

On appeal from: North Gauteng High Court (Pretoria) (Botha J sitting as court of first instance).

The following order is made:

1. The appeal is upheld with costs, such costs to be paid by the first and second respondents, jointly and severally the one paying the other to be absolved.
2. The order of the court a quo is set aside and substituted with the following:
 - '(a) The third defendant is ordered to rectify the title deed of Portion 2 and Portion 3 of Mazunga 142, Registration Division KT Limpopo Province, by cancelling the transfer and registration of the said portions in the names of first defendant, Isabella Christena Coetzer and the second defendant, Johannes Meintjes, and re-transferring and registering the said Portion 2 and Portion 3 into the name of deceased estate of John Meintjes (ID 170610 0008 086).
 - (b) The first and second defendant's counter claim is dismissed.
 - (c) The first and second defendant's are ordered to pay the plaintiff's costs, jointly and severally the one paying the other to be absolved.'

JUDGMENT

Shongwe JA (Mthiyane JA and Theron and Seriti AJJA concurring):

[1] This appeal is against the judgment and order of the North Gauteng High Court (Pretoria) (Botha J) dismissing an action instituted by the appellant, as plaintiff, against the respondents, as first, second and third defendants. For convenience I shall refer to the parties as plaintiff and defendants as in the court a quo. In that action the plaintiff sought an order directing the third defendant to rectify the title deeds of portions 2 and 3 of the farm Mazunga 142, Registration Division K.T., Limpopo Province to indicate that the deceased estate of John Meintjes (ID 170610 0008 086) is the registered owner of the said portions. In the alternative he sought an order compelling the first and second defendants to sign the necessary documentation to effect the transfer of portions 2 and 3 of the farm Mazunga 142, Registration Division K.T., Limpopo Province, to the deceased estate within 30 days of the order, failing which the sheriff within whose jurisdiction area farm Mazunga 142 is situated, is authorised to sign all necessary documents to effect such retransfer. In its dismissal of the plaintiff's claim the court a quo found that the first and second defendants had succeeded in proving their defence of waiver. The matter is now before this Court with the leave of the court a quo.

[2] In my view the facts of this case are not in dispute but the sole question for decision on appeal is whether the deceased had waived or abandoned her right to the ownership of portions 2 and 3 of her property, which were fraudulently transferred by the first and second defendants into their names. Allied to this issue is the question whether immovable property is capable of being transferred by way of waiver without a deed of alienation duly signed by both the owner and the transferee as required by s 2(1) of the Alienation of Land Act 68 of 1981 (the Act).

[3] A short backdrop of the history of the matter is perhaps necessary. The plaintiff, the first and second defendants are the children of the deceased John Meintjes, their mother, although the name may misrepresent her gender. She owned the farm Mazunga (the farm) situated in the Limpopo Province as described above.

She lived on the farm with the plaintiff and his family. In 1993 she made a will wherein she bequeathed all her property to her children in three equal shares. In 1998 she applied for a subdivision of the farm into three portions, which subdivision application was granted. In 2003 she made another will in which she bequeathed each specific portion of the farm to her respective children. The first and second defendants were to receive portions 2 and 3 respectively.

[4] The deceased became ill and died in January 2006. Before she died the first and second defendants clandestinely orchestrated a transfer of portions 2 and 3 of the farm into their names. This, they did without the deceased's knowledge. Documents were falsified and eventually portions 2 and 3 of the farm were transferred and registered into their names. In the year 2002 a purported deed of sale in respect of portion 3 was produced and in June 2003 a purported deed of sale in respect of portion 2 was produced. The deceased did not sign any deed of sale or transfer documents at any stage. Even the so-called transfer documents, for example, the power of attorney and related documents that were put up were false.

[5] There were family meetings taking place between the deceased and her children at different places and with different persons in the person of her children. Eventually in 2004 the deceased became aware that portions 2 and 3 of the farm had been fraudulently transferred and registered in the names of the first and second defendants. The plaintiff also became aware of this fact – hence the action in 2007 in his capacity as executor of the deceased's estate.

[6] In their plea the first and second defendants denied that they forged transfer documents but later filed an amended plea wherein they included a special plea that the plaintiff's action against them had become prescribed. In the alternative they pleaded that if it be found that the deceased did not sign the necessary conveyancing documents required for the transfer of portions 2 and 3 and that the registration of portions 2 and 3 is unlawful, then in that event, the deceased knew that portions 2 and 3 of the farm had been transferred into their names but failed to

take any action to reclaim the said property. Accordingly, continued the plea, the deceased had expressly waived or abandoned her right to claim the return of portions 2 and 3 of the farm by signing a 'Kwitansie en Vrywaring' in favour of the first and second defendants endorsing the transfer. And further alternatively, they pleaded that the deceased tacitly waived her right to claim the retransfer of portions 2 and 3 of the farm.

[7] The first and second defendants included a counterclaim wherein they requested a joinder of the plaintiff in his personal capacity. Consequently they asked for the eviction of the plaintiff from portions 2 and 3 of the farm and costs of the counterclaim.

[8] The plaintiff's claim is founded on *rei vindicatio*. The first and second defendants sought to counter by resorting to the flimsy defence of waiver which was doomed to fail from the moment it was made. The plaintiff contends, correctly in my view, that the deceased never lost her right of ownership, notwithstanding the fact that portions 2 and 3 of the farm had already been transferred and registered in the names of the first and second defendants by illegal means. In *Legator McKenna v Shea & others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) at para 22 Brand JA said the following:

'[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery □ which in the case of immovable property is effected by registration of transfer in the deeds office □ coupled with a so-called real agreement or "saaklike ooreenkoms". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922E-F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* supra at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass □ despite registration of transfer □ if there is a defect in the real agreement (see eg *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 496; *Klerck NO v Van Zyl and Maritz NNO* supra at 174A-B; *Silberberg and Schoeman* op cit at 79-80).'

(See also *Du Plessis v Prophitius & another* [2009] ZASCA 79; 2010 (1) SA 49 (SCA) wherein Ponnann JA referred to *Legator* with approval).

[9] As we know real rights may be acquired by various modes that are not reflected in the Deeds Office, for example by prescription, expropriation etc. In such circumstances the owner can trump a bona fide possessor who acquired the property from the person registered as owner in the Deeds Registry. The Registrar of Deeds under the negative system of registration, which was adopted in South Africa from Roman-Dutch law, plays a rather passive role, however, he examines every deed carefully before registering it, but mistakes do happen. For example where the signature of the transferor is forged, as is the case in the matter before us, the court will order rectification of the Deeds Registry, in favour of the original owner. This will be so even against the bona fide acquirer. In the present case, *a fortiori*, the first and second defendants are not bona fide acquirers as they admittedly forged the deceased's signature. (See also *Preller & others v Jordaan* 1956 (1) SA 483 (A) at 496). Mr Bergenthuin SC, for the plaintiff, referred to *Kristal v Rowell* 1904 TH 66 at 71 where the power of attorney under which the mortgage was executed was forged it was held that the mortgage therefore conferred no right or title of any sort upon the acquirer and the original owner was entitled to have it cancelled.

[10] In the present case it is common cause that no deed of alienation in terms of s 2(1) of the Act was signed by the owner and the defendants to effect a sale or transfer of any portion of the farm. Therefore there was no legal foundation to effect transfer to the first and second defendants. Even the obligation creating the agreement was falsified. The deceased did not and could not lose her right of ownership. It may well be that on an earlier occasion the deceased intended to transfer portions of her farm to her three children, the plaintiff and the first and second defendants. In 1998 she applied for a sub-division of her property. To this may be added the fact that she followed this up with a will she signed in 1993 (referred to in para 3 above). It must however be remembered that a will only takes effect upon the death of the testator. The 1993 will never took effect as it was

revoked by a new will in 2005 in which she left her entire estate to the plaintiff. Accordingly the 1993 will, cannot be relied upon by the first and second defendants as evidence pointing to their ownership of portions 2 and 3 of the farm.

[11] It is contended by the first and second defendants that the deceased was fully aware during her lifetime of the transfer of portions 2 and 3 of the farms to the defendants. They argue further that the inaction of the deceased arose from the fact that the deceased was satisfied with the two portions of the farm remaining in the defendants' names. They cite the making of a new will in 2005 wherein she bequeathed all her estate to the plaintiff as the basis for concluding that she abandoned her right to portions 2 and 3. They argue that the entire estate referred to in the 2005 will is portion 1, which was not mentioned by the deceased in the will. Their argument as to waiver is untenable and unsustainable. The first and second defendants bore the onus to establish that a waiver had occurred. For a waiver to be effectual they had to show that the deceased, with the full knowledge of her right to portions 2 and 3, decided to abandon it, 'whether expressly or by conduct plainly inconsistent with an intention to enforce it.' (*Laws v Rutherford* 1924 AD at 263). What happened in this case is plainly inconsistent with that intention. When the deceased made her last will she bequeathed her entire estate to the plaintiff and not the 'remainder' thereof. If her intention had been to abandon portions 2 and 3 one would have expected her to state unequivocally that she was giving the plaintiff only portion 1 or at the very least the remainder of her estate.

[12] The first and second defendants also raised the question of prescription as a possible defence in the court a quo but it was not persisted in on appeal, the court a quo dismissed it and there is no cross-appeal, therefore there is no need to deal with it in this judgment. Section 28(2) of the Act was found to be irrelevant because the transfer to the defendants took place on a deed of sale which the deceased did not sign and the deed of transfer and related documents were also falsified.

[13] It does not appear that the court a quo addressed itself to prayer 2 of the

plaintiff's claim which is based on the *rei vindicatio*. It is my considered view that had it done so the outcome might have been different, in that it would have enquired into the principles relating to the acquisition and loss of ownership of immovable property. In any event mere registration does not afford proof of ownership.

[14] Mr Omar for the first and second defendants referred this court to *Knysna Hotel CC v Coetzee NO 1998 (2) SA 743 (SCA)* at 754D-E. He relied heavily on this case to show that where all the formalities of a transfer have been complied with, accepted by the Registrar of Deeds, and where transfer is registered in the Deeds Registry, there is a formal and legally valid transfer that will remain binding until it is set aside by an order of court. The facts in *Knysna* are distinguishable to the present case in that in *Knysna* only the deed of transfer was valid whereas in the present case both the obligation creating agreement (*causa*) and the real agreement were absent due the fraudulent conduct of the defendants.

[15] The fact that both the obligation creating agreement, and the real agreement were falsified is enough to deal a fatal blow to first and second defendants' defence who are in fact asking this court to countenance their fraudulent actions. Their actions are, indeed, contrary to public policy. In the words of Ngcobo J in *Barkhuizen v Napier 2007 (5) SA 327 (CC)* para 28:

'Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it.'

I may add that courts should decline to enforce or give life to contracts that are in conflict with constitutional values even though the parties may have consented to them. In this instance the first and second defendants are asking this court to give life to an illegal and fraudulently obtained right by way of recognising a waiver by the deceased. Therefore a contract that is inimical to the values enshrined in our constitution is contrary to public policy and is unenforceable.

[16] The first and second defendants bore the onus throughout to prove waiver or abandonment. The mere fact that the property is registered in the name of a person does not translate into ownership. Ownership may be acquired by prescription or by abandonment even if the property is not registered in one's name. For abandonment of property there must be an intention by the owner to abandon the property - see *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) at 764H. Munnik AJ in *Union Free State Mining and Finance Corporation Ltd v Union Free State Gold and Diamond Corporation Ltd* 1960 (4) SA 547 (W) at 549C-E said the following:

'I do not think that a creditor can by the mere exercise of his will terminate the obligation without the concurrence of the debtor because as both *Wessels* and *Pothier* point out a release, waiver or abandonment is tantamount to making a donation to the debtor of the obligation from which he is to be released and until that donation has been accepted it has not been perfected. There may conceivably be circumstances in which a debtor does not wish to be released from his obligation. It may for a variety of reasons not suit him to be released. To allow the release, waiver or abandonment and the consequent making of a donation dependent solely on the will or action of the creditor would be tantamount to creating a contract at the will of one party which is a concept foreign to our jurisprudence.'

See also Christie, *The Law of Contract in South Africa* 5 ed (2006) pp 437-438.

[17] The deceased is said to have had knowledge of the registration of transfer of portions 2 and 3 of the farm onto the names of the first and second defendants. Examples are derived from the 'Kwitansie en Vrywaring', the letter to the bank dated 6 May 2005 advising the bank manager to alter her will to exclude the first and the second defendants as the transfer of portions 2 and 3 had already been effected; the conversations the deceased had with the plaintiff and his wife; and the tape recordings. Despite all these happenings the deceased did not exercise her right to reclaim portions 2 and 3. The first and second defendants conclude that she waived or abandoned her right to reclaim the property. It is difficult to place any evidentiary value to these phenomena as each role player had a motive for trying to influence the deceased one way or the other. The deceased may not have been aware that some of these things did take place. Therefore it cannot be said that she intentionally

or tacitly abandoned her right to reclaim her property.

[18] In the light of the reasoning proffered above the counterclaim must also fail.

[19] The following order is made:

1. The appeal is upheld with costs, such costs to be paid by the first and second respondents, jointly and severally the one paying the other to be absolved.
2. The order of the court a quo is set aside and substituted with the following:
 - (a) The third defendant is ordered to rectify the title deed of Portion 2 and Portion 3 of Mazunga 142, Registration Division KT Limpopo Province, by cancelling the transfer and registration of the said portions in the names of first defendant, Isabella Christena Coetzer and the second defendant, Johannes Meintjes, and re-transferring and registering the said Portion 2 and Portion 3 into the name of deceased estate of John Meintjes (ID 170610 0008 086).
 - (b) The first and second defendant's counter claim is dismissed.
 - (c) The first and second defendant's are ordered to pay the plaintiff's costs, jointly and severally the one paying the other to be absolved.'

J SHONGWE
JUDGE OF APPEAL

LEACH JA

[20] I have read the judgment prepared by Shongwe JA and although I agree with his conclusion that the appeal should be upheld and an order made in the terms he proposes, I have reached that conclusion by a somewhat different route which renders it unnecessary to determine some of the issues with which he has dealt.

[21] At the outset, I must record that cases such as *Du Plessis v Prophitius* and *Legator McKenna* (see para 8 above) recognised the abstract theory of transfer as part of our law, and that under that theory, even though a valid underlying contract (eg of sale) is not necessary, the passing of ownership of immovable property only takes place when there has been delivery effected by registration of transfer coupled with a so called 'real agreement' or 'saaklike ooreenkoms', the essential elements of which are an intention on the part of a transferor to transfer ownership coupled with a corresponding intention on the part of the transferee to become the new owner – so that if there is a defect in the real agreement, ownership will not pass even if registration of transfer takes place.

[22] In the present case, not only was there no valid deed of alienation of the disputed portions of the farm to the first and second defendants as the deceased's signature thereon had been forged, but the necessary transfer documents had also been similarly falsified. In these circumstances, despite the registrar of deeds having effected registration of transfer, there can be no doubt that the deceased never intended to transfer ownership of the two disputed portions of the farm to the first and second defendants at the time registration of transfer was effected. She therefore remained the owner thereof as my learned brother has correctly concluded.

[23] In order to succeed the first and second defendants therefore had to prove that after the deceased had become aware of the fraudulent transfer of the two portions of the farm, she had waived her right to reclaim them. For present purposes I am prepared to accept, but without deciding, that a waiver in these circumstances

could constitute a valid real agreement for the transfer of ownership (although a potential difficulty seems to me to be that in these circumstances a waiver is no more than a

donation which in itself would be ineffective as not having been recorded in writing and signed as required by s 2(1) of the Alienation of Land Act 68 of 1981). But should no such waiver have taken place, the necessary factual foundation of the first and second defendants' defence falls away and makes it unnecessary to decide any further legal issues.

[24] In order to succeed the first and second defendants were obliged to show that the deceased, with full knowledge of her right to reclaim the two portions of the farm (or put differently, her rights of the ownership in those portions), decided to abandon such claim, whether expressly or by her conduct. As was observed by Innes CJ more than three quarters of a century ago, an observation which remains as valid today as it did then, a waiver is a question of fact which is always difficult to establish. (*Laws v Rutherford* 1924 AD 261 at 263).

[25] In seeking to establish such a waiver in their favour, the first and second defendants referred to a number of factors. In particular they emphasized that during the 16 month period from when she learned of the fraudulent transfer of two thirds of the farm, the deceased did not institute action to enforce her claim for retransfer. It was also alleged that the deceased's alteration to her last will and testament, and her written instruction to her attorney to amend her existing will, indicated that she must have had the intention to abide by the transfer of the disputed two thirds of the farm.

[26] Although I shall deal with these factors later, the immediate difficulty that I have with this argument is that the first and second defendants never sought to make out a case that during her lifetime the deceased had communicated to them, either expressly or through her conduct, that she had waived her claim or that they had accepted such a waiver. As was held in this court in *Traub v Barclays National Bank Ltd*; *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634-635 a creditor's intention not to enforce a right has no legal effect unless and until there is some expression or manifestation of it which is communicated to the person in

whose favour the right is waived or in some way brought to his knowledge, and that any mental resolve not communicated to the other party and only discovered later has no effect.

[27] Accordingly, without the first and second defendants showing that the deceased communicated an intent to waive her claim which they accepted in her lifetime – and in that regard facts of which they learned only after her death, eg, that the deceased had altered her will, cannot be relied on *ex post facto* to establish a waiver on her part – there can be no suggestion of a waiver by the deceased. As it was never the first and second defendants' case that they had accepted a waiver in their favour during the lifetime of the deceased, on that basis alone they must fail.

[28] But in any event, I agree with Shongwe JA that the first and second defendants failed to establish an intention on the part of the deceased to waive her claim. At the outset, it is inherently improbable that a person will lightly waive the right of ownership in valuable property out of which he or she has been defrauded. (Compare *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451 (A) at 469B-C). Moreover the fact that the deceased changed her will to exclude reference to the first two defendants, on which they rely upon as showing that she accepted that it was unnecessary to mention them in her will as their portions of the farm had already been transferred to them, is equally consistent for the deceased being so angered by their fraudulent conduct that she had decided to remove them as beneficiaries. Equivocal conduct of this kind is by its very nature insufficient to establish a clear intention to waive. (Compare *Van Rensburg & andere v Taute & andere* 1975 (1) SA 279 (A) at 308).

[29] The first two defendants also rely upon the written instruction the deceased addressed to her bank to vary her will which, they argue, can only be regarded as amounting to an indication that she accepted the fraudulent transfer and did not intend to take steps to seek to recover the two portions of the farm. Suffice it to say that I do not think that this correspondence can carry the day. One does not know how it came about that the letter in question was prepared and typed or under what circumstances the deceased came to sign it. In the light of the admitted fraud perpetrated in respect of the deed of sale and transfer of portions of the farm, any

documentation must be viewed with some suspicion. And when weighed up against an undisputed allegation that the deceased, after learning of the fraudulent transfer of the two portions of the farm to the first and second defendants, had passed a remark to the effect that they had 'hulle kele afgesny' (slit their own throats) before instructing the attorney to change the will, her likely intention appears to have been to disinherit them.

[30] Similarly, the so-called 'receipts and indemnifications' allegedly signed by the deceased in 2004 were most suspicious. They sought to provide proof of payment of the purchase price reflected in each of the two forged sale agreements which amounts, it was ultimately conceded, had not in fact been paid. What led to these documents being prepared and signed is unknown, but in the light of the suspicious circumstances which prevailed, the attorney who appeared for the first and second defendants, most correctly in my view, did not attempt to afford much weight to them and, in truth, they take the matter no further.

[31] Although the fact that the deceased did not take steps to reclaim the two portions of the farm during the 16 month period from when she learned of the fraud until her death is to be taken into account in considering whether she had waived such right, a delay in exercising a right is but only one factor to be taken into account and does not necessarily lead to an inference of its abandonment. (See eg *Mahabeer v Sharma NO & another* 1985 (3) SA 729 (A) at 736E-737C). It must also be remembered not only that the deceased was aged and in poor health, but that she was caught up in a situation of family strife with her various children making competing claims upon her and her affection. In addition, at no time during the remainder of the deceased's lifetime did the first and second defendants seek to exercise any de facto rights of ownership over any portion of the farm which the plaintiff continued to farm without interruption. In these circumstances, the deceased's failure not to immediately embark on litigation is understandable and is not indicative of an intention on her part to abandon either her rights of ownership in the two portions of the farm or her claim for them to be transferred back to her.

[32] Taking these and the other factors mentioned by my learned colleague into account, the defence of waiver is unsustainable on the facts and, on that basis alone, the appellant's claim for rectification of the title deeds ought to have succeeded. For these reasons I agree that the appeal must succeed.

L E LEACH
JUDGE OF APPEAL

APPEARANCES:

For Appellant:

J G Bergenthuin SC

Instructed by:
Rooth Wessels Motla Conradie
Pretoria
Rosendorff Reitz Barry
Bloemfontein

For Respondent:

Z Omar (Attorney)

Instructed by:
Zehir Omar Attorneys
c/o Friedland Hart & Partners
Monument Park
Goodrick & Franklin
Bloemfontein