



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 9 December 2021
Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Malan v Die Gerhard Labuschagne Familie Trust & Another [2021] ZASCA 171

Today the Supreme Court of Appeal dismissed an appeal from the Full Court of the Gauteng Division of the High Court, Pretoria (per Neukircher J, with Louw J and Ally AJ concurring). The matter arose from various property transactions. An immovable property, Erf 25 in Schweizer Reneke, was owned by Die Gerhard Labuschagne Familie Trust (the trust). In 1998, it subdivided Erf 25 into Portion 1 (portion 1) and the Remainder (the remainder). It sold portion 1 to one Ms Nel. It also leased to her, and granted her an option to purchase, part of the remainder (the disputed property). If she exercised the option, she was obliged at her own cost to subdivide the disputed property from the remainder and, on taking transfer or thereafter, could consolidate the disputed property with portion 1. Ms Nel exercised the option and had a diagram reflecting a subdivision of the disputed property and the remainder approved by the Surveyor General in 2004. She did not, however, take transfer of the disputed property. As such, the disputed property continued to form part of the remainder owned by the trust.

On her insolvency in November 2003, Ms Nel's trustee sold portion 1 to Mr Malan, the appellant. He took occupation of both portion 1 and the disputed property and,

thereafter, took transfer of portion 1. During 2012, the trust sold and transferred to the Delwerye CC (the CC) the remainder. The CC was unaware that anyone else claimed any rights in the disputed property. The deed of transfer reflected that the CC became owner of the remainder which had originally been subdivided in 1998 since that property had throughout been owned by the trust. This because Ms Nel did not take transfer of the disputed property after exercising the option. The CC applied to evict Mr Malan from the disputed property. He, in turn, counter-applied to rectify the sale agreement and the deed of transfer to him to reflect that what had been sold and transferred to him was a consolidated property formed by portion 1 and the disputed property. The basis for this was that a common error had reflected both the sale and the transfer as being of portion 1 whereas it ought to have reflected a sale and transfer of the consolidated property formed by portion 1 and the disputed property. Rabie J dismissed the application for eviction and granted the counter-application of Mr Malan. The full court upheld an appeal against the order of Rabie J.

The counter-application was premised on Ms Nel having obtained a real right in the disputed property, despite the accepted fact that she had not taken transfer. The Supreme Court of Appeal held that Ms Nel's right relating to the disputed property was a personal right to take transfer since our system of registration requires transfer in the deeds office in order to obtain ownership of immovable property. As such, the rectification claimed by Mr Malan was not competent since, even if the facts showed a basis for some form of rectification, it could not result in his obtaining better rights than those which Ms Nel had enjoyed in the disputed property. Those were the rights which devolved upon her trustee in insolvency and which could be transmitted to Mr Malan. In addition, that form of rectification was not competent since it would amount to depriving the CC of property transferred to it without its knowledge of any such claim.

For these reasons, the Supreme Court of Appeal dismissed the appeal of Mr Malan and upheld the order of the Full Court.