IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED

DATE: **31 May 2023**

SIGNATURE:.....

Case No. A296/2020

In the matter between:

MASANGO, MARIGA PIET **APPELLANT**

And

MASANGO, BRIDGETT DIPUO **FIRST RESPONDENT**

JORDAAN, RUDOLPH PHILLIPUS N.O **SECOND RESPONDENT**

Coram: Millar J et Van Der Schyff & Munzhelele JJ

Heard on: 19 April 2023

Delivered: 31 May 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 31 May 2023.

Summary: Appeal against the upholding of an exception – On a consideration of the pleading, it is not possible on the facts to exclude the cause of action pleaded – Appeal upheld – Order of the court a quo replaced with one dismissing the exception with costs.

ORDER

On Appeal from the Gauteng High Court, Pretoria

It is Ordered:

[1] The appeal is upheld.

[2] The order of the court *a quo* is set aside and replaced with the following order:

[2.1] The exception is dismissed with costs.

[3] The first respondent is ordered pay the appellant’s costs of the appeal.

JUDGMENT

MILLAR J (VAN DER SCHYFF & MUNZHELELE JJ CONCURRING)

[1] This is an appeal against a judgment of this court handed down on 13 February 2020 in an opposed exception. The exception was upheld, and the particulars of claim set aside with punitive costs. Leave to appeal was granted to this Court by the Supreme Court of Appeal.[1]

[2] The appellant is the plaintiff in an action instituted between himself, his former spouse and the liquidator of the parties joint estate who are the respondents in this appeal. The first respondent was the excipient before the court *a quo.* An exception was taken to the appellant's particulars of claim.

[3] Pursuant to the grant of a decree of divorce between the parties on 13 February 2019, a deed of settlement was entered into between them and was made an order of court.

[4] It is the enforcement of one of the terms of that deed of settlement upon which the appellant's action is based. The appellant pleaded the terms as follows:

> *"4.2 The marriage relationship between the Plaintiff and 1st Defendant was dissolved via order of Court under case number 1181/2018 on 13 February 2019 following a Deed of Settlement being entered into;*
>
> *4.3 In terms of (sic) the Deed of Settlement between the Plaintiff and the 1st Defendant, the 2nd Defendant is appointed as Receiver and Liquidator in order to divide the joint estate between the Plaintiff and 1st Defendant.*
>
> *4.4 The Powers and Duties of the 2nd Defendant is set out in annexures to the Deed of Settlement, and provides that the 2nd Defendant is to distribute the net assets of the joint estate between the Plaintiff and 1st Defendant on such basis as may be agreed upon between them, alternatively, if no such agreement can be reached, to sell the assets of the joint estate either by public auction or private treaty.*

[1] The court a quo refused an application for leave to appeal on 4 August 2020 but special leave to this court was subsequently granted by the Supreme Court of Appeal on 9 November 2020.

5.1 On/about 2 June 2019 and at Kilner Park, Pretoria, the plaintiff and the 1st Defendant, representing themselves, reached and entered into an oral agreement in respect of the division of the 2 immovable pro"

[5] Subsequent to the deed of settlement being made an order of court, it is the case for the appellant that he and the first respondent, as they were permitted to do in terms of the deed of settlement, entered into an oral agreement in terms whereof he would retain a particular one of the two immovable properties forming part of the joint estate and the respondent the other.

[6] It was subsequently alleged that the first respondent had breached the agreement and had made separate offers to the second respondent for the purchase of both properties. It is in respect of the agreement between the appellant and the first respondent for which he seeks orders against both the first respondent *qua* the oral agreement and against the second respondent to give effect to the oral agreement read together with the deed of settlement.

[7] The first respondent's exception was cast as follows:

"In terms of section 2 of the Alienation of Land Act, Act 68 of 1981, no alienation of land shall be of any force or effect unless:

3.1 Contained in a deed of alienation, which is in terms of section 1 of the Alienation of Land Act, Act 68 of 1981 is defined as a document under which land is alienated;

3.2 which deed of alienation must be signed by the parties thereto or by their duly appointed agents.

Plaintiff cannot rely on an oral agreement as basis for his purported claim for alienation of land."

[8] The Court *a quo* took the view that, notwithstanding the court order, which specifically vested the second respondent with the power to give effect to any agreement entered into between the appellant and the first respondent that:

> *"the intended consequences of the alleged oral agreement is the exchange of ownership of land, in other words the one party takes the half of the property, which had otherwise belong to him, or her, and vice versa. It can therefore not be understood in any other way. You are alienating land from yourself to your former spouse and your former spouse is alienating land from himself, or herself, to the other spouse. It is therefore logical to conclude that the requirements of the Act are applicable to such an agreement to give same legal validity."*

[9] It is trite that when considering an exception, this must be done within the confines of the case as pleaded and that all the averments contained in the pleading are accepted as being correct.[2] Relevant to the determination of the present exception[3], is whether or not on the case as pleaded by the appellant, there is a cause of action. The test to be applied is set out in *H v Fetal Assessment Centre*[4] where it was held:

> *"[10] In the high court the matter was decided on exception. Exceptions provide a useful mechanism "to weed out cases without legal merit," as Harms JA said in Telematrix. The test on exception is* ***whether on all possible readings*** *of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts".* [my emphasis]

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2 *Marney v Watson and Another* 1978 (4) SA 140 (C) at 144F-G.

3 See *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at para [15] for a discussion of the general principles relating to exceptions.

4 2015 (2) SA 193 (CC) at para [10]. See also *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) at para [36].

[10] In the case pleaded by the appellant, the orders sought by him are: *"an order that the 1st and/or 2nd Defendant take all necessary steps to uphold and give effect to the oral agreement reached between the Plaintiff and the 1st Defendant. . ."* The order that is sought by him, is not for the transfer of any immovable property but rather in its terms, an order for specific performance in respect of the oral agreement pleaded and for the second respondent to give effect to it.

[11] The Court *a quo* proceeded from the premise that the case pleaded was one which had as its "effect" the alienation of immovable property which can only be effected in terms of a written agreement as provided for in section 2(1) of the Alienation of Land Act.[5]

[12] The section provides: "*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****."* [my emphasis].

[13] In the divorce settlement, the second respondent was appointed as the agent of the parties for purposes of the liquidation and distribution of the joint estate. The mandate was given subject to the condition that he was obliged to give effect to any agreement entered into between the parties. It was neither pleaded nor was it placed before the court that the deed of settlement required the agreement between the appellant and the first respondent to be reduced to writing for it to be of any effect.[6]

[14] Vested with the power to liquidate and distribute the joint estate, the second respondent, having regard to any agreement between the parties would "effect" it in terms of a "written authority" being the court order.

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[5] 68 of 1981.

[6] *SA Sentrale Ko-OP Graanmaatskappy BPK v Shifren en Andere* 1964 (4) SA 760 (A) at 767A-C.

[15] In other words, the case for the appellant may be construed as one seeking to compel the first respondent to abide the oral agreement and for their agent, the second respondent, to act in accordance with the mandate given to him and to thereafter enter into a deed/s of alienation on their behalf.

[16] This interpretation is entirely consistent with the case as pleaded, particularly having regard to paragraph 6.1 of the particulars of claim in which it is alleged that:

> *"The 1st defendant has however breached the oral agreement in that she has proceeded to make an offer to purchase in respect of the two immovable properties mentioned in 5.2 which offer the 2nd defendant has accepted in his capacity as Receiver and Liquidator."*

[17] It is self-evident that on the case as pleaded the second respondent is the "*agent acting on the written authority*" of the parties as required by section 2(1) and that it is he who would be obliged to give effect to their instructions and enter into a deed of alienation for the property concerned.

[18] For the reasons I have set out above, the construction placed upon the plaintiff's claim by the court *a quo* is not the only construction that can be placed upon it and in my view the appeal must succeed.

[19] In the circumstances, I propose the following order:

[19.1] The appeal is upheld.

[19.2] The order of the court *a quo* is set aside and replaced with the following order:

[19.2.1] "The exception is dismissed with costs."

[19.3] The first respondent is ordered pay the appellant's costs of the appeal.

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A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED,

_____

E VAN DER SCHYFF

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE,

_____

M MUNZHELELE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	19 APRIL 2023
JUDGMENT DELIVERED ON:	31 MAY 2023
COUNSEL FOR THE APPELLANT:	MR. J NYSSCHEN
INSTRUCTED BY:	JOHAN NYSSCHENS ATTORNEYS
REFERENCE:	MR. J NYSSCHEN
COUNSEL FOR THE FIRST RESPONDENT:	ADV. Z MARX DU PLESSIS
INSTRUCTED BY:	SHAPIRO AND LEDWABA INC.
REFERENCE:	MR. A SHAPIRO