THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 209/2011

In the matter between:

ELIZE SCHOLTZ **APPELLANT**

v

THEODORUS ERNEST SCHOLTZ **RESPONDENT**

Neutral citation:	*Scholtz v Scholtz* (209/2011) [2012] ZASCA 9 (14 March 2012)
Coram:	**Brand, Cloete, Cachalia, Tshiqi JJA *et* Plasket AJA**
Heard:	**1 March 2012**
Delivered:	**14 March 2012**
Summary:	**Donation – s 5 of the General Law Amendment Act 50 of 1956 – donated property encumbered by mortgage bond – no term pertinently governing liability for bond debt after transfer in written agreement – does not inevitably result in invalidity of donation for non-compliance with s 5.**

ORDER

On appeal from: On appeal from Western Cape High Court, Cape Town (Le Grange J sitting as court of first instance).

1 The appeal is upheld with costs, including the costs of two counsel.

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

'(a) The defence raised in para 9 of the defendant's plea is dismissed.

(b) The defendant is to pay the costs of the preliminary proceedings arising from that defence.'

JUDGMENT

BRAND JA (**CLOETE, CACHALIA, TSHIQI JJA *et* PLASKET AJA**):

[1] On 18 November 2007 the parties entered into a written agreement of donation. In terms of the agreement the respondent donated his undivided half share in an immovable property to the appellant. At the time of the agreement the parties were married to each other and the appellant owned the other undivided half share in the property. Alleging that the respondent refused to give effect to his obligation under the donation agreement, the appellant instituted action against him in the Western Cape High Court for specific performance. The respondent in his plea raised various defences against her claim. Included amongst these was the defence in para 9 of the plea that the contract of donation was invalid for failure to comply with s 5 of the General Law Amendment Act 50 of 1956.

[2] Eventually the matter came before Le Grange J. By agreement between the parties he was asked to determine only those issues arising from the respondent's plea of invalidity while all other issues stood over for later determination. During the preliminary proceedings that followed, no evidence

was led by either party and the matter was argued on the pleadings. At the end of these proceedings Le Grange J upheld the respondent's plea that the agreement of donation was invalid for failure to comply with the provisions of s 5 of the General Law Amendment Act. The appeal against that judgment is with the leave of the court a quo.

[3] The background facts are undisputed and not particularly complex. They are these. The written deed of donation is in Afrikaans. It contains the description of the property as registered in the Deeds Office and then records the respondent's donation of his undivided half share in the property thus described to the appellant. The agreement proceeds to stipulate that the respondent would sign all documents and take all other steps necessary to facilitate the transfer of the donated property to the appellant as soon as possible. Finally the agreement records the appellant's acceptance of the donation as well as her undertaking to pay the costs of transfer, including transfer duty, to bring about the registration of the property in her name.

[4] In her particulars of claim the appellant alleged that she performed her obligations in terms of the donation by providing her conveyancers with the funds necessary to effect transfer of the donated property in her name. According to the particulars of claim the conveyancers thereupon prepared the transfer documents and presented them to the respondent for his signature, but the respondent refused to comply with their request. On the basis of these allegations the appellant sought an order – according to my translation from Afrikaans –

(a) that the respondent be directed to sign all documents and to take all other steps necessary to transfer the donated property to her; and that

(b) failing compliance by the respondent with the order in (a), the sheriff be authorised to sign all documents and to take all necessary steps on behalf of the respondent to effect transfer of the property.

[5] As I have indicated by way of introduction, the respondent raised various defences, including that he was unduly influenced to make the donation; that he had revoked the donation because of appellant's gross ingratitude; and so forth. Pertinent for present purposes, however, is the discrete defence raised in paragraph 9 of the plea. Underlying this defence was the undisputed fact that at the time of the donation the donated property was – and still is – encumbered by a mortgage bond in favour of Nedbank for some R2 million. Relying on this factual basis, the defence in paragraph 9 was formulated along the following lines:

(a) There must have been some agreement between the parties as to what would happen to the liability for the bond debt.

(b) That agreement would constitute a material term of the donation.

(c) Since that material term is not contained in the deed of donation, the deed failed to comply with the requirements of the governing statutory provisions, which rendered the donation void.

[6] The respondent's argument in support of this defence, which found favour with the court a quo, rested on the supposition that the governing statutory provisions are to be found in s 5(1) of the General Law Amendment Act 50 of 1956. In relevant part this section provides:

'. . . [N]o executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses.'

[7] The appellant, on the other hand, contended that the agreement is governed by s 2(1) of the Alienation of Land Act 68 of 1981. The relevant provisions of this section are:

'No alienation of land after the commencement of this Section shall . . . 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.'

[8] In support of this contention the appellant referred to the meaning of 'alienate' as defined in this Act, which includes 'sell, exchange or donate'. To my way of thinking an executory contract of donation of immovable property – like the one under consideration – falls within the ambit of both these statutory enactments. But since the General Law Amendment Act appears to be the more stringent one, I think the court a quo was right in its approach that the validity of the donation at issue depends on compliance with this enactment.

[9] Having said that, I do not believe that in this case it would make any difference if we were to apply s 2(1) of the Alienation of Land Act instead. A comparison of the two statutory enactments reveals two additional requirements in the General Law Amendment Act. First, that the terms of the agreement must be embodied in the document. Second, that the written authority to sign on behalf of the donor must be given in the presence of two witnesses. The last mentioned requirement clearly has no bearing in this case. As to the first requirement, s 2(1) of the Alienation of Land Act has been understood to contain virtually the same stipulation, albeit not expressly stated. This much appears from the following dictum by Maya JA in *Stalwo v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA) para 7:

'That [ie s 2(1)] means that the essential terms of the agreement . . . must be in writing and defined with sufficient precision to enable them to be identified. And so must the other material terms of the agreement.'

(See also *Johnston v Leal* 1980 (3) SA 927 (A) at 937G-H.)

[10] Both the argument of the respondent and the reasoning of the court a quo relied to a great extent on the judgment by Myburgh AJ in *Savvides v Savvides* 1986 (2) SA 325 (T). The facts in *Savvides* were not entirely on all fours with the facts of this case. Yet I believe they were similar enough to render the two cases indistinguishable on their facts. As in this case, the immovable property donated in *Savvides* was encumbered by a mortgage bond to which no reference was made in the deed of donation. In this light Myburgh AJ recognised at least two

possibilities: that the donor would discharge the mortgage debt and thus facilitate the transfer of the property free of the bond; alternatively that the donee accepted liability for the bond debt. Thereafter he proceeded as follows (at 333A-B):

'Those are possibilities. But the point is this that in terms of s 5 [of the General Law Amendment Act 50 of 1956] the terms [of the donation agreement] had to be stipulated in the deed. That is the meaning of the words "unless the terms thereof are embodies in the written document".'

[11] Absent any pertinent reference as to who would be liable for the bond debt, which would constitute a material term, Myburgh AJ therefore held the donation void for non-compliance with the requirements of s 5. But with respect to Myburgh AJ and the court a quo following him, I find their reasoning flawed. The flaw, as I see it, is that it fails to recognise the possibility that the 'missing term' relating to liability for the bond debt can be found in a proper interpretation of the express terms of the agreement or that it may be incorporated by way of a tacit term. As to the first possibility, it requires no motivation that in the event of ambiguity the process of interpretation is not restricted to the wording of the document. So for example reference may be had to the context or the factual matrix of the contract which includes both the background and surrounding circumstances (see eg *KPMG Chartered Accountants SA v Securefin Ltd* 2009 (4) SA 399 (SCA) para 31).

[12] Tacit terms, on the other hand, are by definition not to be found through interpretation of the express terms. They are by definition neither recorded nor expressly agreed upon by the parties. They often pertain to matters which the parties did not even consider. They emanate from the common intention of the parties as inferred by the court from the express terms of the contract and the surrounding circumstances (see eg *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531 *in fine*). The juxtaposition of tacit terms in the context of statutory provisions requiring the written recordal of

the terms of certain contracts, is explained with admirable clarity by Nienaber JA in *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 143 *in fine* – 144D:

'. . . [I]t was argued on behalf of the plaintiff . . . that the tacit term pleaded, if found to exist, would offend against [the similarly worded predecessor of s 2(1) of the Alienation of Land Act] . . .

A tacit term in a written contract, be it actual or imputed, can be the corroloray of the express terms – reading, as it were, between the lines – or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances. Either way, a tacit term once found to exist, is simply read or blended into the contract: as such it is "contained" in the written deed. Not being an adjunct tool but an integrated part of the contract, a tacit term does not, in my opinion, fall foul of . . . the Act.'

(See also *Stalwo v Wary Holdings (supra)* paras 11 and 12.)

[13] What may have contributed to the confusion in this case is that it does not appear from the pleadings whether there is any dispute as to what would happen to the bond. The appellant's complaint in her particulars of claim is essentially that the respondent refused to sign the papers presented to him that are necessary to effect transfer. She then sought an order that the respondent be directed to sign these papers and to do whatever else is necessary to facilitate transfer. But we do not know what papers were presented to him, nor whether those papers had any bearing on the bond. And we also do not know what the appellant claims to be 'necessary steps' that the respondent is obliged to perform.

[14] In argument before us counsel for the appellant contended that on a proper interpretation of the deed of donation the respondent is obliged to discharge the bond. In support of this contention counsel referred to the respondent's undertaking to do all things necessary to effect transfer of the property. This undertaking, so counsel argued, must be read with s 56(1) of the Deeds Registries Act 47 of 1937 which is to the effect that the transfer of mortgaged property can only be registered after the bond has been cancelled or

the property has been released from the operation of the bond. In this light, so the argument concluded, ‘steps necessary to effect transfer’ must be understood to include the discharge of the bond.

[15] The problem with this argument, as counsel for the respondent rightly pointed out, is that it fails to take account of s 57(1) of the same Act. That section provides that, notwithstanding s 56(1), transfer of mortgaged property may be registered without cancellation of the bond, subject to the written consent by the bond holder and the transferee to the substitution of the latter for the transferor as the debtor in terms of the bond. In the result the respondent’s undertaking ‘to do everything necessary to effect transfer’ does not necessarily exclude the hypothesis that the agreement was that the appellant would take transfer of the property, subject to the bond, with the written consent of the bond holder.

[16] Another problem with this argument raised by the appellant’s counsel is, of course, that her own pleadings do not rely on an agreement that the respondent would discharge the bond. Her pleadings are equally open to the interpretation that she is prepared to take transfer of the property subject to the bond. What is likely to result from these proceedings is that the appellant will amend her particulars of claim so as to state her position with regard to the bond liability. The same clarity can, of course, be obtained through a request for further particulars by the respondent.

[17] Should the appellant’s position be clarified in one of these ways, it may transpire that there is no dispute between the parties with reference to the bond liability. If, for example, the appellant should allege that it was a tacit term of the agreement, or that on a proper interpretation of the express terms of the agreement in their proper context, she would take responsibility for the bond, the respondent may very well admit those allegations. That, I believe, would clearly put paid to an argument that the written donation does not embody all the

material terms of the agreement. The 'missing term' contended for would be established through interpretation, or by incorporation of a tacit term.

[18] But even if the respondent were to deny the appellant's allegations, the position would be no different. As Steyn CJ pointed out in *Neethling v Klopper* 1967 (4) SA 459 (A) at 464E-G, the legislature's intention with the prescription of formalities for certain contracts could hardly have been to eliminate all disputes with regard to the terms of these contracts. It therefore stands to reason that a subsequent dispute about the terms of the contract, in itself, cannot render the agreement void *ab initio*. The court will simply have to determine the dispute. Once the facts of this case have been determined on the pleadings or by the court it may emerge that the donation is indeed invalid because the deed omitted to record a material term. But as I see it, that prospect does not detract from my conclusion that on the pleadings as they stand, the respondent failed to establish the defence raised in para 9 of his plea.

[19] In the result:

1 The appeal is upheld with costs, including the costs of two counsel.

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

'(a) The defence raised in para 9 of the defendant's plea is dismissed.

(b) The defendant is to pay the costs of the preliminary proceedings arising from that defence.'

_____

F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	A C Oosthuizen SC
	P van den Heever
INSTRUCTED BY:	Visagie Vos Cape Town
CORRESPONDENTS:	Rosendorff & Reitz Barry Bloemfontein
RESPONDENTS:	A S de Villiers
INSTRUCTED BY:	Hannes Pretorius, Bock & Isaacs Cape Town
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