

SOUTH AFRICA / JUDGMENT

Van Reenen and Another v Van Reenen and Others (9071/07) [2011] ZAWCHC 22 (22 February 2011)

[2011] ZAWCHC 22

COURT

Western Cape High Court, Cape Town

BEFORE

Schippers AJ

CASE / FILE NUMBER

9071/07

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IN THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT, CAPE TOWN

Case no: 9071/07

In the matter between:

REGINALD CHARLES VAN REENENFirst Applicant

PEARL JEAN VAN REENENSecond Applicant

and

FERROL WALLES VAN REENENFirst Respondent

MARY MIRIAM VAN REENENSecond Respondent

REGISTRAR OF DEEDS, CAPE TOWNThird Respondent

JUDGMENT: 22 FEBRUARY 2011

Schippers AJ

- [1] This is an application for an order declaring that the applicants are entitled to the registration of transfer into their names of the first and second respondents' undivided half-share in certain property, known as Portion 7 (portion of Portion 4 of the farm "Myrtle Grove" No. 824 situate in the Sir Lowry's Pass Local Area. Division of Stellenbosch, Western Cape ("the property"): and directing the first and second respondents to take the necessary steps give effect to that registration of transfer.

- [2] The first and second applicants are married to each other in community of property, as are the first and second respondents. The first applicant and the first respondent are brothers. Their father, the late Rudolph C. Van Reenen ("the deceased"), in his will bequeathed the property to them in equal shares. In January 1986 and in accordance with the provisions of the deceased's will, the property was transferred into the names of the applicants and the respondents who have since been registered as the joint owners of the property in equal and undivided shares.
- [3] The applicants' claim is founded on a written agreement which they allege they entered into with the respondents on 15 April 1982 ("the agreement"). The applicants say that in terms of the agreement, drawn up by the first applicant's former attorney, Mr. G. Malherbe ("Malherbe"), they purchased the respondents' undivided half-share in the property for R4 000.00; that the purchase price was paid then and there; and that during the negotiations, it was agreed that the first respondent would be entitled to occupy the house on the property in which he was living at that stage for the rest of his life. A reading of the agreement reveals that it is a redistribution agreement entered into between the first applicant and the first respondent. The relevant provisions are these:

"NADEMAAL die partye '« ooreenkoms aangegaan hei met betrekking tot die verdeling van 'n sekere erfposisie van hulle synde n Gedeelte (ironde getee in die A/deling van Stellenbosch. Gedeelte 7 van die Plaas Nr. 824,

.....

EN NADEMAAL die partye voorts ooreengekom het met betrekking tot 'n herverdeling van hulle erfposisie

.....

2. Dit word ooreengekom dat REG [Reginald Charles Van Reenen] 'n bedrag van R4000 (VIER DUISEND RAND) sal betaal aan FERROL [Ferrol Walks Van Reenen] in volle en finale vereffening van enige erfposisie of eis op erfposisie wat FERROL mag he en eis fen opsigte van die EIENDOM, ten opsigte van die boedel van sy wyle Vader en Moeder.
 3. Die bedrag van R4000.00 (VIER DUISEND RAND) sal betaal word deur REG aan FERROL gelyktydig met ondertekening hiervan, en die ondertekening hiervan deur FERROL is ook 'n erkenning van ontvangs van betaling.
 4. Hierdie ooreenkoms sal voorts ook voldoende kwitansie wees met betrekking tot die ontvangs van gemelde FERROL van sy erfposisie in die gemelde boedel en so ook sy posisie van die EI EN DOM. "
- [4] The respondents deny that they entered into the agreement. They say that there were no negotiations between them and the applicants regarding the purchase of the first respondent's half-share of the property; that they did not sign the agreement; and that they did not receive the sum of R4 000 from the applicants.

- [5] It is convenient to deal firstly with the respondents' contention that there are substantial legal impediments to the relief sought by the applicants. These are that the applicants' claim has prescribed; and that the alleged agreement is void for want of compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 ("the Alienation of Land Act").

Prescription

- [6] The agreement does not stipulate any date for the transfer of the first respondents' half-share of the property to the first applicant. It is settled law that if a contract does not stipulate a date for performance, the debtor is obliged to perform forthwith, alternatively within a reasonable time.¹
- [7] The agreement was concluded on 15 April 1982. Transfer of the property from the deceased's estate into the names of the applicants and the respondents jointly, was effected on 29 January 1986. The respondents therefore contend that a reasonable period for the implementation of the agreement has elapsed and that any claim based on the agreement has prescribed in terms of the Prescription Act 68 of 1969 ("the Prescription Act").
- [8] Section 10(1) of the Prescription Act provides that a debt shall be extinguished by prescription after the lapse of the relevant period, which in this case is three years. The first question that arises is whether the applicants' claim constitutes a "debt" as contemplated in the Prescription Act. Mr. Brown, who appeared for the applicants, submitted that the case does not concern enforcement of a contractual debt, as the respondents sold their personal right to claim transfer of the property from the estate to their co-heirs, the applicants. The applicants' performance was payment of the purchase price. By providing the applicants with the signed deed of sale, the respondents performed in terms of the agreement and ownership in the personal right to registration of transfer passed to the applicants. He contended that once the parties have performed, the administrative requirements of winding up the estate and registering transfer are then required to take place. These requirements, it was submitted, do not constitute obligations on the part of parties to a contract.
- [9] The argument cannot be sustained. Although the Prescription Act does not define the term "debt", it has a wide and general meaning and includes whatever is due from any obligation.² More specifically, an obligation to pass transfer of land is a "debt" as contemplated in section 10(1) of the Prescription Act.³ So too, a claim for the enforcement of an owner's rights to property.⁴ In the instant case the redistribution of the property was brought about by a sale agreement.⁵ The applicants are claiming performance of the very obligation or debt due under clause 2 of that agreement. It follows that the

applicants' claim to the undivided half-share of the property, constitutes a debt as envisaged in section 10(1) of the Prescription Act.

- [20] I accordingly hold that the applicants' claim has been extinguished by prescription.

Non-compliance with the Alienation of Land Act?

"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."

[22] Mr. Van Helden, who appeared for the respondents, submitted that the agreement was invalid for two reasons. The first is that it was not signed by the second applicant and the second respondent or their agents acting on their written authority. The second is that the agreement was signed by the second respondent in her capacity as a witness and not as a party.

[23] In my view, the argument is unsound and must be rejected. The applicants and the respondents, respectively, are married in community of property. The agreement was concluded in 1982 by the first applicant and the first respondent as the representatives, *ex lege*, of the community estate, at a time when the marital power still applied to all marriages in community of property. The marital power was abolished only in 1984 by the Matrimonial Property Act 88 of 1984, which came into force on 1 November 1984. In terms of section 11(1) of that Act, the common law rule in terms of which a husband obtained the marital power over the person and property of his wife,

was repealed. Section 11(4) of the Act provides that the abolition of the marital power shall not affect the legal consequences of any Act done before such abolition.

[24] At the time of concluding the agreement therefore, the first applicant and the first respondent, as representatives and administrators of the joint estate had full and absolute powers to alienate immovable property falling within the joint estate, even without the knowledge and consent of their spouses. In my opinion the agreement complies with the provisions of section 2(1) of the Alienation of Land Act.

[26] What remains, then, is the question of costs. It is trite that all costs are in the discretion of the court.²¹ This discretion must be exercised judicially in the light of the facts of each case. In essence it is a matter of fairness to both sides.²² The general rule is that costs follow the event, but this rule may be departed from where good grounds exist for doing so.²³ Even this general rule is subject to the overriding principle that costs are in the court's discretion.²⁴ In my view, there are good grounds for departing from the general rule. First, this application arose from the agreement. Although I have made no finding as regards its validity and it cannot be said that the respondents brought about the litigation.²⁵ It appears that the applicants and the respondents were under the impression that the applicants were indeed the owners of the

property, and it was necessary for the applicants to approach this Court. Furthermore, the respondents appear *in forma pauperis*. Despite this, in awarding costs, the court should be guided by the same general principles as in non-pauper suits.²⁶ However, if the purpose of an award of costs is to indemnify a party for the expense which he or she has incurred by having to

defend litigation, then any expense which the respondents may have incurred, is minimal. Their attorneys and counsel are not charging for their services and are to be commended for assisting the respondents. Furthermore, the dispute concerns a bitter disagreement between two brothers which has created a rift between them and their respective families that unfortunately seems

to have been carried over to the next generation. An adverse costs order is likely to aggravate this situation. For these reasons, I consider an order for costs inappropriate.

[27] The order of this Court is as follows:

The application is dismissed.

There is no order as to costs.

SCHIPPERS, AJ

1Nel v Cloete 1972

(2) SA 150 (A) at I69E-G.

2Electricity Supply Commission v Stuarts and Lloyds of SA (Pty) Ltd 1981

(3) SA 340 (A) at 344F-G.

3Desai NO v Desai and Others [1995] ZASCA 113; 1996

(1) SA 141 (A) at 146H-147A.

4Burnett and Others v Minister of Land Affairs and Others 2007

(6) 313 (SCA) para 19.

5Klerck NO v Registrar of Deeds 1950

(1) SA 626 (T) at 629.

6Nedcor Bank Bpk. v Regering van die Republiek van Suid-Afrika 2001

(1) SA 9R7 (SCA) paras 11 and 13; Minister of Finance and Others v Gore NO 2007

(1) SA 111 (SCA) para 17.

7Section 14 of the Deeds Registries Act reads inter alia as follows: "14(1). Save as is otherwise provided in this Act or in any other law or as directed by the Court-

- (a) transfers of land... shall follow the sequence of the successive transactions in pursuance of which they are made (b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land Provided that- (i).... (ii).... r (iii) if in the administration of the estate of a deceased person any redistribution of the immovable property in such estate takes place among the heirs of the deceased ... the executor or administrator of such estate may transfer or cede the property

direct to the persons entitled thereto in terms of such redistribution. "

7Section 14 of the Deeds Registries Act reads inter alia as follows:

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(a) transfers of land... shall follow the sequence of the successive transactions in pursuance of which they are made

(b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land Provided that-

(i)....

(ii).... r

(iii) if in the administration of the estate of a deceased person any redistribution of the immovable property in such estate takes place among the heirs of the deceased ... the executor or administrator of such estate may transfer or cede the property

direct to the persons entitled thereto in terms of such redistribution. "

8See-in this regard regulation 5(l)(e)(iii) of the Regulations in terms of section 103 of the Administration of Estates Act 66 of 1965.

8See-in this regard regulation 5(l)(e)(iii) of the Regulations in terms of section 103 of the Administration of Estates Act 66 of 1965.

9Nedcor Bank Bpk. v Regering van die Republiek van Suid-Afrika [2000] ZASCA 154; 2001

(1) SA 987 (SCA).

10Nedcor n 9 para 9.

11Drennan Maud & Partners v Pennington Town Board [1998] ZASCA 29; 1998

(3) SA 200 (SCA) at 209F-G.

12Munnikhuis v Melamed NO 1998

(3) SA 873 (W) at 890F per Cameron J, Wunsh J and Fevrier AJ.

13Munnikhuis n 12 at 890F.

14Munnikhuis n 12 at 891C-D.

15Munnikhuis n 12 at 893II-I.

16Van der Merwe et al (eds) Contract: General Principles (3rd ed 2007) 561.

17Desai 3at 147A.

18Christie: The law of Contract in South Africa (5th ed

2006) 488.

19Gericke v Sack 1978

(1) SA 821 (A) at 832C-D.

20The emphasis appears to be in the original.

21Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69; Union Government (Minister of Railways and Harbours) v Heiberg 1919 AD 477 at 484; Jtmbcrt et al (eds) The Law of South Africa (2nd ed) 2006 vol 3 Part 2 p 208 para 291 and the authorities there collected.

22Gelb v Hawkins 1960 vol 3 SA 687 (A) at 694A; Norwich Union Fire Insurance Society Ltd v Tuft 1960(6) SA 851 (A) at 854D.

23Frippv Gibbon & Co 1913 AD 354 at 363;Sackvilte West v Nourse and Another 1925 AD 516 at 529 and 532.

24Union Government v Heiberg n 21 at 484.

25Merher v Merher 1948

(1) SA 446 (A) al 453.

26Cilliers et al (eds) Herstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Couri of Appeal of South Africa (5h cd 2009) 1599.

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