

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2015/11549

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
17 October 2018
DATE	SIGNATURE

In the matter between:

J, R

Plaintiff/Applicant

and

J, M

Defendant/
Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. In March 2015 the plaintiff instituted divorce proceedings against his wife to whom he is married out of community of property with the application of the accrual system under Chapter 1 of the Matrimonial Property Act 88 of 1984.
2. He alleged that during the subsistence of the marriage the defendant's estate had accrued while his showed no accrual. It was therefore contended in the summons that the plaintiff was entitled to one half of the difference between the accrual of his and the defendant's respective estates.
3. In January 2018 the plaintiff delivered a notice of intention to amend his claim by introducing an oral agreement between the parties concluded in September 2009 in terms of which his wife had been appointed as his nominee to purchase the farm De Oude Mouragie; although the property would be registered in the defendant's name the plaintiff would remain the sole beneficial owner. The property was registered in the defendant's name.

It was also alleged that in terms of the agreement the plaintiff would pay the purchase price of R605 000 and would effect all improvements, conduct the farming operations and maintain the property. It was further alleged that he had done so.

4. In terms of the notice of amendment the plaintiff then sought to introduce a new claim to the summons declaring that he is the lawful owner of the farm in question despite it being registered in the defendant's name.
5. The defendant objected to the amendment. The application before me is to allow the amendment.
6. The defendant's substantive objections to the proposed amendment are that;
 - a. It is bad in law because the amendment sets up an oral agreement which is impermissible by reason of the provisions of s 2 of the Alienation of Land Act 68 of 1981¹(which, it is contended, requires such an agreement concerning immovable property to be reduced to writing;

¹Section 2 *Formalities in Respect of Alienation of Land*

- b. It is bad in law because it is at variance with the terms of the antenuptial contract and offends against the Matrimonial Property Act 88 of 1984;
- c. It does not accord with his stated position in other documents including an affidavit deposed to by him in these same proceedings.

7. I proceed to deal with each

NOMINEE AGREEMENTS IN RESPECT OF OWNERSHIP OF IMMOVABLE PROPERTY

8. Leaving aside the terms reception into our legal lexicon from English law² nominee shareholdings and ownership became a popular device in South Africa in an attempt to circumvent the racial legislation under apartheid which precluded Blacks, Indians and Coloureds from owning land in the so called white areas. Its use as a means of not having to identify the true beneficial owner is still prevalent and reaches into securities held in public listed companies, although certain levels of disclosure are now required albeit that the ultimate beneficial owner may never be revealed.

(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.

See previously s 1(1) of the General Law Amendment Act 68 of 1957 which provided that:

No contract of sale or cession in respect of land . . . shall be of any force or effect . . . unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.

² *Dadabhay v Dadabhay and another* 1981 (3) SA 1039 (A) at 1047D

9. Courts soon recognised nominee holdings and by reason of the classification of the relationship established, our law considered that it did not have to be in writing even though the true beneficial owner's entitlement to claim *vis a vis* the actual registered owner was reduced to writing. See *Dadabhay v Dadabhay and another* 1981 (3) SA 1039 (A) at 1050A where this very issue was pertinently dealt, also on exception as the cited extract from the judgment of Holmes AJA (at the time) reveals:

“To sum up, in the present matter, on the case pleaded in the appellant's particulars of claim, there was an oral agreement that the respondent would buy an erf from the Board; that he would do so as "nominee" (which, as I have said, may well have been intended to mean "trustee") for the appellant; that there is no mention of monetary consideration for this service; and that, when called upon, he would sign all documents necessary to enable the erf to be registered in her name. Having regard to the authorities cited above, in my view the oral agreement is not hit by s 1 (1) of Act 68 of 1957; it is not a contract of sale or a cession in the nature of a sale. Finally, if the respondent purchased the erf in pursuance of the trust, the appellant is now entitled to demand of him that he complete the trust by signing the papers necessary to ensure registration in her name. I emphasize that this judgment is in the nature of a decision on exception to a summons. For that purpose the averments in the summons are assumed to be true. When the case goes to trial, the plea and the effect of the evidence will have to be considered.”

In *Hadebe v Hadebe and another* [2000] 3 All SA 518 (LCC) at para 17 Gildenhuys J in applying *Dadabhay* said:

“The legal relationship between the plaintiff and the first defendant which emanated from the facts set out above, is that of an informal trust whereunder the first defendant (as “nominee”, which could also mean trustee) would hold the property for the plaintiff.”

10. Accordingly the first ground of objection fails.

THE ALLEGED NOMINEE AGREEMENT IS AT VARIANCE WITH THE ANTENUPTIAL CONTRACT AND LEGISLATION

11. If there was indeed a nominee relationship then it is difficult to see how it could offend the terms of the antenuptial agreement or the provisions of the Matrimonial Property Act. The existence of a nominee agreement does no more than identify who in fact is and has always been the true beneficial owner. It does not subvert; it merely reveals what was always the true situation.

THE PROPOSED AMENDMENT CONTRADICTS THE PLAINTIFF'S OWN STATEMENTS

12. This argument fails to draw the line between a legal objection to a pleading, or to one that the pleading would be vague and embarrassing, and the production of evidence to knock a claim or defence out at trial stage.

13. The fact that a party may have made a statement against interest which would, if proven, result in the claim being dismissed does not mean that such evidence can be introduced to challenge the pleading of a contrary state of affairs. The one has to do with pleadings- the other has to do with contradicting evidence reserved for the trial.

By way of a simple illustration; a party cannot challenge an amendment to a claim because it is able to find some document which would put an end to the litigation. That will have to be pleaded. Hopefully such situations will become rarer once case management in its more resolution orientated form takes root to ensure that parties deal with the genuine disputes between them.

14. The only time when a statement of a party which contradicts his pleading can be raised by way of objection is if he has including that statement in his pleading.

And then the objection can be no more than that the pleading is vague and embarrassing; e.g. the alleging of terms in the body of the claim which are contradicted by the contents of an agreement attached to the very particulars of claim.

15. The objection on this ground must therefore fail.

COSTS

16. The plaintiff has been successful and seeks a costs order against the defendant.

Costs are a matter within the exercise of the courts judicial discretion.

17. At the outset I have sympathy for the defendant's position.

18. The evidence she presented demonstrates that the plaintiff by his own admission under oath in the same proceedings stated that the farm is jointly owned by them. There are also other statement he made, or that were made on his behalf which are at odds with his claim to be the sole beneficial owner of the farm; rather that he and the defendant are co-owners.

19. These constitute clear admissions against interest which would be admissible against him.

I cannot discount the possibility that the plaintiff is forcing the defendant into court by adopting an extreme position when his own *ipse dixit* is far different. It suggests that he may be using this as a stratagem to obtain a more favourable settlement than he would otherwise have been entitled if he had pleaded in a manner consistent with his express statements under oath. Of course the plaintiff will have an opportunity to explain the prior inconsistent statements at trial. There remains however the risk that the plaintiff is attempting to outlitigate the defendant in an attempt to force a favourable, but possibly unfair, overall settlement.

20. Since the matter may be settled it would be inappropriate to order that costs are determined by whether or not the plaintiff proves full ownership in the farm as opposed to co-ownership. In these circumstances it appears that an appropriate order is that costs be in the cause.

ORDER

21. The application to amend is granted and costs are to be in the cause.

SPILG, J

DATE OF HEARING:	15 October 2018
DATE OF JUDGMENT:	17 October 2018
FOR PLAINTIFF/APPLICANT:	Adv. JW Kloek CMM Attorneys Inc
FOR DEFENDANT/RESPONDENT:	Adv. Steyn SJ Naude Attorneys