



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

# JUDGMENT

Case no: 204 / 08

ANDRIES PETRUS DU PLESSIS

Appellant

and

RICHARD PROPHITIUS  
ANNA MARGARETHA PROPHITIUS

First Respondent  
Second Respondent

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Neutral citation: *Du Plessis v Prophitius and Another*  
(204/08) [2009] ZASCA 79 (3 June 2009)

CORAM: NAVSA, VAN HEERDEN, PONNAN, SNYDERS JJA and  
KROON AJA

HEARD: 22 MAY 2009

DELIVERED: 3 JUNE 2009

SUMMARY: Immovable property – transfer of ownership – validity of.

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**ORDER**

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**On appeal from:** The High Court (Durban) (Nicholson J sitting as court of first instance).

The appeal is dismissed with costs.

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**JUDGMENT**

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**PONNAN JA (NAVSA, VAN HEERDEN, SNYDERS JJA and KROON AJA concurring):**

[1] The real point in issue in this appeal is the ownership of an undeveloped stand situated on the south coast of KwaZulu-Natal, more fully described as Erf 757, Palm Beach, Registration Division ET, in extent 1374 square metres (the property). The facts are not in dispute. A useful starting point is the history of the property.

[2] On 31 March 1989, Robert and Betsy Campbell (the trustees), acquired the property in their capacity as trustees on behalf of the Campbell Children's Trust (the trust). On 22 January 2004, a written agreement of purchase and sale was concluded between the Trust and Whitkel Properties CC (Whitkel)<sup>1</sup> in respect of the property for the sum of R45 000.

[3] On 3 June 2004, the original deed of transfer (TE7413/89) in respect of the property was furnished by the trust to the conveyancing attorney who had been appointed in terms of the agreement to effect transfer of the property to Whitkel.

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<sup>1</sup> Cited as the 3<sup>rd</sup> Respondent in the court below but who took no part in the proceedings.

During September 2004, a meeting of the trustees resolved to sell the property to Whitkel for the sum of R45 000 and authorised Robert Campbell (Campbell), in his capacity as trustee, to sign such documents as may have been necessary for the registration of the transfer into the name of Whitkel. On 9 September 2004, Campbell duly signed the power of attorney on behalf of the trust to cause transfer of the property to pass to Whitkel.

[4] On 28 October 2004, Richard and Anna Margaretha Proffitius (the respondents), made a written offer to purchase the property for the sum of R195 000. The offer was accepted by the trustees on behalf of the trust two days later. As the trust claimed to have lost the original title deed, an application was made to the Registrar of Deeds, Pietermaritzburg<sup>2</sup> in terms of Regulation 68 of the Regulations made in terms of s 10 of the Deeds Registries Act 47 of 1937 for the issue of a copy of the title deed. In his affidavit in support of that application, Campbell stated that the title deed '... has been lost or destroyed and notwithstanding diligent and extensive search cannot be found. The circumstances of the loss is unknown to me.' That allegation, to the knowledge of Campbell, was false.

[5] In compliance with the Regulation, an advertisement was placed in the *South Coast Herald* on 3 December 2004 informing all interested persons of the trust's intention to apply for the issue of a certified copy of the title deed of the property 'which has been lost or destroyed'. The Registrar of Deeds allowed transfer of the property to proceed without the original title deed and after due compliance with all of

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<sup>2</sup> The 5<sup>th</sup> respondent in the court below who took no part in the proceedings.

the other formalities, the property was transferred to and registered in the names of the respondents by the Registrar of Deeds on 15 February 2005.

[6] On 15 February 2005 and after the payment of disbursements, the balance of the purchase price due to the trust (R176 921.81) was transferred into its bank account by the conveyancing attorney.

[7] In the meanwhile, on 26 December 2004, Whitkel concluded a written agreement of purchase and sale in respect of the property with the appellant, Andries du Plessis, for the price of R165 000. On 5 May 2005, there was a simultaneous transfer of the property from the trust to Whitkel and in turn from Whitkel to the appellant, and the balance of the purchase price (R39 423.97) was paid to the trust. During August 2005, concerned at not having received any rates accounts from the local authority in respect of the property, the respondents caused enquiries to be made through their attorney with, inter alia, the Registrar of Deeds. In response the Registrar of Deeds wrote:

'According to the records of this Office [the property] is registered in two different names as owners and held by two different Deed of Transfers, namely No. T20531/2005 and No. T6506/2005 respectively.

The above registrations have resulted in a double registration.

[The property] cannot be dealt with by any of these two owners until the High Court Order has been made regarding the rightful owner of the property.'

[8] An exchange of correspondence between the appellant and the respondents in an endeavour to resolve the matter amicably proved fruitless. Impasse having been reached, the order alluded to in the letter of the Registrar of Deeds was sought

by the respondents in the Durban High Court. That application was opposed by the appellant, who moreover launched a counter-application. Each party sought, in addition to the usual orders relating to costs, an order that:

- (a) they be declared to be the rightful owner of the property;
- (b) the transfer of the property to the other party be set aside;
- (c) the Registrar of Deeds be directed to amend the records in the Deeds Registry to give effect to the preceding orders.

[9] Before Nicholson J the application succeeded and the counter-application failed. With the leave of the learned judge, the matter now serves before this Court on appeal.

[10] In *Legator McKenna Inc v Shea* (143/2008) [2008] ZASCA 144 (27 November 2008) this court held that 'the time has come for [it] to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well' (para 21). Brand JA, writing for a unanimous court stated (para 22):

'In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property, is effected by registration of transfer in the Deeds Office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) at 922E-F; *Dreyer and Another NO v AXZS Industries (Pty) Ltd* [2006 (5) SA 548 (SCA)] para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement (see eg *Preller v Jordaan* 1956 (1) SA 483 (A) 496; *Klerck NO v Van*

*Zyl and Maritz NNO* [1989 (4) SA 263 (SE) at] 274A-B; Silberberg and Schoeman [*The Law of Property* 5ed (by Badenhorst, Pienaar and Mostert)] 79-80).

[11] As I understood the argument on behalf of the appellant, it was contended that the trust as transferor had no intention to transfer ownership to the respondents. It is so that at the moment of passing of ownership the transferor must have the intention of transferring ownership (*animus transferendi domini*), which supplies the subjective element for the passing of ownership. Instead, so the contention goes, the trust was indifferent as to whether or not transfer eventuated. I cannot agree. In my view all the facts point firmly to an intention on the part of the trust to successfully cause transfer of the property to be registered into the names of the respondents. Thus, on 10 January 2005, the trust adopted a resolution authorising transfer to the respondents. To that end, Campbell was mandated to sign all such documents as may have been necessary. Pursuant to that resolution, during the succeeding week, Campbell signed an 'affidavit by transferor', a 'certificate in respect of a transfer from a trust' and a 'power of attorney to transfer' the property to the respondents. Those in my view were not the hallmarks of indifference, but rather positive acts with a single ultimate goal in mind – namely the transfer of the property into the names of the respondents for a price far in excess of that stipulated in the prior sale.

[12] The second string to counsel's bow was that the trust was motivated by a fraudulent intent. Assuming that to be so, that does not detract from the trust's genuinely held intention to cause transfer of the property to be effected into the names of the respondents. If fraud was the motive, then the trust's ultimate goal would have been the securing of payment of the higher purchase price offered by the respondents. That, in turn, was dependent upon the successful registration and

transfer of the property into the names of the respondents. Were the property not to have been transferred, the fraudulent purpose would not have been achieved. It follows that the trust would in those circumstances have felt obliged to do all that was required of it with the requisite intention to ensure successful registration. That it ultimately did.

[13] As to costs. The matter was devoid of any legal or factual complexity. There was thus no warrant for the employment of the services of two counsel by the respondents on appeal. Mr Kemp conceded as much. In those circumstances it would be wholly unjustified to mulct the appellant with those costs. The costs incurred by the respondents consequent upon the employment of two counsel accordingly falls to be disallowed.

[14] In the result the appeal is dismissed with costs.

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**V M PONNAN**  
**JUDGE OF APPEAL**

**APPEARANCES:**

For Appellant:

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Instructed by:  
Schürmann Joubert Attorneys  
Pretoria  
Symington and De Kok  
Bloemfontein

For Respondent:

K J Kemp SC  
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