



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 1438/2018

In the matter between:

**UNITING PRESBYTERIAN CHURCH IN
SOUTHERN AFRICA**

FIRST APPELLANT

**UNITING PRESBYTERIAN CHURCH IN
SOUTHERN AFRICA: WESTERN CAPE
PRESBYTERY (TIYO SOGA MEMORIAL
CONGREGATION)**

SECOND APPELLANT

and

**REFORMED PRESBYTERIAN CHURCH IN
SOUTHERN AFRICA (TIYO SOGA
MEMORIAL CONGREGATION)**

FIRST RESPONDENT

THE CITY OF CAPE TOWN

SECOND RESPONDENT

THE REGISTRAR OF DEEDS, CAPE TOWN

THIRD RESPONDENT

Neutral citation: *Uniting Presbyterian Church in SA & another v Reformed Presbyterian Church in SA & others* (1438/2018) [2019] ZASCA 129 (30 September 2019)

Coram: Leach, Tshiqi, Zondi and Van der Merwe JJA and Dolamo AJA

Heard: 27 August 2019

Delivered: 30 September 2019

Summary: Contract – material *error in persona* caused by respondent – no contract of sale came into being.

Property – abstract theory of transfer of ownership – dissensus as to identity of party that would obtain ownership – no real agreement to transfer and receive ownership – ownership not passing.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Thulare AJ sitting as court of first instance):

The following order is issued:

1 The application for condonation is granted. The appellants are directed to pay the costs of the application for condonation on an unopposed basis and the first respondent is directed to pay the costs of opposition.

2 The appeal is upheld with costs.

3 The order of the court a quo is set aside and replaced with the following:

‘(a) The sale, transfer and registration of erf 546, situated at Washington Street, Langa Township, Western Cape, held by the first respondent under Deed of Transfer T00056121/2007, is set aside;

(b) The second respondent is interdicted from considering the first respondent’s application in respect of the purchase of erf 547, situated at Washington Street, Langa Township, Western Cape until such time as the second applicant submits its application to purchase erf 547, which application must be submitted within a reasonable time after the date of this order; and

(c) The first respondent is directed to pay the costs of the application.’

JUDGMENT

Van der Merwe JA (Leach, Tshiqi and Zondi JJA and Dolamo AJA concurring)

[1] The first appellant, the Uniting Presbyterian Church in Southern Africa (the UPCSA), is a voluntary association with legal personality. The second appellant is a constituent congregation of the UPCSA, situated in Langa, Cape Town (the Langa Congregation). The Langa Congregation forms part of the Western Cape Presbytery of the UPCSA. It is common cause that the Langa Congregation is a legal person in its own right. The first respondent is cited as the Reformed Presbyterian Church in

Southern Africa (the RPCSA). Whether the persons who acted in the name of the RPCSA in this matter in fact represented that entity, is one of the issues in the appeal. For convenience I refer to them simply as the respondent.

[2] The City of Cape Town (the City), a duly constituted municipality, is the second respondent. The City filed a helpful explanatory affidavit in the court a quo. It opposed only a portion of the relief claimed by the appellants, which relief the latter subsequently abandoned. The City abides the decision of this court. The third respondent, the Registrar of Deeds: Cape Town (the Registrar), did not participate in the appeal.

Litigation history

[3] The appeal concerns two adjoining properties occupied by the respondent, namely erven 546 and 547, Washington Street, Langa (the properties). As I shall explain, erf 546 is registered in the name of the RPCSA. The City is the registered owner of erf 547.

[4] On 22 March 2005, the respondent, acting in the name of the RPCSA, submitted a written application to the City to purchase erf 546. After having followed its standard processes in this regard, the City approved the application. Consequently, the City entered into a written agreement of sale with the respondent, acting in the name of the RPCSA, in terms of which the City sold erf 546 to the respondent for the amount of R22 500. Pursuant to the agreement of sale, the Registrar registered erf 546 in the name of the RPCSA on 17 July 2007.

[5] On 26 June 2008, the respondent, again acting in the name of the RPCSA, submitted an application to the City to purchase erf 547 as well. In terms of its standard procedures, the City published the application for public comment. This resulted in an objection to the application by the Langa Congregation. The attorneys of the Langa Congregation conveyed the grounds of the objection in a detailed letter to the City. As I shall explain fully, the essence of the objection was that the respondent neither constituted nor represented the RPCSA.

[6] At about this time, the appellants became aware that erf 546 had already been sold and transferred as set out above. They consequently approached the Western Cape Division of the High Court, Cape Town, for an order aimed at setting aside the sale and transfer of erf 546, obliging the City to transfer it to the Langa Congregation and affording the Langa Congregation the opportunity to submit an application to purchase erf 547. That court (per Thulare AJ) dismissed the application with costs, but granted leave to the appellants to appeal to this court.

[7] On appeal the appellants limited their claim for relief to an order: (a) setting aside the sale and transfer of erf 546 to the RPCSA; (b) interdicting the City from considering the respondent's application to purchase erf 547 until such time as the Langa Congregation has submitted its application to purchase erf 547. I proceed to consider whether the appellants made a case for any of this relief.

Background

[8] The properties have for many decades been used as a church hall (erf 546) and manse (erf 547). The RPCSA was previously known as the Bantu Presbyterian Church in Southern Africa. One of its congregations was the Tiyo Soga Memorial Congregation (the Tiyo Soga Congregation). The Tiyo Soga Congregation occupied the properties since at least 1940. The respondent averred that the Bantu Presbyterian Church in Southern Africa or the Tiyo Soga Congregation had during 1940 entered into a 99-year lease agreement in respect of the properties with the legal predecessor of the City. Although neither the respondent nor the City was able to produce such a lease agreement, the City did not dispute its existence.

[9] During 1979 the Bantu Presbyterian Church in Southern Africa changed its name to the RPCSA. By that time the RPCSA consisted of 11 presbyteries situated across South Africa, each in turn consisting of several congregations. The RPCSA owned and had rights to various immovable properties. The majority of the members and worshippers of the RPCSA were black. Its mainly white counterpart was the Presbyterian Church of Southern Africa (the PCSA). The demise of apartheid led to the desire to unify the RPCSA and the PCSA. This set in motion a comprehensive process to constitute a new unified church.

[10] During 1998, the highest decision-making body of each of the RPCSA and the PCSA, the general assembly, adopted a document entitled 'BASIS OF UNION: BETWEEN PRESBYTERIAN CHURCH OF SOUTHERN AFRICA (PCSA) AND REFORMED PRESBYTERIAN CHURCH IN SOUTHERN AFRICA (RPCSA)' (the Basis of Union). It was the principal constitutive document of the UPCSA, and it provided that the highest decision-making body of the UPCSA would be its general assembly. It also provided that each congregation of the RPCSA and the PCSA 'shall enjoy in the Uniting Church the status which it held in its own Church prior to union ...'.

[11] In respect of property and investments, para 10 of the Basis of Union further provided:

'The properties and investments of the negotiating Churches shall become the properties and investments of the Uniting Church in the following manner:

- (a) fixed property formerly held by the General Assembly of the PCSA shall be re-registered in the name of The Uniting Presbyterian Church in Southern Africa;
- (b) fixed property formerly held by other Courts and congregations of the PCSA shall become the property of the corresponding bodies in the Uniting Church;
- (c) fixed property formerly held by the RPCSA shall be reregistered in the name of The Uniting Presbyterian Church in Southern Africa;
- (d) sites in former Black townships and areas which either of the negotiating Churches has leased or has permission to occupy shall be re-registered in the name of The Uniting Presbyterian Church in Southern Africa;
- (e) fixed property acquired after the formation of the Uniting Church shall be registered in the name of The Uniting Presbyterian Church in Southern Africa; and
- (f) all investment and other assets held and registered in the name of either of the negotiating Churches shall become the property of the Uniting Church.'

(I draw specific attention to para 10(d), which applies to the properties.)

[12] The Basis of Union also established a joint Special Commission on Union which was empowered to 'finalise all arrangements' in respect of the union. This body in due course compiled a report entitled REPORT TO 1999 GENERAL ASSEMBLIES OF THE PCSA AND RPCSA AND TO THE FIRST ASSEMBLY OF THE UNITING PRESBYTERIAN CHURCH IN SOUTHERN AFRICA (UPCSA). This report dealt comprehensively with all aspects of the implementation of the Basis of Union. It was adopted by the general assemblies of the RPCSA and the PCSA.

[13] The RPCSA and the PCSA resolved that the commissioners to their respective closing general assemblies, would be the commissioners to the uniting general assembly of the UPCS. The first session of the first general assembly of the UPCS took place on Sunday 26 September 1999. This carefully planned momentous occasion was recorded in the approved minutes of this meeting as follows:

'UNITING PRESBYTERIAN CHURCH
IN SOUTHERN AFRICA
PROCEEDINGS OF THE FIRST GENERAL ASSEMBLY
FIRST SESSION

At Port Elizabeth and within the Centenary Hall in New Brighton, on Sunday 26th September, 1999, at 10h00, the ministers and elders, as Commissioners of the General Assemblies of the Presbyterian Church of Southern Africa and the Reformed Presbyterian Church in Southern Africa met together for public worship, which was attended by a large congregation composed of members of both Churches.

CONSTITUTION

The procession into the Centenary Hall was led by the Rev M Mashiyi, carrying the Assembly Bible. He was followed by the communion elders, the dignitaries and fraternal delegates.

A procession of Past Moderators of the PCSA General Assembly processed up the left aisle and a procession of Past Moderators of the RPCSA General Assembly processed up the right aisle of the Centenary Hall and converged just before the stage, forming one unified line ascending the stage.

The Clerks of the two Assemblies, the Moderator-Designate, the Preacher and the two Retiring Moderators, Professor CZ Gebeda (PCSA) and the Rt Rev JV Ncevu (RPCSA) processed into the Hall.

The service commenced with the reading of the Call to worship by one of the Moderator-Designate's Chaplains, the Rev MS Mashiyi.

ROLL OF ASSEMBLY

The Clerks of the PCSA Assembly and the RPCSA Assembly presented the Rolls of Commissioners of the respective Assemblies. These were received by the two Moderators.

PUBLIC WORSHIP

The Assembly was constituted with worship, led jointly by the Moderators.

SCRIPTURE READINGS

The Scripture Readings from Exodus 15:1-13, Ephesians 4:1-6, 11-16 and John 17:1-6, 20-23 were read in Xhosa, Sotho and Afrikaans respectively.

SERMON

The Rev Dr HR Botman, past Moderator of the Southern Africa Alliance of Reformed Churches, preached the sermon.

DECLARATION OF UNION

The Moderators read together the Declaration of Union. The people responded.

The Moderators signed the Declaration of Union,

The congregation rose and joined hands in singing the Doxology.

DECLARATION OF CONSTITUTION

The Moderators declared the first General Assembly of the Uniting Presbyterian Church in Southern Africa duly constituted.

INDUCTION OF THE MODERATOR

The two retiring Moderators led the Moderator-Designate to the front of the hall.

The Moderators inducted the Rev CW Leeuw in proper form. . . .’

Analysis

[14] Thus, there can be no doubt that the UPCSA was duly constituted on 26 September 1999 and that on that day, all the congregations of the RPCSA and the PCSA, including the Tiyo Soga Congregation, became part of the UPCSA. This was admitted in the answering affidavit of the respondent, deposed to by the Reverend Zibebe Eric Futshane. Reverend Futshane also admitted that he had been inducted as a minister of the UPSCA during 2000. He declared that he thereafter led the Tiyo Soga Congregation ‘under the auspices’ of the UPCSA.

[15] The court a quo held that it was not shown that the formation of the UPCSA had been completed and that the Tiyo Soga Congregation had become part of the UPCSA. As I have said, the ample contrary evidence was admitted by the respondent. These findings of the court a quo were quite clearly wrong.

[16] A dispute arose during June 2004, when a substantial number of the members of the Tiyo Soga Congregation resolved to withdraw from the UPCSА. It is not necessary to discuss the reasons for the unhappiness that led to this decision. The decision was conveyed to the UPCSА in a letter dated 28 June 2004. It was written on the letterhead of the 'UNITING PRESBYTERIAN CHURCH IN SA – PRESBYTERY OF THE WESTERN CAPE – TIYO SOGA MEMORIAL CONGREGATION'. Attempts to resolve the dispute were unsuccessful.

[17] In this way, members of the Tiyo Soga Congregation of the UPCSА broke away from the UPCSА, but remained in occupation of the properties. These are the persons that I have referred to as the respondent. The minutes of the meeting of the Tiyo Soga Congregation held on 27 June 2004, include the following:

'The Session of Tiyo Soga in order to avoid lowering its dignity decided to withdraw from the union and return to the RPCSA (Reformed Presbyterian Church in southern Africa).'

The respondent therefore took the position that, after its withdrawal from the UPCSА, it was entitled to the rights to and occupation of the properties because it represented the RPCSA.

[18] Understandably certain matters of implementation of the union had to be attended to subsequent to the formation of the UPCSА. At its first business session held on 27 September 1999, the general assembly of the UPCSА also adopted the aforesaid report of the Special Commission on Union. The report mentioned that despite the unification, the RPCSA and the PCSА 'as legally constituted bodies, needed to be dissolved formally'. The report continued as follows:

' . . . The same applied to Presbyteries of the PCSА, because they were associations distinct from the legal personality of the PCSА. The RPCSA Presbyteries however are akin to Committees of the Church, and so, although they have similar functions and powers to the Presbyteries of the PCSА, do not have legal personality. When the RPCSA is dissolved, therefore, its Presbyteries are automatically dissolved at the same time.

Congregations however do not need to be dissolved, because they automatically become part of the UPCSА by virtue of the union: see Sections 5(a) and 6(a) of the Basis of Union and, in the case of PCSА congregations, also para. 2.74 of the Manual, which is repeated in the Constitution of the Congregation. Congregations which owned property before union can therefore keep their properties after union. (Section 10(b).)

Dissolution of the PCSA and RPCSA and their Presbyteries cannot take effect until

1. the UPCSAs and its Presbyteries have been constituted;
2. all properties transferred (see Basis of Union, Section 10);
3. all other assets transferred and liabilities settled or delegated;
4. the central administrations have been merged; and
5. final sets of General Assembly and Presbytery accounts have been produced and audited.

In order to handle these and any other outstanding financial and property matters – but only for these purposes – the PCSA and RPCSA and their Presbyteries need to continue in existence for a period. . . .’

[19] The foundation of the case of the respondent was that the transfer of the immovable properties of the RPCSA to the UPCSAs had not been completed and that the RPCSA therefore remained in existence. This was accepted by the appellants as far as it goes. By June 2004 some, but not all, of the various immovable properties of the RPCSA had been registered in the name of the UPCSAs.

[20] It is beyond doubt, however, that the congregations of the RPCSA were integrated into the UPCSAs during 1999 and that the RPCSA continued to have a technical legal existence only for the purpose of completion of the transfer of its immovable properties and other assets to the UPCSAs. It follows that at no time did the members of the Tiyo Soga Congregation who had broken away from the UPCSAs thereafter become members of the RPCSA, nor its representatives.

[21] It is equally clear, however, that the respondent led the City to believe the contrary and that it represented the RPCSA. The truth was that the respondent was simply a breakaway group that did not represent the RPCSA and that the RPCSA was, in any event, bound to transfer its properties and rights to the UPCSAs.

[22] The City is an organ of state. Section 195 of the Constitution provides, *inter alia*, that the administration of the City must be governed by the democratic values and principles enshrined in the Constitution, including that of transparency and accountability. The City’s conduct in respect of the competing claims of the parties and the present litigation, indicated that it took these precepts seriously. It would not permit

the sale of public property to a person that materially misrepresented its identity. Put differently, that the other party to the transaction was what it said it was, was material to the City. Therefore it cannot be gainsaid that had the City known the truth, it would not have entered into the sale agreement in respect of erf 546. In the result the conduct of the respondent caused a material mistake (*error in persona*) on the part of the City.

[23] When a representation by a party results in a fundamental or material mistake on the part of the other party, the contract between them is void *ab initio*. Put more correctly, a contract does not come into existence at all. That is so because there is no consensus between the parties and, when the 'contract' is in writing and the doctrine of quasi-mutual assent applies, the error of the other party is *iustus*. In such a case there is no need for cancellation or rescission because there is nothing to cancel or rescind. See *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 5; *Spenmac (Pty) Ltd v Tatrim CC* [2014] ZASCA 225; 2015 (3) SA 46 (SCA) para 28; S W J van der Merwe et al *Contract General Principles* 4 ed at 26; G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 373 and D Hutchison et al *The Law of Contract in South Africa* 2 ed (2012) at 83-84, 88, 100-101 and 110-111. It follows that no sale agreement came into existence in respect of erf 546 and that it is immaterial that the City did not purport to rescind or cancel such agreement.

[24] Our law subscribes to the abstract theory of transfer of property, including immovable property. In terms of this theory, the validity of the transfer of ownership is not dependent on a valid underlying agreement. This means that ownership of immovable property passes on registration of transfer, notwithstanding that the underlying contract is defective, when the registration gives effect to a so-called real agreement, that is, a meeting of minds to transfer and receive ownership. The general principles applicable to agreements, apply to real agreements. Thus, a real agreement may itself be defective or may not have come into existence. In such a case registration of transfer does not result in the passing of ownership and has no effect. See *Cape Explosive Works Ltd & another v Denel (Pty) Ltd & others* 2001 (3) SA 560 (SCA) para 10; *Legator Mckenna Inc & another v Shea & others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) paras 20-22; *Absa Ltd v Moore & another* [2015] ZASCA 171; 2016 (3) SA 97

(SCA) paras 36-37 and P J Badenhorst et al *Silberberg and Schoeman's The Law of Property* 5 ed at 79-80.

[25] The City had no intention to transfer ownership of erf 546 to the respondent. It intended to transfer ownership to the RPCSA, an entity that the respondent did not represent. In the result there was no real agreement to transfer and receive ownership of erf 546. Despite the registration of transfer in the name of the RPCSA, ownership of erf 546 did not pass and remains vested in the City.

[26] Do the appellants have standing to obtain relief in respect of these transactions? In my view they clearly do. By adopting the Basis of Union, the holder of the 99-year lease in respect of the properties, namely the RPCSA, relinquished any rights to obtain ownership of the properties to the UPCS. The UPCS therefore has a direct and substantial interest in the sale and transfer of the properties. It chose to exercise its rights through the Langa Congregation. And as a resident of the area of jurisdiction of the City, the Langa Congregation in any event has standing to hold the City accountable for the unlawful alienation of public property. See for instance *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A) at 536J-537B.

Condonation

[27] One matter remains. The appellants did not lodge its notice of appeal and the appeal record in time. They formally applied for condonation of these failures to comply with the rules of this court. The respondent opposed the application and persisted in doing so in argument before us.

[28] The court a quo granted leave to appeal on 27 February 2018. The notice of appeal had to be lodged within a month after that date. Due to the remissness of the erstwhile attorneys of the UPCS, its general secretary only became aware that leave to appeal had been granted on 23 May 2018. He explained that the UPCS did not have readily available resources to fund litigation of this nature and that it took a considerable period of time to secure the necessary funds. In the result the notice of appeal was lodged on 8 August 2018. Despite the fact that the appeal record had been

delivered to the local attorneys of the appellants in time, they lodged the record one day late.

[29] In all the circumstances the appellants provided a satisfactory explanation for the delays and, as I have said, the prospects of success on appeal are excellent. A proper case for condonation has been made out. The opposition of the application for condonation was unreasonable. For these reasons the appellants should bear the costs of the application for condonation on an unopposed basis, but the respondents should be directed to pay the costs of opposition.

Conclusion

[30] To summarise, no contract of sale came into existence in respect of erf 546 and ownership thereof did not pass. The properties vest in the City and, as between the appellants and the respondent, the appellants are entitled to apply to the City to purchase them.

[31] For these reasons the appeal must be upheld with costs and the order of the court a quo set aside and replaced with the order referred to above. The appellants did not ask for the costs of two counsel.

[32] The following order is issued:

- 1 The application for condonation is granted. The appellants are directed to pay the costs of the application for condonation on an unopposed basis and the first respondent is directed to pay the costs of opposition.
- 2 The appeal is upheld with costs.
- 3 The order of the court a quo is set aside and replaced with the following:
 - ‘(a) The sale, transfer and registration of erf 546, situated at Washington Street, Langa Township, Western Cape, held by the first respondent under Deed of Transfer T00056121/2007, is set aside;
 - (b) The second respondent is interdicted from considering the first respondent’s application in respect of the purchase of erf 547, situated at Washington Street, Langa Township, Western Cape until such time as the second applicant submits its application

to purchase erf 547, which application must be submitted within a reasonable time after the date of this order; and

(c) The first respondent is directed to pay the costs of the application.'

C H G van der Merwe
Judge of Appeal

APPEARANCES

For Appellants: S Gcelu, with him T Masuku SC
Instructed by:
Guthrie Colananni Attorneys, Tokai
Maduba Attorneys, Bloemfontein

For First Respondent: L Gabriel
Instructed by:
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For Second Respondent: No appearance
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