

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 24785/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
27 September 2022	
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SIGNATURE	DATE

In the matter between:

TJAART NICOLAAS BRITS

APPLICANT

and

HESTER PETRONELLA KLOPPER

FIRST RESPONDENT

GERT ROELOF JACOBUS BRITS

SECOND RESPONDENT

JUDGMENT

MAZIBUKO AJ

1. The applicant seeks an order declaring the instalment sale agreement void *ab initio* and repayment of the purchase price in the amount of R1 833 332.22 with interest.

2. On 5 May 2017, the applicant and the second respondent, as purchasers, entered into an instalment sale agreement (agreement) for immovable property described as Portion 3 of the farm Blesbokfontein, Registration Section IR, Gauteng Province (the property) with the first respondent (the seller) for R2 400 000. Different amounts between May 2017 and August 2019 were made to the seller and her attorneys towards the purchase price, amounting to R1 833 332.22. With an outstanding amount of R566 667,78.

3. The applicant deposed to an affidavit and stated that he learnt bonds were registered over the property. In October 2020, he was advised that the agreement was void *ab*

initio in terms of the Alienation of Land Act 68 of 1981(ALA). He demanded the amounts paid to be paid back together with interest.

4. The applicant stopped making payments to the seller and her attorney and kept them in his attorney's trust account. Regardless, the seller continued to demand the amount of the balance owed.
5. The seller is in *ad idem* with the applicant that the contract is *void ab initio*. The seller admits that there were two purchasers, and that would entail a subdivision of agricultural land and permission was not obtained from the Minister before the conclusion of the agreement. The payments made by the applicant are not in dispute, and repayment thereof with interest. She disagreed with the applicant that the relief claimed in the form of repayment is based on Section 28(1) of ALA. The second respondent did not take part in this application.
6. The seller opposed the application and raised three points *in limine*;
 - a) *Lis alibi pen dens*,
 - b) Incomplete cause of action and counterclaim and
 - c) That there were bona fide disputes of facts.

Void ab initio

7. It was submitted on behalf of the applicant that he relied on the Alienation of the Land Act and the Subdivision of Agricultural Land Act 70 of 1970 (SDALA). In chapter 2 of ALA, the instalment sale agreement for agricultural land is expressly prohibited. There were two purchasers of the agricultural land, and that would entail a subdivision of agricultural land and permission was not obtained from the Minister before the conclusion of the agreement in terms of Section 3(b) of the Subdivision of Agricultural Land Act 70 of 1970 (SDALA).
8. The purpose of the Sub-division of Agricultural Land Act, 70 of 1970 (SDALA)¹. Section 3(a) provides that *agricultural land shall not be subdivided*. Section 3(b) provides that *no undivided share in agricultural land not already held by any person shall vest in any person; unless the Minister has consented in writing*.

¹ Is to control the subdivision and, in connection therewith, the use of agricultural land.

9. The Alienation of Land Act 68 of 1981²(ALA). Section 28 deals with the consequences of deeds of alienation that are void or terminated.

Section 28(1) reads “any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and—

(a) the alienee may in addition recover from the alienator—

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for—

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may, in addition recover from the alienee—

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.

Section 28(2) Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.

² is to regulate the alienation of land in certain circumstances and to provide for matters connected therewith.

10. It is common cause that there were two purchasers, and the contract would entail a subdivision of agricultural land. Permission was not obtained from the Minister before the parties entered into the contract. The parties are also correct in that the instalment sale agreement entered into between the parties is *void ab initio*. Consequently, payments made relating to the agreement must be paid back with interest.

Lis alibi pendens

11. In 2021, the applicant and the second respondent, simultaneously with this application, instituted an action against the first respondent for damages in the Magistrates' court, under case number 326/2021, in that when the applicant and second respondent took possession, the applicant made improvements on the property, amounting to R150 000.
12. In Hassan & another v Berrange NO,³ Zulman JA expressed the requirements for *lis pendens* in the following terms: "*Fundamental to the plea of lis alibi pendens is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause.*"
13. The applicant does not dispute that there is pending litigation between him and the seller where the second respondent is a second plaintiff, which is an action for damages emanating from the improvements made on the property he possessed after the conclusion of the agreement.
14. In the matter of Nestle Limited vs Mars⁴, It was stated that: "*The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, this suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token, the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties should be brought once and finally.*"

³ Hassan & another v Berrange NO 2012 (6) SA 329 (SCA) paragraph 19 – the judgment was delivered in 2006 but only reported in 2012.

⁴ Nestle (South Africa) (Pty) Limited vs Mars Inc 2001 (4)(SA) 542 (SCA):

15. The applicant submitted that where the *lis alibi pen dens* plea is upheld, he would abandon his claim in the magistrate's court. The action is not abandoned or withdrawn. Even if the applicant would or had done that, the second respondent remains a plaintiff in the magistrates' court action and has not made his election. Conversely, the seller stated that she intended to bring a counterclaim from the agreement. In principle, a matter is pending in another court involving the same parties on the same set of facts. Though in casu, it is to declare the agreement void ab initio resulting in the repayment of amounts paid and interest, and the other in the magistrates' court is a damage claim. These claims emanate from the same set of facts and the agreement.
16. For those reasons, I conclude that the requirements for the successful invocation of *lis alibi pen dens* are satisfied.

Incomplete cause of action and counterclaim

17. The first respondent raised two other points *in limine*; there was an incomplete cause of action in that the second respondent was still in the property's occupancy; therefore, monies paid in relation to the agreement cannot be made to the applicant. This flows from the principle that the nullity of the agreement gives rise to the restoration of every party in the agreement to its original state. The applicant deposed to a supplementary affidavit stating that the second respondent had moved out of the property. The incomplete cause of action was not persuaded for those reasons.

Bona fide disputes of facts

18. The parties do not agree on which act is applicable. On behalf of the applicant, it was argued that he relied on both ALA and the SDALA for its relief that the contract is ab initio and repayment must be paid with interest. The respondent contends through her counsel that the applicable act is SDALA, not ALA, which will lead to the parties' reliance upon the common law principles of an illegal contract for non-compliance with SDALA. Further, the seller would bring a counter-claim based on common law principles.
19. In the Plascon-Evans Paints case⁵ it was said; "*It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires*

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635

some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in

the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact."

20. The applicant submitted that the relief sought is based on ALA and SDALA, whilst the seller argued that the relevant legislation is SDALA. Considering that the point in *limine lis alibi pen dens* has merits, there is no need to determine the dispute of facts relating to the legislation upon which the application is based.
21. The parties agree that the agreement is *void ab initio*. The legality of the agreement, restitution and interest is therefore not an issue. The payments and improvements were made based on that agreement. The second purchaser, the second respondent, has not participated in this application. However, he is the second plaintiff in the magistrates' court action. Further, the seller averred that he would be bringing a counterclaim.
22. The issues emanating from the agreement appear to be more than the ones canvassed in this application. The disputes of facts arise to be inescapable in the circumstances. For the benefit of all parties and the administration and interest of justice, it is not desirable to canvass issues from the same set of facts against the same litigants fragmentary and in different forums. The relief sought is incompetent to bring finality in litigation surrounding the agreement due to other issues emanating from the agreement.

Costs

23. The applicant sought an order awarding costs against the respondent on an attorney and client scale. The seller sought the same against the applicant. Both parties advanced different reasons in pursuit of their submission, respectively, primarily based on the strength and persuasiveness of their case.
24. On one hand, in a meeting between parties held at the seller's attorneys' offices, the applicant expressed willingness to correct whatever was needed regarding the invalid contract by signing a new one. Met with *lis alibi pen dens* plea, he elected only to state his desire to abandon his magistrates' court action against the seller. Still, he took no effort to effect that, nor did the second respondent take any step to withdraw or formally abandon the pending action.
25. Conversely, the respondent, continued to make demands for the payment of the purchase price balance whilst it was common cause the agreement is *void ab initio*. Even if the parties did not agree on the nullity of the contract, the court could, *mero motu*, take cognisance of that fact and determine the consequences thereof. The counterclaim mentioned by the respondent is unliquidated damages. No reasons were advanced why no steps have been taken to quantify the counterclaim and prosecute same.
26. Though there is an apparent dispute between the parties concerning the applicable legislation and consequences thereof. No cogent facts were placed before this court that the applicant brought the application to abuse the court process or in an attempt to circumvent the respondent's counterclaim. There is no case made out for the costs order on an attorney and client scale. Such an order cannot be justified.

27. The parties agree that the agreement is void *ab initio*; even if they did not, this court could, *mero motu*, take cognisance of that fact and determine its consequences. However, I am guarded not to make an order on the agreement's nullity, restitution, and consequences thereof as the *lis alibi pen dens* plea is successful.

28. In the result, the following order is made for all these reasons.

Order

1. The plea of *lis alibi pen dens* is upheld.
2. Each party is to pay its costs.

N. MAZIBUKO

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email by being uploaded to Case Lines. The date for hand-down is deemed to be on 27 September 2022.

Counsel for the Applicant Advocate JJ Bouwer

Instructed by: Taute Bouwer Cilliers Attorneys

Counsel for Respondents: Advocate PJ Greyling

Instructed by: Odendaal & Kruger Attorneys, Inc.

Date of hearing: 19 July 2022

Judgment delivered on: 27 September 2022