

21/9/07

Not reportable

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

3. CASE NO: 20263/06

In the matter between:

KARIN KRUGER (born SAM)

PLAINTIFF/EXCIPIENT

-and-

FRANCOIS KRUGER

DEFENDANT/RESPONDENT

JUDGMENT

PHATUDI AJ

1. This is an exception application instituted by the Plaintiff (Excepiant) against the Defendant's (Respondent) plea and counterclaim in terms of Rule 23(1) and 23(3) respectively, of the Uniform Rules of Court.

2.The Excepiant excepts that the Respondent's plea does not disclose the defence and that the Respondent's counterclaim does not disclose the cause of action.

6.The Plaintiff and Defendant (parties) married each other on 1 May 1999 out of community of property with accrual system.

4.On the 27 June 2006, the Plaintiff caused issue of summons against the Defendant for a divorce. The parties orally reached a settlement agreement at a round table conference held on the 30 October 2006.

5.The terms of the said purported settlement agreement were reduced to writing and incorporated in a letter sent to the Plaintiff's (Excepiant) attorneys on the 31 October 2006. The said letter is annexed at page 36 of the record marked A.

6. Clause 2.5 of the said letter reads as follows:

"2.5 Proprietary rights

2.5.1 Your client will sign all documents and do whatever may be necessary in order to facilitate the transfer of her share in the immovable property currently owned by the parties in equal shares to my client, when called upon to do so.:

7. On the 31 January 2007, the Defendant/Respondent served and filed his plea and counterclaim on the Plaintiff's attorney and the Registrar respectively.

8. The *Plaintiff/Excepiant*'s raise an exception on basis that the oral agreement alleged to have been concluded by the parties, purports to be a contract of purchase and sale of her half share in an immovable property situated at 45 Greg Street, Kensington B, Randburg.

9. The Plaintiff/Excepiant further except that the said "half share" in the property constitute land in accordance with the provisions of ***ALIENA nON OF LAND ACT NO. 68 of 1981***.

10. Mr MacDonald, counsel for the Excepiant/Plaintiff, emphatically stated that the wording of clause 2.5.1 of the said letter which state:

" ... will sign all documents and do whatever may be necessary in order to facilitate the transfer of her share in the immovable property.

.. ?

Constitute deed of alienation.

11. Further thereto, he stated that the undertaking by the Defendant/Respondent to pay R330, 000.00 fall squarely within the meaning of purchaser as defined in terms of section 1 (1) of Act 68 of 1981 which reads as follows:

" ... means any person to whom land is alienated under a contract;"

12. He emphasised further that a deed of alienation should, as provided in terms of section 1 and 2 of the Act, be in writing, signed by the parties thereto or by their agents acting on their written authority.

13. In his concluding argument, Mr McDonald submitted that the Plaintiff's contention is, based on the above, that the oral settlement agreement entered into, is invalid and unenforceable. On those basis, he prayed for the striking out of paragraph 4.3.2 of Defendant's plea and further that paragraph 11, 12, 13 and 14 as well as prayer (b) of Defendant's counterclaim be set aside.

14. He finally referred the court to the case of **BRINK v STANDLER 1963 (2)** **SA 427 (Cl)**. The facts of the case are briefly the following:

"The applicant and respondent were riparian owners of Rhenoster-river, a public stream in the district of Sutherland. The applicant applied for permanent servitudes of abutment and aqueduct over respondent's

farm to enable applicant to abstract and convey water from the river to his farm. The applicant offered the respondent compensation in the amount of £100. The respondent refused to accept the offer. Correspondence on proposals and counter proposals were exchanged via their counsel with an agreement ultimately been reached. The agreement was embodied as 'stikkingsooreenkoms' signed by counsel for applicant and respondent respectively. "

15. The Respondent In the said case contested the *"stikkingsooreenkoms"* concluded and signed by their *legal* representative as not complying with the provisions of section 1 (1) of General Laws Amendment Act 68 of 1957 (now repealed). That section read as follows:
"No contract of sale or cession in respect of land or any interest in land ... shall be of any force or effect if concluded after the commencement of this section unless it is reduced to writing and signed by the parties or by their agents on their written authority. "

16. This provision is almost exactly the same as that of section 1 (1) of the Alienation of Land Act 68 of 1981.

17. In rebuttal to the Plaintiff/Excepiant's contention and submissions, Mr Meijers submitted that the oral settlement agreement concluded by the parties is not the transaction solely for the transfer of an immovable property but a settlement of all the issues between the parties with a view to putting and end to litigation.

18. Mr Meijers brought this court's attention to the case of **HOEKSMA AND ANOTHER v HOEKSMA 1990 (2) SA 893 (A)** where the parties, who were beneficiaries in a will executed by their father, entered into a settlement agreement "in an effort to avoid litigation."

19. The terms of their settlement were recorded in a letter dated 26 November 1986 and sent to all other parties concerned.

20. The Respondents reneged and contended that the agreement was invalid for want of compliance with the provisions of the Alienation of Land Act 68 of 1981.

21. The Court held at 896 C-D that the oral agreement entered into between the parties was valid and binding.

22. Mr Meijers emphasised the fact that settlement agreements may be oral in nature. He further emphasised the fact that the present oral settlement agreement is a compromise and not agreement of sale of land as alleged. He said that the compromise does not fall within

the ambit of the **ALIENATION OF LAND ACT 68 OF 1981**. He further stated that the said agreement is clearly not a sale or alienation of land as described in the Act.

23. In my evaluation of counsel's arguments, it is apparent that upon issue and service of the summons commencing action for divorce, the parties held a round table conference with a view to reach settlement (which they orally did) in an effort to avoid lengthy litigation process.

24. The Plaintiff/Excepiant now reneg from the purported settlement agreement on the basis that the agreement does not comply with the Provisions of sections 1 and 2 of **ALIENATION OF LAND ACT 68 OF 1981**

25. The facts of the case referred to by Mr McDonald of **BRINK v STADLER** (supra) appear to be similar to the present case save to mention that in Brink's case, the parties owned separate pieces of land but for the riparian (river bank) they shared.

26. In my view, the court correctly held that the contract for registration of servitudes over another's piece of land should be in writing, signed by the parties or their agent on their written authority.

27. In *casu*, the parties, who are married to each other, are "partners" and joint owners of the property situated at 45 Greg Street, Kensington 8, Randburg.

28. The "oral settlement agreement" entered into by and between the parties is a compromise and not a sale of land as alleged by the *Plaintiff/Excepiant*.

29. The outcome of the case of HOEKSMA AND ANOTHER v HOEKSMA (supra) is the pillar the Defendant lean on to emphatically contend that the "oral settlement agreement" to endorse a portion of land that is jointly owned does not constitute a sale and need not comply with the provisions of ALIENATION OF LAND ACT 68 OF 1981.

30. It is common practice in divorce actions that parties often conclude "settlement agreements" in an effort to avoid lengthy litigation processes.

31. It is further common practice that these "settlement agreements", either oral or in writing, are often made Orders of Court for them to be enforceable.

32. It is common cause that married parties are joint owners of an undivided shares in an immovable property. It often happen in

practice, especially divorce matters, that the one party often offer to compensate the other for the other's half share.

33. In my view, the provision of the letter dated 31 October 2006, purporting to be the "oral settlement agreement", need not comply with the provisions of **ALIENA nON OF LAND ACT 68 OF 1981**. In my opinion, the exception should fail.

34. I, as a result, make the following order.

ORDER

THE EXCEPTION IS DISMISSED WITH COSTS.

Acting Judge of the High Court of South Africa

(Transvaal Provincial Division)