

SOUTH AFRICA / JUDGMENT

Victor v Strohmenger and Another (2020/2015) [2020] ZANCHC 79 (20 November 2020) [2020] ZANCHC 79

COURT

Northern Cape High Court, Kimberley

BEFORE

Tlaletsi, Williams, Lever

CASE / FILE NUMBER

2020/2015

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTHERN
CAPE DIVISION, KIMBERLEY)

Case

No: 2020/2015

Date

of Hearing: 16 November 2020

Date

of Judgment: 20 November 2020

In

the matter between: SCHALK
WILLEM
VICTOR
Appellant
and
SUSARA
MAGRIETHA
STROHMENGER
1st Respondent
THE
REGISTRAR OF DEEDS,
KIMBERLEY
2nd Respondent

Coram: Tlaletsi JP; Williams J & Lever AJ

JUDGMENT

Lever AJ

1. This is an appeal to the full bench in this division of a judgment handed down by Sieberhagen AJ on the 27 September 2019. This appeal is with the leave of the court a quo.
2. The appellant, the plaintiff in the court a quo, sought restitution of his part performance, by way of action, in what he described as an unlawful and illegal oral agreement. The restitution sought, initially involved claiming the transfer of the property described as [...] M Street, Postmasburg ([...] M Street) alternatively the value of the said property and compensation for a property described as [...] E Street, Postmasburg ([...] E Street) as that property had been on-sold to a bona fide third party. The first respondent defended the action. The second respondent, as can be expected, played no active role in the action and the same holds true for the present appeal.
3. The first respondent filed a defence, firstly based on a special plea of prescription and secondly a denial of the oral agreement as pleaded by the appellant. The first respondent also provided an explanation of her said denial, such explanation constituted an alleged donation of immovable property. This 'explanation' is at the root of the issue that the court a quo had to deal with and is also at the root of the issue that this appeal court must wrestle with.
4. It is also important to note that at the commencement of proceedings in the court a quo, the appellant abandoned his claim for any compensation for the property described as [...] E Street, as well as the alternative relief for the value of [...] M Street.
5. The court a quo dismissed first respondent's special plea of prescription. There is no cross-appeal on this special plea of prescription.

6. The court a quo dismissed the plaintiff's action with costs and it is against this part of the judgment and order of the court a quo that the present appeal lies.
7. The pleadings in the action played a critical part in the court a quo and the same also holds true in the present appeal. In the circumstances it is appropriate to set out certain extracts of the pleadings verbatim. The basis of appellant's claim is set out in paragraphs 4, 5 and 6 of his Particulars of Claim (POC), which read as follows:

"4. On or about June 2009, and at Postmasburg, the plaintiff and the first defendant concluded an oral agreement. Both parties acted personally.
5. The express, alternatively implied, in further alternative tacit terms of the agreement were:
 - 5.1 The plaintiff will buy or-, alternatively, cause to be transferred into – the name of the first defendant, three immovable properties in the Northern Cape Province and more specifically the town of Postmasburg.
 - 5.2 The properties so transferred would be in value equal to the amount of R1 600 000,00.
 - 5.3 In lieu, the first defendant would transfer ownership of the immovable property known as [...] V Street, Postmasburg, to the plaintiff.
 - 5.3 (sic) The transfer of [...] V Street would coincide with the date of transfer of the third and last of these properties into the name of the first defendant, alternatively shortly thereafter.
6. The plaintiff performed in part in terms of the agreement in that:
 - 6.1 ...(relates to [...] E Street and no longer forms part of appellant's claim)...
 - 6.2 ...(relates to [...] E Street and no longer forms part of appellant's claim)...
 - 6.3 On or about 16 May 2012, he purchased the property known as [...] M Street, Postmasburg. The property was subsequently registered in the name of the first defendant. This transaction was occasioned by a written deed of alienation between the plaintiff qua purchaser and a third party.
 - 6.4 The plaintiff paid an amount of R1 600 000,00 as purchase price and paid the amount of R64503.50 in respect of transfer costs."
8. The appellant then went on to plead that on or about the 28 May 2015 by way of a letter from first respondent's attorney that first respondent had repudiated the aforesaid agreement. Further, that such repudiation had been accepted by the appellant. Appellant also then pleaded that the aforesaid agreement was 'illegal and unlawful' in that "...as far as the transfer of [...] V Street, Postmasburg into the name of the plaintiff was not reduced to writing as prescribed in section 2(1) of the Alienation of Land Act, 68 of 1981." [1] Appellant then went on to plead that he had thus performed in part in terms of an illegal agreement. [2]

9. In response to paragraphs 4 and 5 of the Particulars of Claim (POC) the first respondent pleaded:

“5.1 The content of the paragraphs under reply are denied as if specifically traversed individually and plaintiff is put to the proof thereof.

5.2 In amplification of the denial the first defendant denies the agreement as alleged was concluded.

5.3 The first defendant, ex abundanti cautela pleads that:

5.3.1 The plaintiff and first defendant were in a life partnership at all relevant times for purposes of the action, alternatively they lived together as husband and wife would do;

5.3.2 The plaintiff bought immovable property for the first defendant and caused the same to be registered in her name as token of his love and affection towards her and to comply with the maintenance obligation which the plaintiff assumed and undertook to fulfil towards the plaintiff (sic). The immovable properties, after transfer in the first defendant's name were hers to do with as she pleased as owner thereof;

5.3.3 During the subsistence of the relationship between the first defendant and the plaintiff, the plaintiff and the first defendant both had the benefit of the income from the properties whilst the plaintiff leased the same to third parties.”

10. In response to paragraphs 6.3 and 6.4 of the POC, the first defendant pleaded as follows:

“7. Save to deny that the purchase and registration of the immovable property in the first defendant's name was pursuant to or as a result of the alleged agreement referred to in paragraph 4 of the POC, the first defendant admits that the immovable property was registered in her name. The plaintiff is put to the proof of the allegation in paragraph 6.4 of the POC.”

11. In answer to the alleged repudiation of the agreement pleaded by the appellant, first respondent pleads that there was no agreement for her to repudiate nor was there an agreement capable of being repudiated.[3]
12. At the hearing in the court a quo the appellant, represented by Mr Grobler SC, after withdrawing the cause of action already referred to herein in relation to [...] E Street and the alternative claim for the value of [...] M Street, closed the appellant's case without leading any evidence. The first respondent, represented by Mr Reinders, likewise closed the first respondent's case, also without leading evidence.
13. After considering argument from both parties and considering the pleadings filed, Sieberhagen AJ concluded that on neither version set out in the papers could it be shown that the property known as [...] M Street was transferred into the first respondent's name as a result of an illegal contract. On that basis, the court a quo concluded that the appellant could not succeed with his claim as he had failed to prove his case.

14. The appellant sets out his grounds of appeal in a 5 page document containing 12 paragraphs. No purpose will be served by reproducing such document in this judgment. In summarising the case presented on behalf of the appellant, an attempt will be made to do justice to the intricate argument presented on behalf of the appellant in both the Heads of Argument filed on his behalf as well as the oral argument also presented on his behalf.
15. Mr Grobler contended on behalf of the appellant that both parties relied on an agreement with the other. That although these agreements were very different in nature, the salient fact in the present circumstances is that both contracts as pleaded respectively by the appellant and first respondent were illegal. That the agreement that the first respondent contended for was in the nature of a Remuneratory Donation. That as first respondent had not pleaded that such donation was in writing it was illegal or unlawful.
16. Mr Grobler went on to submit that there was a presumption against donations. Although Mr Grobler was careful not to use the words that once a donation was pleaded the onus of proof shifted, but the authorities he cited and the passages from those authorities clearly made that assertion.
17. However, in oral argument Mr Grobler conceded that he asserted no more than that the first respondent by pleading the donation attracted an evidentiary burden, what is described as a 'weerleggingslas' in Afrikaans. He did not assert that the first respondent attracted a full onus in the sense that the term is ordinarily understood.
18. It was Mr Grobler's assertion that all the appellant had to show was that the contract was illegal and that he had performed in terms of such contract to be entitled to restitution. Mr Grobler asserted that the appellant relied on the fact that on first respondent's own version the contract she had pleaded was illegal. That it was evident from the first respondent's plea, properly read, that she conceded that the transfer of [...] M Street was part of appellant's performance. That in the absence of the first respondent showing by way of pleading and the appropriate evidence that she was entitled to rely on the provisions of s 28(2) of the Act, appellant was entitled to restitution. That as first respondent had failed in that regard, Mr Grobler submitted that the appellant was entitled to judgment in his favour and that the appeal should succeed and the judgment of the court a quo be set aside and judgment in favour of the plaintiff be granted with costs.
19. Mr Reinders in his argument on behalf of the first respondent tried, somewhat half – heartedly to resurrect the special plea of prescription. He then argued that the court a quo was correct in finding that the first respondent had not admitted that [...] M Street formed part of the donation that first respondent had received and accepted from appellant.
20. At the outset I note that both the appellant and the first respondent used the label 'illegal contract' rather loosely.

21. An illegal contract is one that is prohibited by the common law or by statute.[4] An example of an illegal contract would be a contract to sell one's child. An 'invalid' contract is one which does not comply with certain statutory formalities.[5] Such as we are dealing with here, being failure to reduce a contract dealing with the sale of immovable property to writing and having it signed by the parties concerned as contemplated in s 2(1) of the Act.
22. In the present circumstances the distinction is raised only for the purpose of accurate terminology as, in this case, no consequences flow from the inaccurate use of terminology. The invalidity flows from the wording of s2(1) of the Act and the remedy available to the appellant is provided for by the provisions of s28(1) of the Act.
23. It is convenient to turn to the arguments raised by Mr Reinders first. The attempt to resurrect the special plea of prescription must fail. There is no cross-appeal in which first respondent challenges the court a quo's finding on the special plea of prescription. The first respondent has not made out a sufficient case for this appeal court to exercise any discretion it might have in respect of dealing with the special plea of prescription. It would not be appropriate to entertain such special plea in the present circumstances.
24. The finding in the court a quo that there is nothing in paragraph 5.3.2 of the plea[6] to indicate that first respondent admitted that [...] M Street was one of the properties that was donated to her by the appellant,

with respect, cannot be supported. My reasons for reaching that conclusion are, in short: The plea must be interpreted holistically;

and the plea must also be interpreted in its proper context. If one were to interpret the plea in that manner, one cannot escape the conclusion that if paragraph 5.3.2 of the plea related to properties other than those claimed by appellant in his particulars of claim, there would have been no need to set out and plead paragraphs 5.3.1 to 5.3.4. as the allegations in those paragraphs would simply not have been relevant to the appellant's claim.

25. Indeed, in such circumstances she would not have been entitled to plead the contents of the said paragraphs.
26. Furthermore, on a proper reading of paragraph 5.3.2 of first respondent's plea in its context, it can only relate to all the properties that the appellant claimed in his POC. This would include [...] M Street.
27. This then disposes of the issues raised by Mr Reinders on behalf of the first respondent. Turning now to the issues argued by Mr Grobler on behalf of the appellant.
28. It was debated with Mr Grobler as to whether the first respondent was obliged to go into the detail to the extent that she was obliged to plead that the donation was in writing as on our view of her pleadings she was not obliged to plead the donation and the other allegations set out in paragraphs 5.3.1 to 5.3.4 as she had done. She could simply have denied the factual allegations of the appellant's claim.

29. Mr Grobler responded that she had pleaded the donation and the other allegations as a defence and insisted that as a result thereof first respondent was obliged to plead whether the donation had been in writing. Mr Grobler was asked whether he had authority for that proposition. He had none, but nevertheless insisted that the first respondent was obliged to plead whether the donation was a written one or an oral one. He insisted that in the circumstances the donation that the first respondent pleaded had to be considered as an invalid agreement in the context of s2(1) of the Act as first respondent had not established that the donation was in writing.
30. It is correct that having pleaded the donation first respondent was also obliged to plead whether such donation was oral or in writing. The reasons for reaching this conclusion are twofold.
31. Firstly, on basic principles, the purpose of pleading is to define the issues between the parties and the plea must set out the factual basis for such defence in sufficient detail to enable the appellant to know what case he had to meet.[7]
- 31.1. Although the first respondent was not obliged to plead the donation and could have simply denied the factual contentions upon which appellant's claim was based, she chose to plead the donation. Having regard to the wording of Rule 22(2) of the Uniform Rules of Court the first respondent was then obliged to plead clearly and concisely the factual allegations she relied upon to establish the defence of a donation.
- 31.2. In these circumstances if the donation was a written one, she was obliged to make that contention in her plea.
32. Secondly, if there was a written deed of donation, on the pleadings as they stood, she could not have closed her case. In this regard she would have had an evidential burden to discharge. It would have been incumbent upon first respondent to have led evidence to establish that contention. However, first respondent closed her case without leading any evidence.
33. Finally, ERASMUS SUPERIOR COURT PRACTICE[8], relying on Odgers Pleading states there are two disadvantages of a defendant going on to plead her/his own story, being: "First, the defendant somewhat limits his case at trial; secondly, although the onus of proof is not in fact shifted by such method of pleading, the court may expect the defendant to prove an affirmative case, and is apt to find against him if he does not. The defendant will therefore be well advised not to add to his allegations unless this course is necessary." [9] (references omitted)
34. In the circumstances, and for the reasons set out above, this court is constrained to conclude that the first respondent's alleged donation is in fact invalid.

35. At this point it is convenient to return to the appellant's contention that all he had to establish was that the transaction was invalid and from that, it followed that he was entitled to restitution of his performance unless the first respondent established that the provisions of s28(2) of the Act applied to her acquisition of [...] M Street in the circumstances of her case.

36. In order to do this, it is necessary to briefly consider the relevant provision of the Act. The relevant portions of the Act are quoted hereunder.

““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.”

“2. Formalities in respect of alienation of land.—(1) 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.”

“28. Consequences of deeds of alienation which are void or are terminated.—(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2 (1), or a contract which has been declared void in terms of the provisions of section 24 (1) (c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and— ...”

“28(2) Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.”

37. The definition of ‘alienate’ read with section 2(1) of the Act clearly shows that the formalities required by section 2(1) apply to donations. Consequently, a donation of land will only be valid if it is reduced to writing and signed by the relevant parties thereto.

38. This clearly shows that the agreement of donation the first respondent relies upon is an invalid donation under the provisions of the Act.

39. Section 28(1) of the said Act provides that any person may recover any full or partial performance in circumstances where the underlying transaction does not comply with the formalities prescribed in s2(1) of such Act.

40. Mr Grobler was asked if the appellant was in any event bound by the finding of the majority of the court on the question of onus in the case of *Barkhuizen v Forbes*[10], where Leach J (as he then was) stated:

“I am therefore in respectful disagreement with my learned Brother Liebenberg’s conclusion that there was an onus upon the respondent to prove the donations which he relied upon and agree with Froneman J that the appellant bore the onus at all times of satisfying the court that she was entitled to repayment from the respondent of amounts which she claimed, including

those which respondent contended were donations.”

41. The effect of Mr Grobler’s answer was that Barkhuizen’s case was distinguishable from the facts of the present case, in that in the present case appellant was relying on first respondent’s own version which disclosed an invalid agreement of donation. Whereas, in Barkhuizen’s case, the appellant and the respondent pursued their own respective versions of the

facts.

42. In order to test whether this distinction is well made and valid we have to ask ourselves, what did the appellant need to prove in order to succeed in the court a quo. The answer is governed by the provisions of the Act set out above. Those provisions require nothing more than that there be an invalid transaction and a performance or a part performance under such invalid contract.
43. It being understood that the function of the pleadings in court proceedings is to define the issues in dispute. The appellant would be entitled to rely on the first respondent’s plea if it established those facts which form part of the onus which was and always remained his to discharge.
44. In other words, there is no reason why appellant cannot rely on concessions or factual allegations pleaded by the first respondent in order to discharge the onus which remains his to discharge. These are unusual circumstances, but in such circumstances it would be artificial to say to the appellant no you must adduce evidence to prove the version you have pleaded when the pleadings of the first respondent actually establish or concede the facts that he needed to establish in order to be entitled to the statutory relief

he claimed.

45. The decision of the majority of the court on the question of onus in the Barkhuizen case[11], the relevant passage has been quoted above, is indeed an authoritative statement of the law on how the issue of onus is dealt with in our law and it has general application, except in circumstances where the pleadings of the other party, whether by mistake or otherwise, concede the issues or facts which would discharge the onus that would ordinarily rest upon the claimant.
46. In the present circumstances, there is a real and valid distinction between the facts of the present case and the facts of Barkhuizen’s

case.[12]

47. That leaves the appellant's final contention that if first respondent wanted to escape restitution she had to bring her case within the provisions of s28(2) of the Alienation of Land Act[13] which is quoted above. In order to bring her case within the parameters of the said section the first respondent would have had to adduce evidence to achieve that end. The first respondent did not adduce any evidence and there is no evidence upon which this court can rely to make such finding.
48. In the circumstances, the appeal must succeed and the judgment of the court a quo must be set aside and replaced with the following order. There will be judgment in favour of the appellant in accordance with the prayers set out in paragraph 13.1, 13.2, 13.3 and 13.7 of the appellant's POC dated 30 September 2015.
49. The last question to be considered is the issue of costs. No reasons were presented as to why costs should not follow the result. I also cannot find any reason why costs should not follow the result.

Order:

- 1) The appeal is upheld and the judgment and the order of the court a quo is set aside.
- 2) The order of the court a quo is replaced with the following order:
 - a. Judgment is granted in favour of the plaintiff in accordance with the prayers contained in paragraphs 13.1, 13.2, 13.3 and 13.7 of the plaintiff's Particulars of Claim dated 30 September 2015.
 - b. The first defendant is to pay the costs of the action.
- 3) The first respondent is to pay the costs of this appeal.

Northern Cape Division, Kimberley

I agree.

Tlaletsi JP

Williams J

APPEARANCES:

Appellant: S Grobler SC oio Engelsman, Magabane Inc.

1st Respondent S J Reinders oio Haarhoff's Inc.

[1] Para 9 of the Particulars of Claim (POC) to be found on page 10 of the Record.

[2] Para 10 of the POC to be found on page 10 of the Record.

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- [3] Para 9 of the plea page 29 of the Record.
- [4] ABSA Insurance Brokers (Pty) Ltd v Luttig N.O. 1997 (4) SA 229 (SCA)
- [5] Enoccon Construction Ltd v Palm Sixteen Ltd 1972 (4) SA 511 (TPD) at p513F
- [6] Record p 27.
- [7] FPS LTD. V TRIDENT CONSTRUCTION (PTY) LTD 1989 (3) SA 537 (AD) at 541H to 542D.
- [8] Van Loggerenburg., ERASMUS SUPERIOR COURT PRACTICE, 2nd Ed. Loose Leaf Service 9, p D1-265.
- [9] Above.
- [10] 1998 (1) SA 140 (ECD) at p 159H.
- [11] Above.
- [12] Above.
- [13] Above.
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