a material term required for the alienation of land. [7] Mr. de Villiers heavily relied on the dictum in the Sawides matter to support his contention that the description of the donation in the deed was incomplete and as a result the requirements of Section 5 of the General Law Amendment Act have not been met. [8] The provisions of Section 5 of the General Law Amendment Act 50 of 1956 stipulate the following:- "No donation concluded after commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarily executed: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses." [9] It is common cause that in casu the deed of donation is executory in nature. It is also not in dispute that the property in question is encumbered by a bond as is alleged by the Defendant in his amended plea and no provision is made in the donation deed as to how the bondholders' rights are to be dealt with. [10] It is well accepted in our law that a donation is an agreement whereby a person, "the donor", under no legal obligation undertakes to give something, including the gratuitous release or waiver of a right, to another person, called "the donee", with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage. In this regard see *Ovenstone v Secretary for Inland Revenue* 1980

- (2) SA 721 AD at 736 H - 737 A and Lawsa Second Edition vol 8 part 1 at para 301. [11] The contention by Mr. Oosthuizen that the provisions in Section 2
- (1) of the Alienation of Land Act should also be applicable to donations is, in my view, not without merit. The provisions of Section 2(1) provide as follows:- "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority." [12] The word "alienation" is defined in the Act as follows:- "'alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and 'alienation' has a corresponding meaning." [13] In *Stalwo (Pty) Ltd v Warv Holdings (PM) Ltd and Another* 2008
- (1) SA 654 (SCA) at 658 at paragraph [7] the following was held:- "Section 2 (1), whose objective is to achieve certainty in transactions involving the sale of fixed property regarding the terms agreed upon and limit disputes, requires an agreement for the sale of land to be in writing and signed by the parties. That means that the essential terms of the agreement, namely the parties, the price and subject matter, must be in writing and defined with sufficient precision to enable them to be identified. And so must the other material terms of the agreement." [14] This dictum is instructive. In my view, the same objective must underpin the provisions of Section 5 of the General Law Amendment

Act, namely, to achieve certainty in transactions. [15] In the context of donations of an executory nature the words, "the terms", must therefore at least refer to all the essential terms, namely; the subject matter which must be defined with sufficient clarity, that one party transfers property to the other, and finally, that one party shall render no counter-performance at all or a counter-performance if necessary which is of little value. [16] In the present matter, the property donated in terms of the deed of donation was encumbered by a mortgage bond. No reference was made to such mortgage bond in the written contract. On the face of the contract, the Defendant appears to be the owner of an unencumbered portion of the property, which is not the case. Since limited real rights in property such as a mortgage bond or the ownership of land subject to a usufruct may be donated, the need to define the real extent of one's ownership in property becomes imperative. The failure to do so will definitely fall short of the requirements as stipulated in section 5(1) of the General Law Amendment Act, Act 50 of 1956. See also *Stalwo* supra at 658. [17] In casu, the manner in which the Defendant defines his ownership is one of absolute owner, which he is not. Moreover, the entire property is encumbered by a bond in favour of Nedbank. It is unclear whether the Defendant intended to donate an unencumbered property or whether the intention was that his obligations be substituted with the Plaintiff. [18] The rights of bondholders, in my view, must be an important consideration where a donation of an encumbered property is concerned as no transfer of immovable property can be registered unless the bond over the property is cancelled or the transferee is substituted for the transferor as debtor in respect of the bond. In this regard see section 56(1) and 57(1) of the Deeds of Registries Act, 47 of 1937. [19] Mr. Oosthuizen argued that the deed only stipulates that the Plaintiff must pay the transfer costs,

thereby implying that the Plaintiff is excluded from paying any other costs, including the outstanding balance of the bond which amount to approximately two million rand. This may be so, but it is only one of the possibilities. In terms of the law, the terms of the donation must

be stipulated in the deed. In this instance it was not done and only demonstrates that the terms of the donation are vague, uncertain and not defined properly and with sufficient clarity. [20] The failure of the Defendant to define the full extent of his ownership of the property, which was subject to the real right of the bondholder, clearly fall short of what is required by law. [21] The reasoning in the Sawides case is therefore sound. By reason of the foregoing, "the terms of the donation" were not reduced in writing as required by law. [22] It follows that the parties failed to comply with section 5(1) of the General Law Amendment Act 50 of 1956, therefore rendering the contract of donation void. As such, the Plaintiff's action cannot succeed. [23] In the result the Plaintiff's action is dismissed with costs. LE GRANGE, J

What may be donated? Everything which is in commercium may be the subject of a donation. If the promise to donate involves the property of a third party, dominium will not be passed on transfer to the donee unless the third party acquiesces in the gift. If the third party has not granted permission then the donee can only acquire ownership by means of prescription. It is not only single articles which may form the subject of a donation but also a universitates rerum which has accrued to the donor. One may donate all one's goods, both present and future. The donation of all one's goods may be made either by way of a donatio mortis causa or donatio inter vivos. Where the gift of all one's goods is made inter vivos there will be a presumption that only present goods (and not future goods) are intended. The gratuitous release from a debt may amount to a donation but not a renunciation of a right which has not yet accrued to the donor. Not only ownership but also limited real rights in property, such as a mortgage bond or the ownership of land subject to a usufruct may be donated'.

The last sentence is authority for my saying that she could have donated her unrestricted right of a portion of the ownership of the property but not as it was done in the present case.

In the present case no effort was made to define the extent of her ownership in the property which she donates. One must be mindful of the fact that she is not the absolute owner (the words "absolute owner" also come from the description in Law of South Africa) of the property. The whole of her ownership is subject to the real right of the bond holder. In my view "the terms of the donation" were not reduced to writing as required by s 5."

[6] The substratum of Mr. Oosthuizen's argument is that the dictum in the Sawides case is obiter in nature as it omitted to consider the fundamental principles of a donation and should not be followed. Moreover, the provisions of Section 5 of the General Law Amendment Act No 50 of 1956 cannot be more onerous than Section 2 (1) of the Alienation of Land Act 68 of 1981 and should be interpreted similarly. Furthermore, the failure or omission to specify in the deed of the donation the real rights of bondholders cannot render a donation invalid as this is not even a material term required for the alienation of land.

[7] Mr. de Villiers heavily relied on the dictum in the Sawides matter to support his contention that the description of the donation in the deed was incomplete and as a result the requirements of Section 5 of the General Law Amendment Act have not been met.

[8] The provisions of Section 5 of the General Law Amendment Act 50 of 1956 stipulate the following:-

"No donation concluded after commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarily executed: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses."

[9] It is common cause that in casu the deed of donation is executory in nature. It is also not in dispute that the property in question is encumbered by a bond as is alleged by the Defendant in his amended plea and no provision is made in the donation deed as to how the bondholders' rights are to be dealt with.

[10] It is well accepted in our law that a donation is an agreement whereby a person, "the donor", under no legal obligation undertakes to give something, including the gratuitous release or waiver of a right, to another person, called "the donee", with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage. In this regard see *Ovenstone v Secretary for Inland Revenue* 1980

(2) SA 721 AD at 736 H - 737 A and *Lawsa* Second Edition vol 8 part 1 at para 301.

[11] The contention by Mr. Oosthuizen that the provisions in Section 2

(1) of the Alienation of Land Act should also be applicable to donations is, in my view, not without merit. The provisions of Section 2(1) provide as follows:-

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[12] The word "alienation" is defined in the Act as follows:-

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

[13] In *Stalwo (Pty) Ltd v Warv Holdings (Pty) Ltd and Another* 2008

(1) SA 654 (SCA) at 658 at paragraph [7] the following was held:-

"Section 2 (1), whose objective is to achieve certainty in transactions involving the sale of fixed property regarding the terms agreed upon and limit disputes, requires an agreement for the sale of land to be in writing and signed by the parties. That means that the essential terms of the agreement, namely the parties, the price and subject matter, must be in writing and defined with sufficient precision to enable them to be identified. And so must the other material terms of the agreement."

[14] This dictum is instructive. In my view, the same objective must underpin the provisions of Section 5 of the General Law Amendment

Act, namely, to achieve certainty in transactions.

[15] In the context of donations of an executory nature the words, "the terms", must therefore at least refer to all the essential terms, namely; the subject matter which must be defined with sufficient clarity, that one party transfers property to the other, and finally, that one party shall render no counter-performance at all or a counter-performance if necessary which is of little value.

[16] In the present matter, the property donated in terms of the deed of donation was encumbered by a mortgage bond. No reference was made to such mortgage bond in the written contract. On the face of the contract, the Defendant appears to be the owner of an unencumbered portion of the property, which is not the case. Since limited real rights in property such as a mortgage bond or the ownership of land subject to a usufruct may be donated, the need to define the real extent of one's ownership in property becomes imperative. The failure to do so will definitely fall short of the requirements as stipulated in section 5(1) of the General Law Amendment Act, Act 50 of 1956. See also Stalwo supra at 658.

[17] In casu, the manner in which the Defendant defines his ownership is one of absolute owner, which he is not. Moreover, the entire property is encumbered by a bond in favour of Nedbank. It is unclear whether the Defendant intended to donate an unencumbered property or whether the intention was that his obligations be substituted with the Plaintiff.

[18] The rights of bondholders, in my view, must be an important consideration where a donation of an encumbered property is concerned as no transfer of immovable property can be registered unless the bond over the property is cancelled or the transferee is substituted for the transferor as debtor in respect of the bond. In this regard see section 56(1) and 57(1) of the Deeds of Registries Act, 47 of 1937.

[19] Mr. Oosthuizen argued that the deed only stipulates that the Plaintiff must pay the transfer costs, thereby implying that the Plaintiff is excluded from paying any other costs, including the outstanding balance of the bond which amount to approximately two million rand. This may be so, but it is only one of the possibilities. In terms of the law, the terms of the donation must

be stipulated in the deed. In this instance it was not done and only demonstrates that the terms of the donation are vague, uncertain and not defined properly and with sufficient clarity.

[20] The failure of the Defendant to define the full extent of his ownership of the property, which was subject to the real right of the bondholder, clearly fall short of what is required by law.

[21] The reasoning in the Sawides case is therefore sound. By reason of the foregoing, "the terms of the donation" were not reduced in writing as required by law.

[22] It follows that the parties failed to comply with section 5(1) of the General Law Amendment Act 50 of 1956, therefore rendering the contract of donation void. As such, the Plaintiff's action cannot succeed.

[23] In the result the Plaintiff's action is dismissed with costs.

LE GRANGE, J

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