

/SG

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 06/11/2009
CASE NO: 29116/2006

REPORTABLE

In the matter between:

JOHANN DE WITT OOSTHUIZEN N.O.
(In his capacity as Executor in the estate of
JSJ Uijs, duly appointed by the Master of the
High Court in terms of Letters of Executorship
No 21727/06)

PLAINTIFF

And

PIETER ERNST DU PREEZ

1ST DEFENDANT

ENGELIZE DU PREEZ

2ND DEFENDANT

MARIANNE COETZEE

3RD DEFENDANT

DANIEL HERMANUS COETZEE

4TH DEFENDANT

ELIZABETH VENTER

5TH DEFENDANT

BOTHA, WILLEMSE & WILKINSON

6TH DEFENDANT

THE REGISTRAR OF DEEDS, PRETORIA

7TH DEFENDANT

And

ELIZABETH VENTER

1ST THIRD PARTY

JUDGMENTMAKGOBA, J

- [1] This is a matter wherein one Mrs JSJ Uijs, a widow, instituted action against the first defendant and six others for recovery of her farm which had been surreptitiously transferred into the names of the first and second defendants, a married couple, on 11 June 2004. Mrs Uijs passed away after *litis contestatio* and her executor, Mr Oosthuizen was substituted as plaintiff in terms of rule 15 of the Rules of Court.

The plaintiff in his representative capacity seeks an order for the restoration of the late Mrs Uijs' ownership in the immovable property known as Portion 3 of the Farm Uitkyk No 114, Registration Division H.S. Mpumalanga, in the district of Volksrust, held under Title Deed T36310/2001 (hereinafter referred to as "the Property").

- [2] For the sake of convenience I shall refer to the plaintiff as "Mrs Uijs". The first and second defendants served a notice in terms of rule 13 of the Rules of Court in terms of which they cited the fifth and sixth defendants as the first third party and the second third party respectively.

- [3] Shortly before the commencement of the trial plaintiff withdrew the action against the third, fourth, fifth and sixth defendants. The trial proceeded on the basis that plaintiff abandoned the alternative claim

for damages and proceeds with an action for restoration of ownership of the property against the first and second defendants only.

- [4] The first and second defendants dispute that they conspired with the other defendants to defraud the plaintiff. In the light of the evidence presented by the handwriting expert, Mr Bester, at the trial the first and second defendants concede that a valid deed of alienation did not exist that could have given rise to the lawful transfer of ownership in their names. The first and second defendants pleaded that based upon the principles of estoppel and *in pari delictum rule* the plaintiff is estopped from claiming the restoration of the rights of ownership in totality and prayed that the court should specifically order that the first and second defendants may not be evicted from the property.

The first and second defendants, further claim that the first and second third parties should indemnify them or pay a contribution towards the plaintiff's claim inclusive of any costs order granted against the first and second defendants.

- [5] The gist of the plaintiff's case is that:

5.1 The purported deed of sale (annexure "B") between Mrs Uijs and the first and second defendants is null and void and of no force or effect;

5.2 No valid and enforceable deed of alienation as prescribed in terms of section 2 of the Alienation of Land Act 68 of 1981 came into being;

5.3 The transfer and registration of the property into the names of the first and second defendants was unlawful and should be set aside.

[6] The plaintiff called as witnesses the following persons:

6.1 Mr PT Schnetler, a valuer.

6.2 Mr Jannie Viljoen Bester, a handwriting expert.

6.3 Ms Marianne Coetzee.

6.4 Mrs Bets Venter

6.5 Mr Corne Nel.

6.6 Mr Dannie H Coetzee.

[7] The uncontroverted evidence of Mr Schnetler, the valuer, is to the effect that the market value of the farm in April 2004 (date of sale of the property) amounted to R290 000.00 and as at 1 September 2009

to R1 390 000.00. The significance of this evidence is to support the plaintiff's submission that the sale transaction resulting in the transfer of the property to the first and second defendants in June 2004 was not a transaction in the normal course of business and certainly not a transaction concluded at arms length. In other words that the property was sold at R160 000.00, a giveaway price!

- [8] The evidence of the handwriting expert, Mr Bester, which was also not challenged, was presented to prove that the purported signatures of Mrs Uijs where they appear on annexures "E" (acknowledgment of receipt of the sum of R160 000.00) "F" (letter from Elizabeth Venter Attorney dated 7 May 2004) and "G" (Power of Attorney to pass transfer) are not the signatures of Mrs Uijs.

It follows from this that the transfer of the property into the names of first and second defendants took place wrongfully and unlawfully and as a result of an invalid Power of Attorney to give transfer.

- [9] Mrs Marianne Coetzee testified that it was her who initially wanted to purchase the property from Mrs Uijs. That it is her signature appearing as "Koper" on annexure "A" to the particulars of claim and that she signed the offer to purchase when same was presented to her by Mr Danie Coetzee, then her husband, who requested her to sign as "Koper". This occurred after Mrs Uijs, the "Verkoper", had already

signed and at that point in time no purchase price was recorded in the original contract.

During the course of trial the original offer to purchase was handed in as exhibit "B" and it is clear from exhibit "B" that the purchase price had not been recorded therein at the time that Mrs Uijs and Mrs Coetzee signed the document as "Koper" and "Verkoper". It is worthwhile to record that even to date hereof the said exhibit "B" is still without a recording of the purchase price.

[10] Mr Danie Coetzee testified that he wrote in the purchase price of R160 000.00 on a photo copy of the original contract after enquiring from Mrs Bets Venter the maximum amount that would not attract transfer duty.

[11] Mr Corne Nel, the grandson of Mrs Uijs, testified that the offer to purchase in its original form was given to him by Mr Danie Coetzee to obtain Mrs Uijs' signature thereto as seller. He went to Mrs Uijs in Volksrust where she signed the contract after expressing her dissatisfaction concerning the fact that the purchase consideration, namely R340 000.00 plus a 4X4 Land Cruiser motor vehicle was not recorded therein. It needs to be mentioned that it was Mrs Uijs' desire to sell the property to Mrs Coetzee for the aforesaid consideration (R340 000.00 plus a 4X4 Land Cruiser).

- [12] Mr Corne Nel testified further that on his return to Pretoria he handed the signed document to Mr Danie Coetzee and had nothing further to do with it. He never met or negotiated with the first and second defendants.

He waited for approximately two months and when no money was received from Mr Danie Coetzee and on account of Mrs Uijs putting pressure on him in regard to the purchase price they started making enquiries only to find that the property had been transferred and registered into the names of the first and second defendants.

- [13] Mrs Uijs promptly and assisted by her grandson, Corne Nel, reported the matter to the police who opened a docket charging Mr and Mrs Du Preez (the first and second defendants respectively) with fraud.

- [14] The next witness called by the plaintiff is Mrs Bets Venter. She is the attorney and conveyancer who handled the controversial transfer of the property to the first and second defendants. She is also involved in the present proceedings as the first third party.

As at the time of handling the transfer Mrs Venter was no longer on the roll of practising attorneys and conveyancers and was thus not qualified to handle the transfer and charge fees for work done.

[15] Mrs Venter testified that Mr Dannie Coetzee saw her initially with the document annexure "A" to the particulars of claim (ie the Offer to Purchased signed by Mrs Uijs and Marianne Coetzee). She prepared the transfer documentation for the transfer to Mrs Coetzee and handed same to Mr Danie Coetzee in order for him to have it signed by his wife (Marianne Coetzee). Mr Danie Coetzee accompanied by first defendant approached her a few days later and informed her that the transfer to Marianne Coetzee would not be proceeded with. Discussions took place outside her office between Danie Coetzee and first defendant which culminated in a decision by them that the transfer would be done into the name of first defendant.

[16] According to a note on her file Mrs Venter was requested to draw up a new contract to this effect. However, this was not done. She made a photocopy of annexure "A" and used tip-ex to remove from the copy the names of Marianne Coetzee and her signature. She then requested Mr Du Preez, the first defendant, to insert his and his wife's full names and particulars in the blank spaces as purchasers, which he did in collaboration with her.

She thereafter handed the documents as well as the transfer documents required to be signed also by his wife to the first defendant to attend to and the parties left. She later received the documents back and proceeded with the transfer.

[17] The plaintiff called Mr Danie Coetzee to testify and his evidence on the main aspects corroborate that of Mrs Coetzee, Corne Nel and Mrs Venter. He also testified that after the documents had been handed by Mrs Venter to first defendant he left it all in the hands of the first defendant.

[18] Mr Du Preez, the first defendant, testified that he did in fact partake in effecting the alterations to the contract in collaboration with Mrs Venter. According to him he enquired from Mrs Venter whether this was regular and she assured him that he could do it. According to him that made him uneasy initially but he went on and ignored what he termed the “gevaarligte”. Under cross-examination first defendant conceded the following:

18.1 He had no negotiations with Mrs Uijs (the seller) and never met or saw her.

18.2 He had no negotiations with Mr Corne Nel and never saw him.

18.3 He had no negotiations with Mrs Marianne Coetzee.

18.4 That the mandate of Mrs Venter appearing in the contract given to her by Mrs Uijs was a mandate limited to passing transfer to Mrs Marianne Coetzee.

18.5 He had not paid any purchase consideration to either Mrs Uijs or to Corne Nel.

18.6 He knew of no written authorization for payment of the purchase price to anybody but Mrs Uijs.

[19] On the basis of the evidence outlined above I come to a conclusion that the sale and/or transfer of the property to the first defendant and his wife, second defendant, were tainted with moral turpitude. It was unlawful, illegal and in fact fraudulent. I make a finding that the first defendant knowingly participated in this unlawful transaction from which he benefited. In other words the first defendant derived benefit from his own fraudulent conduct.

[20] The transaction is unquestionably one governed by the provisions of the Alienation of Land Act, 1981 (Act 68 of 1981) and in particular section 2(1) of the said Act.

On account of the fact that the purchase consideration was not recorded in exhibit "B", the original contract, it was invalid and of no force or effect in that it did not comply with the provisions of section 2(1) of Act 68 of 1981 requiring all the material terms of the contract to be recorded therein.

See: *Johnston v Leal* 1980 3 SA 635 (AD) 937-938.

[21] Annexure “A” to the particulars of claim is also invalid as the purchase consideration recorded therein is not one agreed on between the parties, namely Mrs Uijs and Mrs Coetzee. Annexure “B” to the particulars of claim is also invalid on account of the fact that the name of the original purchaser was removed therefrom and substituted by the names of first and second defendants without the consent of Mrs Uijs and Mrs Marianne Coetzee.

In *Bird v Summerville and Another* 1961 3 SA 194 (AD) it was held that: where a prospective seller makes an offer to a specific person, without intending to make an offer which could be accepted by anyone at all, and the offer is accepted by such person and another as joint purchasers, there is no concluded contract of sale.

[22] It follows therefore that no valid contract was concluded with first and second defendants and therefore no valid cause existed for the transfer of the property to them. The transfer was therefore unlawful. Moreover, it is clear on the evidence that the signature of Mrs Uijs was forged on the power of attorney to pass transfer and on this basis too the transfer occurred unlawfully.

[23] The first and second defendants argued that the plaintiff should not be given ownership of the property in its entirety and raised the defence of estoppel and *in pari delictum rule*.

The first and second defendants rely on the following aspects to advance their argument:

1. that Mrs Uijs willingly and knowingly signed the “Aanbod om te koop” (Annexure “A” to the particulars of claim) without completing the offer in respect of the purchase price;
2. that Mrs Uijs knew that the reason why the purchase price was not completed on the offer to purchase was to fraudulently evade payment of the applicable transfer duties.

The first and second defendants’ argument in this regard has no merit. The evidence on record does not support this argument.

[24] In any event even on a question of law the argument cannot stand. On account of the fact that the first defendant conceded under cross-examination that he was at all relevant times aware of the true facts and circumstances surrounding the transaction, they are now precluded from relying on the defence of estoppel.

[25] Estoppel cannot be permitted to cloth with legal efficacy something the law has decreed was a nullity. It cannot be used to make legal what otherwise would be illegal and cannot replace statutory requirements for the validity of contracts.

The legal position in this regard was succinctly set out by the Supreme Court of Appeal as follows:

“It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. It follows that the leases such as those mentioned above cannot, in effect, be validated by allowing estoppel to operate against the provincial government ...”

See: *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA) 148F-H.

[26] With regard to the plaintiff's claim against the first and second defendants my finding is that on the documentation, the objective facts and the evidence it is clearly established that the transfer of the property in question took place wrongfully and unlawfully in that it was not supported by a valid deed of alienation as required by section 2 of Act 68 of 1981. Moreover, the transfer took place without a valid power of attorney given under the hand of the transferor. Consequently the plaintiff is entitled in law to the relief claimed in prayers 1 to 6 of the particulars of claim.

[27] The plaintiff has asked for an order of costs on the scale applicable as between attorney and client given the nature of the case and the

conduct of the defendants. Counsel for the plaintiff referred me to the case, *In Re Alluvial Creek Ltd* 1929 CPD 532 at page 535 where it was said:

“An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.”

[28] I agree with the sentiments expressed by the learned judge in the abovementioned case. *In casu* the first defendant participated in the fraudulent transaction knowingly and when the plaintiff sought restoration the first defendant resisted the claim only to concede at a late stage of the trial. Even then the first defendant raised a defence of estoppel which in my view has no merit. The first and second

defendants did not believe in the justice of their cause and had put the plaintiff to unnecessary trouble and expense.

A punitive costs order is justified in the circumstances.

[29] I now turn to deal with the first defendant's claim against the first and second third parties in terms of the provision of Rule 13 of the Rules of Court. The gist of the first defendant's claims is that the third parties should indemnify him or pay a contribution towards the plaintiff's claim inclusive of any order of costs granted against the first and second defendants.

[30] As I have already made a finding that the first defendant is a party to the fraud committed during the sale and transfer of the property in question it goes without saying that the first defendant cannot be made to benefit from his unlawful conduct. There can be no basis for any indemnity and/or contribution he purports to claim against the third parties.

[31] At most the first and second defendants have shown that the first third party (Ms Bets Venter) was a party to the fraudulent transfer of the property into their names. However, I still maintain that the first defendant is equally guilty of fraud and thus he cannot benefit out of his unlawful conduct.

[32] The second third party's counsel raised a valid point to show that the first defendant cannot succeed in his claim against the second third party. The defendants' case against the second third party (a firm of attorneys) is unsustainable insofar as same boils down to the defendants relying on an agreement allegedly concluded with the first third party, which agreement or mandate without the defendants' knowledge and consent, was alleged to have been transferred to the second third party. In the particulars of claim the defendants allege that their mandate given to Bets Venter was transferred or ceded to the second third party.

[33] The defendants allege, in their own words that the mandate was "oorgedra en oorgemaak alternatiewelik gesideer aan die Tweede Derde Party".

The aforesaid construction constitutes reliance on a delegation of the first third party's obligations to the second third party.

[34] In law a delegation is only attainable with the consent of the creditor. It is not the defendants' case that they consented to such delegation by the first third party.

Jonathan M Silke in The Law of Agency in South Africa, 3rd Edition on page 306-307 says the following:

“The South African Courts have often accepted English authorities as correctly representing our law, and in Belonje v. African Electric Co Ltd, the Court cited the following passage from Wille’s Principles of South African Law as being a correct statement of the law: ‘An agent must perform the mandate in person. He may not delegate his duties or employ a sub-agent – *delegatus non potest delegare* – except with the consent of his principal, or where such employment is necessary for the carrying out of the agency, or is customary in the ordinary course of business.’”

See: *Belonje v African Electric (Pty) Ltd* 1949 1 SA 592 (E).

[35] I accordingly come to a conclusion, based on what is said in paragraphs 30 to 34 above, that the first and second defendant cannot succeed in their claims against the first and second third parties. I do not deem it necessary to make any finding as to whether the first third party was acting within the course and scope of employment with the second third party when she handled the transfer of the property or whether she conducted her legal practice in association with the second third party.

[36] The question as to whether the first and second defendants are liable for payment of the second third party’s legal costs in this matter depends on the extent to which the second third party had knowledge

or were supposed to know that the first third party used their facilities to effect the registration of transfer of the property.

[37] Mr Joseph Wilkinson, a partner of the firm, Botha Willemse and Wilkinson testified on behalf of the second third party. During his evidence-in-chief and under cross-examination the firm's defence was that there was no relation whatsoever between the first and second third parties. This standpoint flies in the face of what is contained in their plea in the main action.

[38] Paragraph 13.5 of the plea in the main action reads as follows:

“Die vyfde en sesde verweerders pleit dat die betrokkenheid van die sesde verweerder by die geheel van die transaksie wat die onderwerp van die eiser se eis vorm, beperk is tot die bystaan van die vyfde verweerderes met die indiening en uitvoering van die transport.” (Emphasis added)

The word “bystaan” as per Mini Dictionary, Jan Kromhout et al means the following:

“To assist, help, back up, assistance and aid.”

On Mr Wilkinson's own words the plea was drafted on the instructions provided by his partner, Mr Willemse, and himself.

[39] The only reasonable inference to be drawn on their statement in the plea is that the firm assisted Mrs Bets Venter in the registration of the transfer of the property. The inference is backed by the fact that the resources of the firm in the form of stationery, faxes, lodgement cover and lodgement number of the said firm were used by Mrs Venter to process the registration of the transfer. After registration of transfer the title deed was sent to the first defendant through the second third party.

[40] My finding in this regard should not be misconstrued as implying that the second third party firm of attorneys was a party to Mrs Venter's fraudulent conduct. This is not the case.

In any event the attorneys' firm did not know at that stage that Mrs Venter was no longer on the roll of practising attorneys and conveyancers.

[41] At least the firm should have taken the necessary measures that would have made it impossible for Mrs Venter to have acted in the manner she did under the auspices of Botha Willemse and Wilkinson attorneys. It is on account of their failure to do this that I use my discretion to deprive them of the legal costs against the first and second defendants.

[42] The following orders are therefore made:

1. That the registration of transfer of the immovable property known as Portion 3 of the Farm Uitkyk No 114, Registration Division H.S. Mpumalanga in the district of Volksrust presently held under Title Deed T78021/2004 in favour of first and second defendant is set aside;
2. The right of ownership in respect of the aforementioned property is restored to the plaintiff;
3. The first and second defendants are ordered jointly and severally to pay any or all costs occasioned by the setting aside of the registration of the property in their names and the re-registration of the property into the plaintiff's name;
4. That the first and second defendants are ordered to do all acts necessary and to sign all documents required by the Registrar of Deeds in order to effect registration of the property into the plaintiff's name, ALTERNATIVELY that such acts be done by the Sheriff of this Court;
5. That the seventh defendant (Registrar of Deeds) is authorised and directed to do all acts necessary to effect registration of the property in the plaintiff's name and to ensure that the records in

the Deeds Registry office reflect the plaintiff as the registered owner of the aforesaid property;

6. The first and second defendant are ordered to pay plaintiff's costs of the action on the scale as between attorney and client, such costs to include the costs of senior counsel.

7. The first and second defendants' claim against the first and second third party is dismissed and that each party shall pay his own legal costs.

E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

29116/2006/sg

<u>Heard on:</u>	19, 20, 21, 22, 23, 26, 27 & 29 October 2009
<u>For the Plaintiff:</u>	Adv D. P. J. Rossouw SC
<u>Instructed by:</u>	Messrs Morris Pokroy Attorneys, Pretoria
<u>For the 1st & 2nd Defendants:</u>	Adv J P Van Den Berg
<u>Instructed by:</u>	Messrs Adams & Adams, Pretoria
<u>For the 2nd Third Party:</u>	L. W. De Koning SC & C. S. Sevenster
<u>Instructed by:</u>	Botha Willemse & Wilkinson Attorneys, Pretoria
<u>Date of Judgment:</u>	06/11/2009