THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 584/2002

In the matter between:

MUSHAVHANI WILSON MADZIVHANDILA	**FIRST APPELLANT**
NYAMUNDZHEDZI MADZIVHANDILA	**SECOND APPELLANT**
JOYCE MULAUDZI	**THIRD APPELLANT**
TSHAMUNWE MASINDI	**FOURTH APPELLANT**

and

THIAMBIWI EUNICE MADZIVHANDILA	**FIRST RESPONDENT**
MAELE JACKSON MUSHASHA	**SECOND RESPONDENT**

CORAM: **MTHIYANE JA, JONES and VAN HEERDEN AJJA**

HEARD: **17 FEBRUARY 2004**
DELIVERED: **24 MARCH 2004**

Summary: Effect of agreement to hold property as nominee - whether agreement in violation of s 23 of the Venda Public Service Act 8 of 1986 – interpretation and application of s 23 of the Act - issue of illegality raised for the first time on appeal.

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:

[1] This appeal is concerned with the question whether certain assets which were held in the name of the second appellant (the second defendant) fell into the joint estate of the first respondent (the plaintiff) and the first appellant (the first defendant), who were married in community of property. Upon the dissolution of the marriage between the plaintiff and the first defendant by a decree of divorce on 25 March 1998 a division of the joint estate was ordered. The second respondent (the fifth defendant) who was appointed to receive and liquidate the assets of the joint estate was unable to do so because of a dispute which arose between the plaintiff, on the one hand and the first defendant and his mother, the second defendant, on the other, as to whether certain assets registered in the second defendant's name formed part of the joint estate or not. The disputed assets were the following:

1.1 An immovable property described as Portion 2 of Stand 37 situated in Thohoyandou (the Stand) and

1.2 Permission to occupy a business site at Tshilamba in the district of Mutale, all buildings on this site as well as all rights in the business being conducted thereon (the Site).

[2] The plaintiff instituted action in the Thohoyandou High Court for an order declaring that the Stand and the Site were assets in the joint estate. In her particulars of claim she alleged that during the subsistence of the marriage she

concluded an agreement with the first and second defendants in terms of which the Stand and the Site were acquired by the spouses for the benefit of the joint estate. It was alleged further that, in terms of this agreement, the Stand and the Site were registered in the name of the second defendant because of impediments connected to the plaintiff and the first defendant's employment which prohibited them from having any interest in any business venture. (They were both civil servants in the employ of the Venda Government.) In essence the plaintiff's case was that the second defendant was merely holding the assets as nominee.

[3] In their pleas, the first and second defendants averred that the latter was the owner of the Stand and the holder of all the rights and interest in the Site, and that the joint estate had no rights in respect of these assets. The agreement alleged by the plaintiff was denied.

[4] The trial court found in favour of the plaintiff and made an order declaring that the Stand and the Site were assets in the joint estate. As the Stand had already been sold and transferred to a third party by the time of trial, the court ordered that the proceeds of the sale (R250 000) be paid to the fifth defendant to be dealt with in terms of the order providing for the division of the joint estate. As regards the Site, the fifth defendant was authorized to take possession of the assets constituting the Site and to deal with them in accordance with the said order.

[5] The learned trial judge (Makgoba AJ) refused leave to appeal. This appeal is with the leave of this Court against his judgment and order. This Court also granted the third and fourth appellants (the third and fourth defendants) leave to

appeal against a ruling of the court *a quo* that there was to be no order as to costs in respect of the plaintiff's unsuccessful claims against them in relation to certain motor vehicles. The plaintiff had also claimed these vehicles as assets in the joint estate. The reasons for denying the third and fourth defendants their costs are not apparent from the record. Their appeal has, however, now fallen away because the plaintiff has (very wisely it must be said) abandoned the judgment and order in so far as it relates to the third and fourth defendants and tendered costs. The abandonment and tender were made in the plaintiff's papers in opposition to the petition for leave to appeal to this Court.

[6] At the commencement of the appeal counsel for the defendants moved for the amendment of the Notice of Appeal in order to introduce the invalidity of the agreement relied on by the plaintiff as a further ground of appeal. In argument before us counsel contended that the alleged agreement (if it existed) was illegal in that it fell foul of the provisions of (inter alia) s 23 of the Venda Public Service Act[1], and that enforcement of this agreement would be against public policy as this would defeat the purpose of the relevant statutory provisions. The alleged violation was founded on the contention that as public servants the plaintiff and the defendant were precluded from 'having an interest in any business venture'.

[7] The amendment was opposed on behalf of the plaintiff on the basis that the illegality and/or unenforceability of the agreement had not been raised in the court

[1] Act 8 of 1986. The Act has now been repealed by s 43 (1) of the Public Service Act, 1994 (Proclamation No 103 of 1994) read with Schedule 4 thereof.

a quo. Even in the notice of amendment the point was taken only in relation to the Site and not the Stand. Counsel for the plaintiff submitted that if reliance was to be placed on s 23 of the Act reference should have been made to the statutory provision in the pleadings or the defence formulated in such a way that it was sufficiently clear on what statutory provisions reliance was placed. If the illegality relied on did not appear *ex facie* the transaction but from the surrounding circumstances, the circumstances should have been pleaded. There is a lot to be said for this submission. Counsel for the defendants was however allowed to argue the new ground of appeal as if the amendment had been granted. What follows are grounds for that ruling.

[8] The approach to be followed where a question of illegality is raised was laid down in *Yannakou v Apollo Club.*[2] Trollip JA writing for the majority said:

'…it is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it.'

In the present case it is true that illegality was not raised pertinently in the plea. It seems to me that even if the point had been specifically raised the plaintiff would not have conducted her case any differently. The question of illegality was raised by the plaintiff herself. As I have already stated the plaintiff in her particulars of

[2] 1974 (1) SA 614 AD at 623H; see also *F & I Advisors (Edms) Bpk en `n ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* [1998] 4 All SA 480 (SCA) at 484d–e; Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4ed (1997) 914.

claim alleged that the parties agreed that the Stand and the Site would be registered in the name of the second defendant because of the 'impediments connected with the plaintiff and the defendant's employment which prohibited them from having any interest in any business venture'. I do not consider that on the facts of the present case there would be any unfairness to the plaintiff if the amendment is granted[3]. In any event this court is on the basis of *Yannakou v Apollo Club* entitled to consider the point *mero motu*. For these reasons the amendment was allowed.

[9] I now turn to the merits. Three main submissions were advanced on behalf of the defendants. The first was that the plaintiff had failed to prove the agreement upon which she relied in her particulars of claim, in terms of which the second defendant would hold the disputed assets as a nominee for the joint estate. In this regard, conflicting versions of the circumstances under which the Stand and the Site were acquired were put forward by the plaintiff and the first and second defendants. The trial court made credibility findings in favour of the plaintiff and her witnesses and against the defendants and their witnesses and ultimately accepted the plaintiff's version as set out in her particulars of claim. It has often been stated that, as a general rule, the trial court is in the best possible position to decide on the credibility of witnesses before it and that a court of appeal will not lightly interfere with its findings in this regard.[4] In this case, I am satisfied that the

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[3] *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290 D–F; see also Herbstein & Van Winsen *op cit* 912 – 914 and the other authorities there cited.
[4] *Rex v Dhlumayo* 1948 (2) SA 677(A) at 705-706.

credibility findings made by the trial court were justified by the evidence before it. In my view, it is not necessary to deal with the argument advanced by counsel for the defendants that, in accepting the plaintiff's version, the trial court incorrectly relied on documents without proof of the authenticity thereof. Even in the absence of such documents, the other evidence before the trial court was such that its finding that the plaintiff had proved her case on a balance of probabilities cannot be faulted.

[10] The second submission made by counsel for the defendants was that the agreement relied on by the plaintiff, if it existed, was invalid in that its aim was to defeat the objects of the Act, which precluded civil servants in the employ of the Venda government from 'having an interest in any business venture'. For this submission reliance was placed on s 23 of the Act. It reads:

'23 Unless it is otherwise provided for in his conditions of employment –

(a) every officer and employee shall place the whole of his time at the disposal of the State;

(b) no officer or employee shall perform or engage himself to perform **remunerative work** outside his employment in the public service, without permission granted on the recommendation of the Commission by the Minister or an officer authorised by the Minister;

(c) no officer or employee may claim any additional remuneration in respect of any official duty or work which he performs voluntarily or is requested by a competent authority to perform.'

[Emphasis added]

[11] The construction placed by counsel on s 23 is not justified. On a proper interpretation of the section the intention of the legislature was to ensure that civil servants placed the whole of their time 'at the disposal of the State'. That much is clear from the wording of sub-paragraph (a) above. The use of the phrase 'remunerative work outside his [the employee's] employment' in sub-paragraph (b) relates to work done which consumes the time of the employee and reinforces the notion that the section requires the employee to devote the whole of his time to his employment. The mere fact that the plaintiff and the first defendant had an interest in the Stand and the Site does not necessarily imply that their time was consumed thereby or that 'the whole of their time' was not placed at the disposal of the State. On the evidence neither the plaintiff nor the first defendant physically participated in the operation of the business on the Site or performed any other 'work' either regarding the Site or the Stand, although apparently they received some remuneration from the business run on the Site. It therefore follows that the mere acquisition and holding of rights or interests in the sites in question in this case does not amount to a contravention of s 23 of the Act and the agreement entered into between the spouses, on the one hand, and the second defendant, on the other, cannot be regarded as illegal or unenforceable.

[12] The third and final submission advanced on behalf of the defendants was that the plaintiff and the first defendant could not have acquired the disputed Stand and the Site because they lacked the requisite intention (animus) to acquire the said assets given that they believed that, as civil servants, they were precluded by the

Act from doing so. The submission was doomed to fail the moment it was made. The question whether or not the plaintiff and the first defendant had the intention to acquire the property concerned is not in issue in this case. That question would have arisen if the plaintiff had been claiming transfer of ownership of the Stand and of the permission to occupy the Site. But this is not the case. All the plaintiff asked for in the action was a declarator that the Stand and the Site were assets in the joint estate. The submission is therefore without merit and falls to be rejected.

[13] In the result the appeal fails and the following order is made:

1. The appeal is dismissed with costs, such costs to be paid by the first and second appellants jointly and severally, the one paying the other to be absolved.
2. The first respondent is ordered to pay the costs incurred by the third and fourth appellants up to the abandonment of the judgment and order of the trial court in so far as it related to such appellants and the tender made by the first respondent.

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KK MTHIYANE
JUDGE OF APPEAL

CONCUR:
JONES AJA
VAN HEERDEN AJA