LL Case No 400/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

BEAM BARRET KHUMALO	Appellant
and	
THE DIRECTOR-GENERAL OF CO-OPERATION AND DEVELOPMENT	First Respondent
THE MANAGER OF THE TOWNSHIP OF KWAMASHU	Second Respondent
JABULANI ANTHONY MADLALA	Third Respondent
EVOTEA MADLALA	Fourth Respondent

CORAM: VAN HEERDEN, MILNE, EKSTEEN JJA, NICHOLAS et NIENABER AJJA

HEARD: 18 SEPTEMBER 1990

DELIVERED: 28 SEPTEMBER 1990

JUDGMENT

VAN HEERDEN JA:

The appellant instituted motion proceedings against the respondents in the court a quo. He sought an order directing the first, second and third respondents to execute and sign all documents necessary to effect registration of transfer of immovable property, described as House D 886, Kwa Mashu, into his name, as well as ancillary relief.

In his founding affidavit the appellant alleged that during 1980 he and the third respondent ("Madlala") entered into an oral agreement in terms of which Madlala sold the property to him for a purchase price of R5 000. He annexed a document ("Annexure C") signed by him and Madlala which, so it was averred, was a "record" of the oral agreement, but submitted that an oral sale of the property was perfectly valid.

The deed of grant of the property to the third respondent was signed by the second respondent, on behalf of the Minister of Co-operation and Development, on 29 August 1980. The grant was,

however, only registered on 23 January 1981. All this was done in terms of the provisions of Proclamation R 293 of 1962 (Regulation Gazette 140 of 16 November 1962) promulgated under sections 6(2) and 25(1) of Act 38 of 1927.

Only the fourth respondent opposed the application. It appeared from the papers that her marriage to Madlala was dissolved in July 1984 by a decree of divorce. It was also ordered that their joint estate be divided "as per Annexure A". That document provided inter alia that the fourth respondent could reside in the parties' matrimonial home at D 886, Kwa Mashu (the property in question), until 31 December 1984, and that at any time "hereafter" (i e, after 30 July 1984) the house could be sold by either party for an amount of not less than R5 000, which amount was to be divided equally between them.

If, as alleged by the appellant, an oral sale of the property was concluded in 1980, it follows, of

course, that Madlala had sold the property to the appellant some 4 years before Madlala and the fourth respondent agreed that either of them could sell the property after 30 June 1984. The fourth respondent also set out additional reasons why, in her submission, the conduct of Madlala and the appellant "smacked of collusion". I shall revert to those reasons. However, the fourth respondent's main ground of opposition was that an oral sale of the property in 1980 would have been invalid by reason of the provisions of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969.

In the court a quo the appellant apparently also relied upon Annexure C. The court held, however, that if a sale of the property had to be in writing the annexure was invalid because it was unclear from its terms precisely what was sold. On appeal counsel for the appellant conceded that he could not rely upon Annexure C and nothing more need be said about it.

The main question debated in the court a quo was whether a sale of the property in 1980 was governed by the provisions of Act 71 of 1969 or those of Proclamation R 293 of 1962. As is well known, s 1 of Act 68 of 1957 introduced uniform formal requirements for the sale of immovable property, wherever situated in the country. It provided that no contract of sale or cession in respect of land or any interest in land (other than a lease, mynpacht or mining claim or stand) would be of any force or effect unless it was reduced to writing and signed by the parties (or by their agents acting on their written authority). The ambit of these provisions was, however, curtailed by regulation 9 of chapter 1 of the Regulations promulgated by Proclamation R 293 of 1962. That regulation reads as follows:

> "Notwithstanding the provisions of ... sub-sec (1) of sec 1 of the General Law Amendment Act of 1957 (Act No. 68 of 1957), no agreement for the sale or lease of any site in a township under these regulations shall

> be invalid merely because such agreement is not in writing."

This regulation was promulgated by the State President under the powers conferred upon him by s 25(1) of Act 38 of 1927. That subsection provides:

> "From and after the commencement of this Act, any law then in force or subsequently coming into force within the areas included in the schedule to the Black Land Act, 1913 (Act No. 27 of 1913), or any amendment thereof, or such areas as may by resolution of both houses of Parliament be designated as black areas for the purposes of this section, may be repealed or amended, and new laws applicable to the said areas may be made, amended and repealed by the Governor-General by proclamation in the Gazette."

It is trite law that s 25(1) conferred upon the Governor-General (and later the State President), within the areas concerned, powers of legislation equal to those of Parliament. In particular it empowered the Governor-General to repeal or amend the common law or any statute law (save, of course, an Act of Parliament which restricts or amends those powers). If, therefore, the Governor-General issued a proclamation

which was in conflict with a prior Act of Parliament, the proclamation, being the later provision, had to prevail. See R v Maharaj 1950 (3) SA 187 (A) 194 and Die Bestuursraad van Sebokeng en 'n Ander v Tlelima 1968 (1) SA 680 (A) 691.

It was, and still is, common cause that the property in question falls within an area referred to in s 25 of Act 38 of 1927 and that the provisions of the said regulation 9 apply to it. It follows that notwithstanding the provisions of s 1 of Act 68 of 1957 a sale of the property would not have been invalid merely because the agreement was not in writing. That, in any event, was the position until at least 1 January 1970.

With effect from that date Act 71 of 1969 came into force. S 1(1) of that Act provided that:

> "No contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing

and signed by the parties thereto or by their agents acting on their written authority."

(I shall refer to the words emphasised by me as "immovable property".)

The Act remained in force until it was repealed by the Alienation of Land Act 68 of 1981. But since the alleged oral agreement was concluded in 1980, the 1981 Act is not of direct relevance for the purposes of this appeal.

The 1969 Act did not contain any restriction as far as the area of its application was concerned. Indeed, s 3 made the Act applicable also in the territory of South West Africa. The Act therefore falls to be contrasted with the Sale of Land on Instalments Act 72 of 1971, s 2(b) of which provides that the Act shall not apply in respect of a contract relating to inter alia land forming part of a scheduled Bantu area as defined in s 49 of Act 18 of 1936.

There is no reference in the 1969 Act to

regulation 9 of the regulations promulgated by Proclamation R 293 of 1962, but in the court a quo the fourth respondent contended that the regulation had been impliedly repealed by the Act. This contention was upheld by the court. Its reasoning may be thus summarised:

1) The terms of s 1(1) of the 1969 Act run directly counter to the provisions of regulation 9. The latter stipulates that an agreement of sale of a site in a township, to which the regulations apply, is not invalid merely because the agreement is not in writing. S 1(1) of the 1969 Act says precisely the opposite provided that the property sold constitutes land or an interest in land.

2) It is unnecessary to determine whether a grant of a site in a township confers ownership in the land; at the very least such a grant confers an interest in land.

3) It is a general principle that

where a later statute is irreconcilable with an earlier one, the latter must be regarded as having been impliedly repealed.

4) The position may be different if the later statute is general, and the earlier one special, in its ambit. In this regard it may be said that the 1969 Act is to be regarded as a general statute because it applies countrywide, and that regulation 9 is a special provision because it applies only in respect of certain land. However, the rule generalia specialibus non derogant is not always applicable, and the cardinal question is whether the legislature intended that its later general Act should alter its own earlier special enactment (or such an enactment of some subordinate legislative authority).

5) In casu it seems clear that the 1969 Act was intended to cover the whole subject to which it related, without distinction as to the situation of land to which any contract might relate.

In this regard a clear guide to the Legislature's intention is to be derived from s 2(b) of Act 72 of 1971 which specifically exempts land in certain areas from the application of the general provisions of s 2(a).

In the result the court a quo dismissed the application with costs, but subsequently granted the appellant leave to appeal to this court against that order.

It is apparent that the attention of the court a quo was not drawn to s 12(1) of the Interpretation Act 33 of 1957 which provides:

> "Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so enacted."

Subject to qualifications which are not material to this appeal, the word "law" is defined in s 1 of the Interpretation Act as meaning "any law,

proclamation, ordinance, Act of Parliament or other enactment having the force of law".

S 1 of the 1957 Act was repealed by s 4 of the 1969 Act. Save for a minor alteration s 1(1) of the former Act was, however, re-enacted by s 1(1) of the 1969 Act. Regulation 9 contains a reference to s 1 of the 1957 Act. There does not appear to be any indication of a "contrary intention". Prima facie, therefore, the said reference should now be construed as a reference to s 1(1) of the 1969 Act. This would mean that the introductory phrase of regulation 9 must be deemed to read:

> "Notwithstanding the provisions of ... subsec 1 of sec 1 of the Formalities in respect of Contracts of Sale of Land Act (Act no 71 of 1969) ..."

However, since the court a quo did not consider the effect of s 12(1) of the Interpretation Act, and since we have not had the benefit of full argument on its precise ambit - and in particular the

meaning of the word "references" - I shall assume, in favour of the respondent, that the subsection does not affect the construction of regulation 9.

As regards the findings of the court a quo, counsel for the appellant submitted that the court did not fully appreciate the scope of the maxim generalia specialibus non derogant, and that on a proper application of that maxim the court should have found that the 1969 Act did not impliedly repeal regulation 9. In my view this submission is sound.

It is, of course, true that in general an earlier enactment is to be regarded as impliedly repealed by a later one if there is an irreconcilable conflict between the provisions of the two enactments. There is, however, an exception to this general rule. According to Glück, Ausführliche Erläuterung der Pandecten, book 1, pp 514-515, the exception applies when the earlier enactment is a special one, because it should not be presumed that the Legislature intended to

repeal the special enactment if it did not make it clear that such was indeed its intention. In such a case, says Glück, the later general enactment and the earlier special one should be equated with a rule and an exception thereto. See also Holl. Cons., third part, p 179, n 11, and Utrechtse Consultatien, second part, p 228, n 19.

A similar approach has been adopted in English law. In In re Smith's Estate, 35 Ch D 589 at 595 it was said:

> "... where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal."

The reason for this rule, or rather the

exception to the general rule, was given in an earlier case. In Fitzgerald v Champneys, 70 ER 958 at 968, the Vice-Chancellor said:

> "... the reason in all these cases is clear. In passing the Special Act, the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and, having so done, they are not to be considered by a general enactment passed subequently, and making no mention of any such intention to have intended to derogate from that which, by their own Special Act, they had thus carefully supervised and regulated."

And in Corporation of Blackpool v Starr Estate Co Ltd, (1922) 1 A C 27 at 34, Viscount Haldane formulated the exception in words reminiscent of those used by Glück. He said:

> "... we are bound ... to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what

> the Legislature had before provided for individually, unless an intention to do so is specially declared."

Following English authorities, the existence of the exception has been recognised in our case law. See, e g, R v Gwantshu 1931 EDL 29,31; Porter v Union Government, 1919 TPD 234, 238-239; Kent N O v South African Railways and Another 1946 AD 398, 429-30, and Gentiruco A G v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) 603. However, the exception is not applicable in every case where the provisions of a later general enactment are in conflict with those of an earlier special enactment. Obviously the exception cannot find application if the later enactment in so many words repeals the earlier one. But even if there is no reference to the earlier enactment in the later one, it may be clear that the Legislature nevertheless intended to repeal the special enactment. If so, effect must of course be given to the implied repeal. It is for this reason, I think, that in New Modderfontein Gold Mining

Co v Transvaal Provincial Administration 1919 AD 367 at 397, Kotze AAJA quoted with approval the following statement of Cooley, Constitutional Limitations, p 182:

> "It is a familiar rule, however, that when a new statute is evidently intended to cover the whole subject to which it relates, it will by implication repeal all prior statutes on the subject."

See also Durban Corporation and Another v Rex 1946 NPD 109, 114.

The true import of the exception therefore appears to be that, in the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. This presumption falls away, however, if there are clear indications that the Legislature none the less intended to repeal the earlier enactment. This is the case when it is evident that the later enactment was meant to cover, without exception, the whole field or subject to which it relates.

In casu the earlier enactment, unlike the 1969 Act, is, of course, not an Act of Parliament. But, as was said in Maharaj, supra, at p 194, s 25(1) of Act 38 of 1927 bestowed upon the Governor-General powers of legislation, within the areas concerned, equal to those of Parliament. Regulation 9 is therefore not subordinate legislation in the true sense of the phrase. Hence there appears to be no reason why, for the purposes of the application of the exception, the regulation should not be equated with an Act of Parliament.

Since s 1(1) of the 1969 Act applies to sales of immovable property countrywide, there clearly is an irreconcilable conflict between its provisions and those of regulation 9. It is equally clear, however, that since the regulation applies only to sales (and leases) of sites within certain areas, it is, in relation to the 1969 Act, a special enactment. There is no reference in that Act to the regulation,

and it must accordingly be presumed that the Act did not effect an implied repeal of the regulation. Are there nevertheless clear indications which ousts the presumption, i e, indications that the Legislature evidently intended that the Act should govern, without exception, sales of immovable property (and in particular land) wherever situated?

The court a quo answered this question in the affirmative. Apart from the reliance placed by it on Act 72 of 1971, the court appears to have come to that conclusion merely because the provisions of the 1969 Act were irreconcilable with those of regulation 9. That fact, however, cannot in itself serve to displace the aforesaid presumption. Indeed, the presumption only arises if there is an irreconcilable conflict between a special and a general enactment.

It has already been pointed out that, save for a minor alteration, s 1(1) of the 1969 Act was no more than a re-enactment of s 1(1) of the 1957 Act.

At its inception the latter subsection applied to sales of immovable property countrywide. Regulation 9 excluded from the scope of the subsection a sale of a site situated in a prescribed area. It therefore seems probable that when the subsection was re-enacted in 1969, the Legislature intended that the re-enacted provision should have the same area of application as the repealed subsection had immediately before the coming into operation of the 1969 Act. And before that date the repealed subsection did not apply to a sale of a site governed by the provisions of regulation 9. In any event, I do not find in the provisions of, or background to, the 1969 Act any clear indication of an intention to effect an implied repeal of regulation 9.

I come then to the reliance placed by the court a quo on Act 72 of 1971. The court, it will be remembered, considered that a clear guide to the Legislature's intention may be derived from s 2(b) of that Act which provides that the Act shall not apply in

respect of a contract relating to certain land, including land forming part of a scheduled Bantu area, contrasted with the absence of such a qualification or exception in the 1969 Act. I am not sure that the 1971 Act can be used as a guide to the Legislature's intention when it enacted the 1969 Act some two years earlier. Be that as it may, the 1971 Act was a new enactment in every sense of those words, and since the Legislature intended that it should not apply in respect of contracts relating to residential land in certain areas, it was obviously necessary to spell this out. By contrast s 1(1) of the 1969 Act was not a new provision and the scope of its precursor had already been curtailed by a special enactment, viz, regulation 9.

In the result I am not persuaded that s 1(1) of the 1969 Act was intended to govern, without exception, sales of immovable property wherever situated. Hence that subsection must be regarded as

embodying a rule and regulation 9 as constituting an exception thereto. Subject to what is said below, it follows that the appeal must succeed.

It will be recalled that in her opposing affidavit the fourth respondent averred that the conduct of the appellant and Madlala smacked of collusion. Although she did not say so specifically, the main reason for this allegation was no doubt the inconsistency between the alleged conclusion of the oral sale in 1980 and the provision in the divorce settlement that either Madlala or fourth respondent could sell the property subsequent to 30 June 1984. The fourth respondent also pointed out that although she and Madlala had lived at the premises in question since their marriage in March 1978, the third respondent at no stage informed her that he intended selling, or had sold, the property; that subsequent to the divorce he personally handed to her attorney the deed of grant in order that effect could be given to

the settlement agreement, and that the grant was only registered on 23 January 1981. It is therefore reasonable to infer, so the fourth respondent submitted, that Madlala was only informed of the grant some time after that date, and therefore after he had allegedly already sold the property to the appellant.

The appellant chose not to file a replying affidavit. The above averments and submissions of the fourth respondent therefore stand unanswered. The appellant did, however, annex to his founding affidavits two receipts allegedly signed by Madlala. The first document reads as follows:

> " 84/02/24
> J H Madlala JN 1376195
> RECEIVED the AMOUNT of R1 250,00 from Mr B B Khumalo in front of Dorak Molife. Paid in advance is R1 750,00. Balance is R2 000,00.
>
> Signed Madlala"

The second document, dated 21 August 1984 merely acknowledges receipt of the amount of R2 000

from the appellant. He relied on the two receipts in support of his averment that the full purchase price had been paid to the third respondent.

On the assumption that an oral sale of the property in 1980 would have been valid, counsel for the fourth respondent submitted that the question whether the alleged oral sale was in fact concluded, should be referred for the hearing of oral evidence. A similar alternative submission was made in the court a quo, but because it held that an oral sale of the property would have been a nullity, the court found it unnecessary to deal with it.

Rule 6(5)(g) of the Supreme Court Rules reads as follows:

> "Where an application cannot properly be decided on affidavit the Court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end

may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

In Moosa Bros and Sons (Pty) Ltd v Rajah, 1975 (4) SA 87 (D), Kumleben J, after a review of relevant authorities, arrived at the following conclusions (at p 93):

"(a) As a matter of interpretation, there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

(b) The illustrations of 'genuine' disputes of fact given in the Room Hire case at p. 1163 do not - and did not purport to - set out the circumstances in which cross-examination under the relevant Transvaal Rule of Court could be authorised. They a fortiori do not determine the circumstances in which such relief should be granted in terms of the present Rule 6(5)(g).

(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion

implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised."

In this court counsel were in agreement that Kumleben J correctly summarised the meaning and scope of application of Rule 6(5)(g), and I need say no more than that I agree with his conclusions. In casu there is not a "genuine" dispute of fact in that the alleged conclusion of the oral agreement falls peculiarly within the knowledge of the appellant (and, of course, of Madlala who did not file an affidavit supporting, or contesting, the appellant's version). Nevertheless the fourth respondent has relied on facts and circumstances which, in her submission, cast doubt on the appellant's relevant allegations. Although not contradicted by

direct evidence, those averments are thus in dispute. The remaining question then is whether there are reasonable grounds for doubting the correctness of the averments. For the following reasons there are, in my view, such grounds:

1) The appellant's version of the conclusion and implementation of the oral sale is somewhat meagre. So, for instance, he is silent on the terms of the sale relating to the payment of the purchase price. He also does not explain why two instalments were paid only some four years after the conclusion of the sale. Nor does he say when the amount of R1 750, referred to in the first receipt, was paid.

2) The inference drawn by the fourth respondent that Madlala could only have become aware of the grant subsequent to 23 January 1981 is not untenable and stands uncontroverted.

3) If Madlala had sold the property in

1980 one would expect him to have told his wife that he had done so. Yet, according to the fourth respondent, Madlala at no stage mentioned to her that the property had been sold.

4) A sale of the property to the appellant during 1980 is hardly reconcilable with the terms of the divorce settlement which inter alia authorised the fourth respondent to sell the property after 30 June 1984 for not less than R5 000.

In the light of the above considerations I am of the view that the court a quo should have referred the matter for the hearing of oral evidence. On the assumption that this should have been done, counsel were agreed that the order set out below should be substituted for the one made by the court a quo.

In the result the appeal is allowed with costs and the following is substituted for the order made by the court a quo:

1) The application is adjourned to a date

to be arranged with the registrar for the hearing of oral evidence, in terms of Rule of Court 6(5)(g), on the issue as to whether or not an oral agreement was concluded between the applicant and the third respondent as alleged in para 6 of the founding affidavit.

2) The applicant and the fourth respondent are to be available at the adjourned hearing for examination and/or cross-examination.

3) Leave is granted to both parties to subpoena the third respondent to attend the adjourned hearing.

4) The provisions of Rules of Court 35, 36, 37 and 38 are to apply in regard to the adjourned hearing.

5) The costs of the hearing on 4 February 1988 are to stand over for determination at the adjourned hearing.

It is recorded that at the hearing of the appeal the appellant's late filing of the notice of

appeal, as well as the late lodging of copies of the record of the proceedings, was condoned, and that the appellant was ordered to pay the costs occasioned by his application for condonation.

H.J.O. VAN HEERDEN JA

MILNE JA

EKSTEEN JA

CONCUR

NICHOLAS AJA

NIENABER AJA