THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1133/20

In the matter between:

SUSARA MAGRIETHA STROHMENGER **APPLICANT**

and

SCHALK WILLEM VICTOR **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS **SECOND RESPONDENT**

Neutral citation: *Susara Magrietha Strohmenger v Schalk Willem Victor and Another* (Case no 1133/20) [2022] ZASCA 45 (08 April 2022)

Coram: SALDULKER, MAKGOKA and HUGHES JJA and MATOJANE and MOLEFE AJJA

Heard: 23 FEBRUARY 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 April 2022.

Summary: Contract – restitution – prescription – whether special circumstances existed for this Court to grant special leave to appeal – whether the first respondent had proved his claim and was entitled to relief.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley Lever AJ (Tlaletsi JP and Williams J concurring, sitting as court of appeal):

1 The applicant is granted special leave to appeal in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

2 The appeal is upheld with costs.

3 The order of the full court of the Northern Cape Division of the High Court, Kimberley, is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

JUDGMENT

MATOJANE AJA (Saldulker, Makgoka and Hughes JJA and Molefe AJA concurring):

[1] This is an application for special leave to appeal, and if granted, the special leave itself. The applicant, Ms Susara Magrietha Strohmenger (respondent in the court a quo), applies for special leave to appeal to this Court against the judgment of the full court of the Northern Cape Division of the High Court, Kimberley (Lever AJ, Tlaletsi JP and Williams J) in terms of which the first respondent's appeal against the judgment of a single judge of that division, was upheld. On 31 January 2019, the full court set aside the order of the court a quo and granted judgment in favour of the first respondent

in accordance with the relevant prayers in the particulars of claim. The second defendant did not defend the action.

[2] Aggrieved, the applicant applied to this Court for leave to appeal and on 10 March 2021, the two Judges of this Court who considered the application referred the application for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act and directed the parties to be prepared if called upon to do so, to address the Court on the merits. The applicant contends that special circumstances exist for this Court to grant special leave to appeal.

Facts

[3] The facts pertinent to the application are relatively brief as neither party presented any oral evidence during the trial of the matter. From the pleadings, the following appears: on 1 October 2015, the first respondent, as the plaintiff, issued a summons against the applicant, claiming restitution of what he alleged was performance pursuant to an invalid agreement concerning the alienation of land.

[4] The restitution sought involved the re-transfer of the property described as 5 Malan Street, Postmasburg, into the name of the first respondent; alternatively, the value of the said property and compensation for the property described as 26 Evkom Street, which had been on-sold by the applicant to an innocent third party after it was transferred to the applicant in terms of the alleged illegal agreement.

[5] The applicant raised a special plea of prescription, averring that the summons had been served more than three years after the alleged debt fell

due. As to the substance of the claim, the applicant denied the oral agreement as pleaded by the first respondent. She explained that the first respondent bought the immovable property for her and had the same registered in her name as a token of his love and affection towards her and to comply with a maintenance obligation he had assumed and undertook to fulfil towards her. The first respondent filed a reply and denied that the claim had prescribed.

[6] When the matter was called on the first day of the trial on 5 August 2019, the first respondent abandoned his alternative claim for the value of the 5 Malan Street property as well as a claim for compensation for the property described as 26 Evkom Street. What remained was the relief pertaining to the re-transfer of the 5 Malan Street property.

[7] The first respondent then closed his case without leading any evidence. The applicant likewise closed her case, also without leading any evidence. The trial court dismissed the first respondent's claim with costs. It also dismissed the applicant’s special plea of prescription. The court held that although the particulars of claim mentioned that the first respondent relied on the assertion that the agreement was unlawful in respect of 9 Venter Street (as referred to in the particulars of claim), no evidence was tendered that the first respondent had performed in terms of an illegal agreement in relation to the 5 Malan Street property.

[8] Aggrieved by the order of the trial court, the first respondent appealed to the full court. The full court upheld the appeal and set aside the trial court's order. As to the applicant’s reliance on her special plea, the court found that

since there was no cross-appeal to challenge the trial court's finding on the special plea on prescription, the applicant was precluded from relying on it.

[9] In its reasoning, the full court found that having pleaded donation, the applicant was obliged to plead whether such a donation was oral or in writing and that if there was a written donation, she could not have closed her case as it would have been incumbent upon her to have led evidence to show how s 28(2) of the Alienation of Land Act 68 of 1981 (the Act) applied.

[10] The importance and role of pleadings cannot be overstated. Generally, a party must plead all facts material to the cause or causes of action alleged against the opposite party. The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies.[1] A material fact is distinct from the evidence by which a party hopes to prove the pleaded material fact. Evidence cannot be pleaded.

[11] In construing a pleading, the presumption is always against the pleader because he or she is taken to have stated his own case in the best possible light and in the manner most favourable to himself. The court must assume the facts to be true and then decide whether or not the pleaded material facts are capable of supporting the cause of action, or defence, being advanced.

[1] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11; *FPS Ltd v Trident Construction (Pty) Ltd* [1989] ZASCA 28; 1989 (3) SA 537 (A) at 541H; *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; [2014] 3 All SA 395 (SCA); 2014 (4) SA 614 (SCA) para 13.

[12] With these general observations in mind, I turn to the pleadings in the matter. As the matter was argued on pleadings only, it is necessary to set out in some detail the cause of action as pleaded, as well as the applicant's plea in relation thereto. The first respondent's oral agreement was pleaded as follows in the particulars of claim:

'4. On or about June 2009, and at Postmasburg, the plaintiff and the first defendant concluded an oral agreement. Both parties acted personally.

5. The express, alternatively implied, in the further alternative tacit terms of the agreement were:

5.1 The plaintiff will buy or -, (sic) alternatively, caused to be transferred into – the name of the first defendant, three immovable properties in the Northern Cape Province and, more specifically the town of Postmasburg.

5.2 The properties so transferred would be the value equal to the amount of R 1 600 000,00.

5.3 In lieu, the first defendant would transfer ownership of the immovable property known as 9 Venter Street, Postmasburg, to the plaintiff.

[5.4] The transfer of 9 Venter Street would coincide with the date of transfer of the third and last of these properties into the name of the first defendant, alternatively shortly thereafter.

6. Plaintiff performed in part in terms of the agreement in that:

6.1 He purchased the property known as 26 Evkom Street, Postmasburg on or about June 2009. The property was subsequently registered in the name of the first defendant. This transaction was occasioned by a written deed of alienation between the plaintiff qua purchaser and a third party.

6.2 The plaintiff purchased the property for an amount of R400 000,00 and incurred costs in the amount of R8 817.80 in order to effect the transfer.

6.3 On or about 16 May 2012, he purchased the property known as 5 Malan Street, Postmasburg. The property was subsequently registered in the name of the first defendant.

This transaction was occasioned by a written dead of alienation between the plaintiff qua purchaser and a third party.

6.4 The plaintiff paid an amount of R 1 600 000.00 as a purchase price and paid the amount of R 64 503.50 in respect of transfer costs.'

[13] In paragraph 8 of the particulars of claim, the first respondent pleaded that the applicant repudiated the agreement on or about 28 May 2015 by means of a letter written by the applicant's attorney, which repudiation the first respondent accepted, alternatively the first respondent accepted the repudiation by means of the particulars of claim.

[14] The first respondent specifically pleaded that the oral agreement concluded was unlawful and illegal as the transfer of 9 Venter Street into the name of the first respondent was not reduced to writing as prescribed in s 2(1) of the Act. It is the first respondent's case that he performed in part in terms of an illegal agreement and as a result, he was entitled to claim restitution of what he performed in terms of the agreement, namely the 5 Malan Street property.

[15] In response to the aforegoing, the applicant, in her plea to paragraphs 4 and 5 of the particulars of claim denied that an oral agreement was concluded between the parties as alleged by the first respondent and pleaded that:

'5.1 The content of the paragraphs under reply are denied as if specifically traversed individually, and plaintiff is put to the proof thereof.

5.2 In amplification of the denial, the first defendant denies the agreement as alleged was concluded.

5.3 The first defendant, *ex abundanti cautela* pleads that:

5.3.1 The plaintiff and first defendant were in a life partnership at all relevant times for purposes of the action, alternatively they lived together as a husband and wife would do;
5.3.2 The plaintiff bought immovable property for the first defendant and caused the same to be registered in her name as token of his love and affection towards her and to comply with the maintenance obligation which the plaintiff assumed and undertook to fulfil towards the plaintiff. The immovable properties, after transfer in the first defendant's name, were hers to do with as she pleased as the owner thereof.
5.3.3 During the subsistence of the relationship between the first defendant and the plaintiff, plaintiff and first defendant both had the benefit of the income from the properties whilst the plaintiff leased the same to third parties;
5.3.4 The plaintiff at all time relevant and pertinent intended to transfer the immovable properties in the first defendant's name and the first defendant intended to receive transfer of the immovable properties in her name.'

[16] In response to paragraphs 6.3 and 6.4 of the particulars of claim, the applicant pleaded:

'Save to deny that the purchase and registration of the immovable property in the first respondents name was pursuant to or as a result of the alleged agreement referred to in paragraph 4 of the POC; the first defendant admits that the immovable property was registered in her name. The plaintiff is put to the proof of the allegation in paragraph 6.4 of the POC.'

[17] Thus, in respect of 5 Malan Street, the first respondent pleaded that he purchased 5 Malan Street for the applicant from a third party in terms of a written Deed of Alienation and that the property was consequently transferred to the applicant. In her plea, the applicant only admitted the fact that the

property was registered in her name. She denied the rest of the allegations pleaded by the respondent.

[18] From an evidential burden point of view, what this meant for the respondent was that he had to prove three crucial allegations denied by the applicant, namely (a) that he concluded a written Deed of Alienation with a third party in respect of 5 Malan Street; (b) that he purchased that property for the applicant and (c) that he caused the property to be registered in the name of the applicant. These are the aspects on which the first respondent bore the burden of proof as they were squarely denied by the applicant in respect of 5 Malan Street. When he elected to close his case without adducing any evidence on these issues, his claim in respect of 5 Malan Street was correctly dismissed.

[19] In any event, on the pleadings, it seems that the first respondent's allegations do not bear scrutiny. It appears from the Windeed property report, annexed to the particulars of claim, that instead of the first respondent, it was the applicant who concluded a written deed of alienation with a third party in respect of 5 Malan Street, pursuant to which the property was transferred from the previous owner and registered in her name.

[20] It could well be that the first respondent paid the purchase price on behalf of the applicant pursuant to an oral agreement. But that agreement, call it a donation or sponsorship, is not one required to be in writing in terms of s 28 of the Act. The agreement which the law requires to be in writing is the underlying agreement in terms of which immovable property is transferred.

The agreement between the first respondent and the applicant, whatever its terms are, does not fall within this purview.

[21] It is now settled that abstract theory applies to the passing of ownership of property. The theory postulates two requirements for the passing of ownership, namely delivery which in the case of immovable property is effected by registration of transfer in the deeds office coupled with the so-called real agreement. Brand JA in *Legator McKenna Inc and Another v Shea and Others*[2] explained that:

'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. . . 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, e.g. sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement. . . .'

[22] There was no defect in the real agreement between the applicant and the transferor. The latter was legally competent to transfer the property after receiving payment from the first respondent. The applicant was legally competent to acquire the property. The property was, accordingly, validly transferred to the applicant.

[23] It was argued on behalf of the first respondent that the first respondent had performed in terms of an illegal contract because the applicant's plea of donation of the property is affected by the provisions of the Act and must be in writing; otherwise it is unlawful and void. The first respondent's reliance

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

on the so-called donation supposedly pleaded by the applicant is misplaced. Properly construed, that relates to a different property which does not form part of this appeal.

[24] In her plea, the applicant did not allege that two properties were donated to her by the first respondent. Her plea reads:

'5.3.2 The plaintiff bought *immovable property* for the first defendant and caused the same to be registered in her name as token of his love and affection towards her and to comply with the maintenance obligation which the plaintiff assumed and undertook to fulfil towards the plaintiff. The immovable properties, after transfer in the first defendant's name, were hers to do with as she pleased as the owner thereof.' (My emphasis.)

[25] It is not disputed that the first respondent purchased the 26 Evkom Street property and had it registered in the name of the applicant. The applicant sold that property to a bona fide third party. There is no evidence that the pleaded maintenance undertaking or alleged donation refers to 5 Malan Street and not 26 Evkom Street. The first respondent's allegations of purchasing 5 Malan Street for the applicant were expressly denied, and there was no evidence to corroborate them.

[26] The pleaded facts do not establish a cause of action for restitution, as the first respondent closed his case without tendering any evidence that there was an overarching agreement as he contended, which was denied by the applicant or that the transfer was occasioned by a written deed of alienation between himself *qua* purchaser and a third party or the basis upon which he would be entitled to restitution. It should be emphasised that the allegations in the pleadings do not constitute evidence and remain allegations until confirmed by admissible evidence.

[27] In view of all the aforegoing, the full court erred in ordering the transfer of the property which, on the face of it, was validly transferred and registered in the applicant's name pursuant to a valid deed of alienation between herself and the seller, to which the first respondent was not a party. There is no evidence as to what the first respondent's role in it was.

[28] It follows that special circumstances exist for this Court to grant special leave to appeal to this Court and that leave to appeal should be upheld.

[29] In the result, the following order is made:

1 The applicant is granted special leave to appeal in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

2 The appeal is upheld with costs.

3 The order of the full court of the Northern Cape Division of the High Court, Kimberley, is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

K E MATOJANE

ACTING JUDGE OF APPEAL

APPEARANCES:

For applicant:	N Snellenburg SC
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For the first respondent:	S Grobler SC
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