THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 44/2021

In the matter between:

DANIEL FRANCOIS MALAN **APPELLANT**

and

DIE GERHARD LABUSCHAGNE FAMILIE TRUST **FIRST RESPONDENT**

C & C DELWERYE CC **SECOND RESPONDENT**

Neutral citation: *Malan v Die Gerhard Labuschagne Familie Trust & Another* (Case no 44/2021) [2021] ZASCA 171 (9 December 2021)

Coram: SALDULKER ADP, ZONDI, DAMBUZA and GORVEN JJA, and SMITH AJA

Heard: 16 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 9 December 2021.

Summary: Sale – immovable property – subdivision of Remainder approved by Surveyor-General – option to purchase one of the proposed subdivisions – option exercised but transfer not effected –no real right in proposed subdivision to dispose of – subsequent sale of unsubdivided property including proposed subdivision to third party – third party taking transfer unaware of any claim to transfer of proposed subdivision – rectification claimed of sale agreement and Title Deed to reflect sale and transfer of consolidated property including proposed subdivision – such rectification not competent – only personal right to transfer of proposed subdivision could be disposed of since no transfer of proposed division had taken place – no basis for title deed of third party to be 'rectified' to exclude proposed subdivision.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Neukircher J, with Louw J and Ally AJ concurring, sitting as full court):

The appeal is dismissed with costs, including those consequent upon the employment of two counsel, wherever so employed.

JUDGMENT

Gorven JA (Saldulker ADP, Zondi and Dambuza JJA and Smith AJA concurring)

[1] This appeal relates to the sale of immovable property. Various transactions, which will be detailed below, gave rise to an application by the appellant (Mr Malan) in the Gauteng Division of the High Court, Pretoria (the high court). Mr Malan sought the following relief:[1]

1. That the written sale agreement and Deed of Transfer of the Applicant, being Deed of Transfer T18324/04, is rectified so that the property description in the said Deed of Transfer reads: 'Portion 3 of Erf 25 of Schweizer Reneke Township, in extent 773 square metres.'

[1] This is not a direct translation from the original Afrikaans in the notice of motion. It reflects the relief sought.

b) That the property description of the second property in Deed of Transfer T95947/12 is rectified to read:

'Remainder of Erf 25 of Schweizer Reneke Township, in extent 2082 square metres.'

c) That the Surveyor-General's diagram LG9914/2001, annexure 'J' to the founding affidavit, be reflected in the above mentioned rectified Deeds.

d) Costs in the event of opposition.

[2] The trustees of the Gerhard Labuschagne Family Trust (the trust)[2] opposed the application as did C & C Delwerye CC (the CC). The CC launched a counter-application for the eviction of Mr Malan. The relief sought by Mr Malan was granted by Rabie J, who dismissed the counter-application. On appeal to the full court of that Division, Neukircher J, in whose judgment Louw J and Ally AJ concurred, upheld the appeal, set aside the order of Rabie J, and substituted an order dismissing the application with costs and granting the order for eviction in the counter-application. The appeal is before us by special leave of this Court.

[3] The relief sought on appeal is to similar effect but, since it differs slightly from that reflected in the prayer to the notice of motion, it is best to set it out fully as embodied in Mr Malan's heads of argument. An order is sought:[3]

'72.1 rectifying the property description in the written Deed of Sale dated 17 October 2003 between the appellant and the trustee in the insolvent estate of Irene Nel and the appellant's Title Deed number T18324/04 to read:

"Gedeelte 3 van Erf 25 van die dorp Schweizer Reneke, Groot 773 vierkante meter."

72.2 rectifying the property description in Deed of Transfer T95947/12 to read:

"Restant van Erf 25 van die dorp Schweizer Reneke, Groot 2082 vierkante meter."

---

[2] Strictly speaking, all references should be to the trustees of a trust but, for the sake of convenience, I shall simply refer to the trust.

[3] This is the paragraph numbering in the heads of argument.

72.3 directing that the Surveyor General's diagram in respect of the abovementioned immovable properties, being LG 9914/2001, be incorporated in Deeds of Transfer T18324/04 and T95947/12, as rectified;

72.4 dismissing the second respondent's counter-application with costs;

72.5 directing the first and second respondents to pay the costs of the application jointly and severally, the one paying the other to be absolved.'

[4] A brief chronology will assist in framing the issues. On 1 July 1998, the trust took transfer of Erf 25 of the Town Schweizer Reneke, registration division H O, North West Province, in extent 2855 square metres (Erf 25). On 17 September 1998, permission was granted to subdivide Erf 25 into:

a) Portion 1 of Erf 25 (portion 1), in extent 547 square metres;

b) Remainder of Erf 25 (the remainder), in extent 2308 square metres.

[5] On 14 June 2000, one Irene Nel (Ms Nel) purchased portion 1 from the trust. The agreement included an option to purchase part of the remainder on which stood pigeon coops and a flat (the disputed property). The material terms relating to the option were:

a) The option would be valid for a period of 5 years with effect from 4 July 2000.

b) The purchase price was R30 000, which amount would escalate by 10% per annum for the period of the option.

c) Should Ms Nel wish to exercise the option, she would give the trust written notice by registered post of her intention to do so and would accord the trust a period of six months to remove the existing pigeon coops from the disputed property.

d) If the option was exercised, Ms Nel would then be responsible for subdividing it from the Remainder and consolidating the disputed property with portion 1 at her cost.

e) Ms Nel was entitled to lease the flat on the disputed property from the trust for a period of 5 years at an agreed rental of R500 per month, escalating at 10% per annum.

[6] On 4 September 2000, portion 1 was transferred to Ms Nel. At the same time, she took occupation of the disputed property. On 29 June 2001, Ms Nel wrote by registered post indicating that she was exercising the option to purchase. On 16 November 2001, Ms Nel paid R30 000 to the trust. The trust issued a receipt stating that this amount had been received in respect of the option.[4] On 21 January 2002, the Surveyor-General approved a division, in terms of diagram LG9914/2001, of the remainder into:

a) Portion 2, in extent 226 square metres, which was the disputed property. When consolidated with portion 1, the two would become portion 3.

b) A remainder in extent 2082 square metres.

It is common cause that the disputed property was never transferred to Ms Nel and was not consolidated with portion 1. As such, the remainder, registered in the Deeds Office as being owned by the trust, was that of the original subdivision of Erf 25 in 1998, in extent 2308 square metres, which included the disputed property.

[7] On 4 November 2003, Ms Nel's estate was finally sequestrated. During November 2003, Mr Malan concluded a sale agreement with the trustee of Ms Nel's estate. The agreement described the property purchased as 'Portion 1 of erf 25, Schweizer-Reneke better known as 19 Du Plessis Street, Schweizer-Reneke.'[5] During January 2004, Mr Malan took occupation of portion 1 and the disputed

---

[4] On the receipt, the words 'TOV Opsie per kontrak' were written.

[5] My translation. The original Afrikaans said: 'Gedeelte 1 van erf 25 Schweizer-Reneke
Beter bekend as Du Plessis straat 19 Schweizer-Reneke.'

property. After January 2004, Mr Malan effected improvements to the disputed property. This involved demolishing the pigeon coops and constructing a carport next to the flat. On 4 February 2004, portion 1 was transferred to Mr Malan. The Deed of Transfer described the property purchased as 'Portion 1 of erf 25 of the Town Schweizer Reneke; Registration Division H.O.; North West Province; Extent 547 (Five Hundred and Forty-Seven) Square Metres, Originally Transferred and Still Held by virtue of Deed of Transfer No. T110703/2000 with Diagram L.G. No. A9706/1998 which applies thereto.'[6] This was accordingly a transfer of portion 1 alone.

[8] On 12 November 2012, the trust sold the remainder to the CC. This included the disputed property which had never been transferred pursuant to the exercise of the option. It was thus not the remainder approved in diagram LG9914/2001 by the Surveyor General in January 2002, in extent 2082 square metres, which was sold to the CC. It was the remainder, in extent 2308 square metres, after the original subdivision of Erf 25 into portion 1 and the remainder in 1998.

[9] On 5 December 2012, the son of Ms Nel's former husband and a member of the CC visited Mr Malan and informed him that the CC had purchased the remainder. He required Mr Malan to vacate the disputed property on pain of proceedings to evict him. On 14 December 2012, the CC took transfer of the remainder. On 14 December 2014, Mr Malan approached the high court as mentioned above. This prompted the counter-application by the CC for his eviction from the disputed property.

---

[6] My translation. The original Afrikaans was:
'Gedeelte 1 van erf 25 Schweizer Reneke Dorpsgebied; Registrasie Afdeling H.O.; Noordwes Provinsie; Groot 547 (Vyf Honderd Sewe en Veertig) Vierkante Meter, Aanvanklik Oorgedra en Steeds Gehou kragtens Akte van Transport No. T110703/2000 met Kaart L.G. No. A9706/1998 wat daarop betrekking het.'

[10] With that backdrop, the issues between the parties can be addressed. Numerous points were raised. Not all of them need be decided. The first issue is whether Ms Nel properly exercised the option. It was submitted by the trust that the option was not properly exercised for three reasons. Firstly, it submitted that written notice by way of registered post had not been given. This is not borne out by the evidence. Secondly, it was submitted that, because payment was made more than a year after the option was granted, the sum of R30 000 fell short of the amount required. It should have been escalated by 10%. This, too, does not wash. The option took effect on 4 July 2000. The requisite notice was given on 29 June 2001. The option period, between the inception and when it was exercised, was accordingly less than a year. No escalated price was claimable, nor did the trust make any such claim at the time. Thirdly, the trust submitted that, in order to properly exercise the option, Ms Nel had to take transfer of the disputed property and consolidate it with portion 1 into portion 3. This, too, was not necessary on construction of the option. Once exercised, the agreement provided that she was the one who had to take those steps at her own expense, not that the option would not be exercised until she had taken those steps.

[11] Two further points were ventilated. The first was whether Mr Malan had proved sufficient facts to found a claim for rectification. Both the trust and the CC submitted that this could not be decided in favour of Mr Malan on the papers. There appears to be compelling evidence that the trustee of Ms Nel's insolvent estate did not know of the exercise of the option by Ms Nel. If this was so, she could not have believed that Ms Nel was the owner of the disputed property. She might have thought that the disputed property formed part of the property owned by Ms Nel, being portion 1. It may be, therefore, that a claim for some form of rectification did not have a factual basis. Due to the view I take of the matter, however, this point need

not be decided and I decline to do so. For present purposes, I shall assume in favour of Mr Malan that the evidence supported a claim for rectification, albeit not necessarily the one contended for by Mr Malan.

[12] The second point is the contention of the trust and the CC that any claim Mr Malan might have had to the disputed property, or any right relating to it, has prescribed. This is disputed by Mr Malan. Once again, I take the view that this need not be decided. For present purposes, I shall assume in favour of Mr Malan that whatever claim he might have has not prescribed.

[13] Mr Malan submitted that Ms Nel had acquired a real right in the disputed property. Our law applies the abstract theory for delivery of immovable property. In order for delivery to take place pursuant to a real agreement such as the present one, registration of transfer in the Deeds Office is necessary.[7] Therefore, for her to have acquired a real right in the disputed property, transfer would need to have been registered in the Deeds Office. There is no dispute that this was never done. As such, Ms Nel never became the owner of the disputed property. What she acquired was a personal right against the trust. It was the right to demand transfer of the disputed property and to consolidate it with portion 1 into portion 3. This much was conceded by Mr Malan in argument.

[14] In summary, therefore, the following was the legal position at the time of the insolvency of Ms Nel. She was the owner of portion 1. In addition, she had a personal right to take transfer of the disputed property and, on transfer or thereafter, to consolidate the disputed property with portion 1 into portion 3.

---

[7] *Legator McKenna INC and Another v Shea and Others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) para 22; [2009] 2 All SA 45 (SCA).

[15] That being the case, the trustee of Ms Nel could not obtain better rights than those of Ms Nel. The rights which devolved upon her were those enjoyed by Ms Nel at the time of insolvency. This means that she could sell and transfer portion 1, because this was owned by Ms Nel. In addition, she could dispose of the right to demand transfer of the disputed property from the trust along with the right to consolidate it, on transfer or thereafter, with portion 1 into portion 3. As I have shown, the right to claim transfer of the disputed property is clearly a personal and not a real right.[8]

[16] It is important to analyse the relief sought by Mr Malan. The prayer in paragraph 72.1 of his heads of argument asks for rectification both of the Deed of Sale and the Title Deed. The rectification sought of the Title Deed would reflect Mr Malan as owner of both portion 1 and the disputed property. On that basis, rectification would result in the legal position that ownership of the disputed property was transferred to Mr Malan at the time of transfer.

[17] Any rectification of the agreement between Mr Malan and the trustee could not create a real right in the disputed property. It could not result in his being the owner otherwise the rights he would have derived from the trustee would have extended beyond the rights which had devolved upon the trustee. The trustee at no time sought transfer of the disputed property from the trust. The transfer to Mr Malan likewise did not result from a demand for transfer of the disputed property from the

---

[8] Our law recognises that one can sell property belonging to another. This was received into Roman-Dutch Law from Roman Law. See *Theron & Du Plessis v Schoombie* (1897) 14 SC 192 at 198. All that need be given is *vacuo possessio* which carries with it a warranty against eviction. Property owned by another can be vindicated in the hands of a possessor unless the possessor can show that a person authorised by the owner granted possession and that permission has not been lawfully revoked. See *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20. If the owner evicts, the seller must make good the loss of the purchaser. However, in the present matter, the trustee could not deliver that property pursuant to the sale, thus giving ownership, without the consent of the owner since delivery of immovable property takes place by way of registration of transfer.

trust. Rectification could thus not result in Mr Malan becoming the owner of the disputed property. This would be the effect of rectifying the Title Deed as claimed. At best, any rectification, if made out, would result in a rectified agreement that Mr Malan purchased portion 1 and the personal right to demand transfer from the trust of the disputed property which could be consolidated, on transfer or thereafter, with portion 1 into portion 3. This is not what Mr Malan claimed. Rectification, as claimed by Mr Malan, reflecting the sale as being one of portion 3, comprising portion 1 and the disputed property, and describing the property which had been transferred as portion 3, could thus not be granted. For this reason, the appeal cannot succeed.

[18] There is a further compelling reason why the relief sought by Mr Malan was not competent. Because transfer to Ms Nel did not take place, the disputed property continued to be owned by the trust as part of the remainder. This is what was reflected in the Deeds Office at the time of the sale by the trust to the CC in 2012. What was sold, and subsequently transferred to the CC, was the remainder created by the original subdivision in 1998. The CC thus took transfer, and is the present owner, of the disputed property. The CC has a real right in the remainder, including in the disputed property.

[19] The prayer set out in paragraph 72.2 of Mr Malan's heads of argument seeks to amend the description of the property transferred from the remainder, reflected in the 1998 diagram, in extent 2308 square metres, to describing the property transferred as the remainder, reflected in the 2001 diagram, in extent 2082 square metres. The effect of this prayer would accordingly be to deprive the CC of part of a property owned by it.

[20] In circumstances where the remainder has been transferred, unless the CC had knowledge of the right to claim transfer of the disputed property at the time of taking transfer, the title of the CC to the disputed property is unimpeachable. The approach to such a situation is found in the following dictum of this Court in *Frye's (Pty) Ltd v Ries*,[9] dealing with a servitude:

'If a servient tenement is sold, the buyer is bound by the servitude registered in favour of the owner of the dominant tenement and it is immaterial whether he did or did not know of the existence of the servitude. Knowledge of a servitude on the part of a buyer is material only when the servitude has not been registered. If it has not been registered the buyer of the servient tenement is not bound by the servitude unless he had knowledge of it when he bought.'

This is based on the principle that, until registered, an agreement to grant a servitude is enforceable as between the parties to that agreement. The right to enforce the servitude remains a personal right until the servitude is registered. That personal right is enforceable against the person who granted it. It is not enforceable against subsequent purchasers of the property unless they had knowledge of it at the time of transfer. Once registered, it becomes a real right enforceable against the world. That principle applies equally to the present matter where Ms Nel, and thereafter her trustee, could have demanded the enforcement of the personal right to transfer of the disputed property.[10] Once she had taken transfer, she would have had a real right, being ownership of the disputed property.

[21] The question of knowledge was dealt with earlier by this Court. In *Grant and Another v Stonestreet and Others*,[11] Ogilvie Thompson JA set out the legal position:

---

[9] *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575(A) at 582C-D; [1957] 3 All SA 473 (A).
[10] See *Wahloo Sand BK en Andere v Trustees van die Hambly Parker Trust* en Andere 2002 (2) SA 776 (SCA) paras 11-12.
[11] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) at 20A-C; [1968] 4 All SA 133 (A).

'Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will . . . be bound by it notwithstanding the absence of registration.'

The underlying rationale of this approach is that, if a party has knowledge of someone with a prior personal right concerning the property, and takes transfer knowing of the prior personal right, that person would be bound despite lack of registration. If, in the present matter, the CC had had knowledge of the right of Ms Nel and her successor in title to take transfer at the time the CC took transfer, the transfer to the CC could be set aside. Unless that was the case, the transfer to the CC cannot be set aside.

[22] It cannot be said that the CC had knowledge of the personal right of Ms Nel to transfer of the disputed property at the time it took transfer. This was conceded by Mr Malan in argument. This means that the transfer to the CC of the remainder, including the disputed property, cannot be set aside. The CC has a real right of ownership of the disputed property. The title of the CC to the disputed property is unimpeachable. The rectification sought is that the property which was transferred to Mr Malan should be described as portion 3 of Erf 25. Such an order would have the effect of excising the disputed property from the remainder which was lawfully transferred to the CC. In other words, it would effectively result in setting aside the transfer of that part of the remainder formed by the disputed property. There is no claim for setting aside that transfer. As was submitted by the CC, the relief sought by Mr Malan, if granted, would amount to a form of judicial expropriation. It is certainly not competent to grant relief which has the effect of depriving the CC of the disputed property purchased and paid for by it in good faith.

[23] The entire claim for rectification is premised on the assertion that Ms Nel had acquired a real right in the disputed property. This would then mean that the disputed property was consolidated with portion 1 into portion 3 since a certificate of consolidation is not necessary under the Deeds Registries Act.[12] This was not the case made out on the papers. In any event, it is clear that the premise is flawed. Unless Ms Nel became owner of the disputed portion, it could not have been consolidated with portion 1. She did not obtain a real right and rectification could not result in the sale and transfer of the consolidated property as claimed.

[24] The full court therefore arrived at the correct outcome. The appeal must be dismissed. There is no dispute that costs should follow the result. Both Mr Malan and the CC employed two counsel. In my view the costs of two counsel are warranted, where two counsel were employed. In the result:

The appeal is dismissed with costs, including those consequent upon the employment of two counsel, wherever so employed.

T R GORVEN
JUDGE OF APPEAL

[12] See s 33 of the Deeds Registries Act 47 of 1937.

APPEARANCES

For appellant:	D van Loggerenberg SC (with I M Bredenkamp SC)
Instructed by:	Pienaar Attorneys, Pretoria Honey Incorporated, Bloemfontein
For first respondent:	A M Heystek SC
Instructed by:	Japie Van Zyl Attorneys, Pretoria Symington & De Kok, Bloemfontein
For second respondent:	J D Maritz SC (with J G Van Der Merwe)
Instructed by:	Foster Attorneys, Pretoria Symington & De Kok Attorneys, Bloemfontein.