THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case No: 246/2013

In the matter between:

PIETER PAUL LE ROUX	**FIRST APPELLANT**
JOHANNA CATHARINA LE ROUX	**SECOND APPELLANT**

and

PAUL STEENKAMP NEL	**FIRST RESPONDENT**
ALWYN JACOBUS MULLER NO	**SECOND RESPONDENT**

Neutral citation: *Le Roux v Nel* (246/13) [2013] ZASCA 109 (16 September 2013).

Coram: Brand, Nugent, Malan, Majiedt JJA *et* Van der Merwe AJA

Heard: **5 September 2013**

Delivered: **16 September 2013**

Summary: **Option to buy land in favour of appellants – subsequent sale of same land to first respondent – application of doctrine of notice – whether exercise of option complied with s 2(1) of Alienation of Land Act 68 of 1981 – application of doctrine of fictional fulfilment.**

ORDER

On appeal from: Northern Cape High Court, Kimberley (Williams J sitting as court of first instance):

The application for reinstatement of the appeal is dismissed with costs including the costs of the appeal and the costs of the appellants' application for the amendment of their particulars of claim.

JUDGMENT

BRAND JA (NUGENT, MALAN, MAJIEDT JJA *ET* VAN DER MERWE AJA CONCURRING):

[1] This is an appeal against the judgment by Williams J in the Northern Cape High Court, Kimberley, with the leave of this court. It is opposed by the first respondent while the second respondent abides the judgment on appeal. The issues arising will be better understood against the background that follows. The first and second appellants, Mr and Mrs le Roux, are husband and wife. On 13 July 2000 they obtained a written option from Mr Jan Harmse Steenkamp, since deceased (the deceased) to buy his farm near Niewoudtville in the province of the Northern Cape for the relatively modest purchase price of R141 000. The option expressly required the appellants to exercise the option within two months of the death of the deceased.

[2] The deceased died on 13 September 2003. On 26 September 2003 the appellants attended at the office of their then attorney, Mr D C Coetzee and instructed him to exercise the option. Coetzee gave effect to this instruction by

writing a letter to the second respondent, Mr Alwyn Muller, who is the executor in the deceased's estate. It then transpired, however, that the deceased had, during his lifetime, on 8 July 2003, sold the farm to the first respondent, Mr Paul Nel, and that in pursuance of the sale, the farm had in the meantime been transferred to him. The first respondent was clearly aware of the earlier option in favour of the appellants when he bought the farm from the deceased. That much appears from the indemnity, expressly provided for in the deed of sale, by the first respondent in favour of the deceased against any potential claim by the appellants, arising from the option.

[3] When the appellants became aware of the sale and transfer of the farm to the first respondent, they instituted action in the Northern Cape High Court, Kimberley, against the first appellant and against the second appellant in his capacity as executor of the deceased's estate. What they essentially sought was an order declaring that they were entitled to transfer of the farm in their names and that the two respondents be compelled to take all necessary steps to effect that transfer. In addition they claimed damages from both respondents for their alleged loss of the profits they would have earned from farming activities had the farm been registered in their name.

[4] In support of their claim for transfer the appellants relied on principles embodied in what has become well known in our law as the doctrine of notice. The operation of this doctrine in the sphere of successive sales has been described in previous cases along the following lines. The starting point is the basic principle of our law that a real right generally prevails over a personal right, even if the personal right is prior in time, when they come into competition with one another. Accordingly, in the ordinary course, if a seller, A, sells a thing – be it movable or immovable – to B and subsequently sells the same thing to C, ownership is acquired, not by the earlier purchaser, but by the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his or her right is unassailable. If the second purchaser, C, is the first

transferee, his or her right of ownership is equally unassailable if he or she had purchased without knowledge of the prior sale to B. But, if C had purchased with such prior knowledge, B is entitled to claim that the transfer to C be set aside so that ownership of the thing sold can be transferred by A to B. In exceptional circumstances B may be allowed to claim transfer directly from the purchaser with knowledge, C. (See eg *Bowring NO v Vrededorp Properties CC & another* 2007 (5) SA 391 (SCA) para 11; *Meridian Bay Restaurant (Pty) Ltd & others v Mitchell NO* 2011 (4) SA 1 (SCA) para 12.)

[5] Equally well established by now is the principle that for purposes of the doctrine of notice, a prior option places the holder in the same position as a prior purchaser (see eg *Le Roux v Odendaal & others* 1954 (4) SA 432 (N) at 442F-G; *Cussons & andere v Kroon* 2001 (4) SA 833 (SCA) paras 10-13). It follows that if attorney Coetzee's letter of 26 September 2003 constituted the proper exercise of a valid option, the appellants would be entitled to transfer of the farm in their names. In his plea the first respondent denied, however, that the option was validly granted because, so he alleged, it was induced either by undue influence or misrepresentation on the part of the first appellant. In addition, and in any event, he denied that the option was properly exercised.

[6] When the matter came before Williams J in November 2007, it ran for three days during which the evidence was presented, on behalf of the appellants, of the first appellant himself and of an expert in support of their damages claim. Thereafter the matter was postponed until August 2009. When the hearing resumed, an application was brought on behalf of the first respondent for the separation of issues in terms of rule 33(4). The application was supported by the appellants and the second respondent and eventually granted by Williams J. In terms of the separation order that followed, the issue to be determined first turned on the first respondent's contention, which was then squarely raised, that the option had not been validly exercised for failure to comply with the formalities

prescribed by s 2(1) of the Alienation of Land Act 68 of 1981. All other issues stood over for later determination.

[7] At the end of the preliminary proceedings, during which no further evidence was led, Williams J upheld the first respondent's contention, which resulted in the dismissal of the appellants' claims with costs. The appellants then brought an application in the court a quo for leave to appeal against that judgment. At the same time they brought an application to amend their particulars of claim. In essence, the import of the amendment sought was to introduce the proposition that even if it should be held that their exercise of the option was not valid for failure to comply with the required formalities, such compliance should be deemed to have been complied with by operation of the doctrine of fictional fulfilment.

[8] In the court a quo both the appellants' application for leave and their application for the amendment of their particulars were unsuccessful. Subsequently the appellants sought and obtained leave to appeal from this court. In the wake of the leave thus obtained, the appellants renewed their amendment application. After all that, the appellants' attorneys allowed the appeal to lapse for failure to file the record within the prescribed period. That gave rise to an application for reinstatement, which was opposed by the first respondent. In argument before us it was common cause between the parties that the matter should be approached on the basis that the outcome of the reinstatement application rests on the appellants' prospect of success on appeal. But that, whatever the outcome, the costs of the application should be borne by the appellants.

[9] In that light, I turn directly to the merits of the appeal. I propose to start with the first respondent's contention, which found favour with the court a quo, that attorney Coetzee's purported acceptance of the option on behalf of the appellants

did not comply with s 2(1) of the Alienation of Land Act 68 of 1981. This section provides in relevant part:

'No alienation of land after the commencement of this section shall, . . . 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.'

[10] In terms of the definition section in the Act, a 'deed of alienation' can consist of more than one document. In principle the letter signed by Coetzee could therefore constitute a proper acceptance of the offer contained in the option if it could be said that he was acting on their written authority. The court a quo held that he was not. In support of this finding, reference was made to the first appellant's concession under cross-examination, on more than one occasion, that the instructions to Coetzee were given orally. For their argument to the contrary the appellants relied on evidence, firstly, that attorney Coetzee wrote down the instructions which he was given; secondly, that the letter of acceptance itself recorded in writing that Coetzee was acting on behalf of the appellants; and, thirdly, that the letter of acceptance was apparently sent on more than one occasion.

[11] As to the pertinent legal principles, the requirement of written authority contained in s 2(1) is by no means a new provision in our law. It was first introduced in s 30 of the Transvaal Transfer Duty Proclamation 8 of 1902, which also required that a contract of sale of land, if not signed by the principal, must be signed by his agent 'duly authorised in writing'. Thereafter the requirement was consistently repeated in subsequent legislation until it was finally re-enacted in s 2(1), virtually in its original form. It is an important provision. Over the years many seriously intended contracts have foundered on the ground that the agent signed the deed of sale without being duly authorised in writing to do so. The object of the provisions of s 2(1), it has been said, is to put the proof of alienation of land beyond doubt in order to avoid unnecessary litigation in the public interest (see eg *Thorpe & others v Trittenwein & another* 2007 (2) SA 172 (SCA) para 8).

The way in which this particular requirement sought to achieve the stated object, so it has also been said, is to minimise the risk of subsequent disputes as to the authority of an agent.

[12] Yet, perhaps contrary to its laudable purpose of avoiding litigation and despite its deceptive simplicity, the requirement has over the years yielded a rich crop of decided cases. Any attempt to measure the facts of a particular case under consideration against those of reported decisions will ordinarily result in no more than a futile exercise, unless, of course, the facts of the previously decided cases are in point. With regard to the cases relied upon by the appellants, it suffices to say, in my view, that the facts of those cases bear no resemblance to those of the present case. As to the facts of this case, the appellants, as I have said, relied firstly on the evidence that attorney Coetzee took notes while they gave their instructions to exercise the option. But the notes were never discovered nor presented in evidence. Hence their contents remain obscured. In this light it is not necessary to decide whether a written recordal of the agent's mandate by the agent himself would satisfy the requirements of s 2(1).

[13] Then the appellants relied on Coetzee's confirmation in the letter in which he exercised the option, that he was doing so on behalf of the appellants, which must mean, with their authority. But I do not believe that this statement in itself could satisfy the requirements of s 2(1). As counsel for the appellants rightly conceded in argument, the statement in a letter 'I have an oral mandate to exercise the option' could hardly in itself convert the oral mandate mentioned into a written one. Since we know from the first appellant's own evidence, that at the time when Coetzee wrote the letter, he had no more than oral instructions, that is all that the letter could convey. In any event, I do not think it can be said that, in the words of s 2(1), Coetzee 'was acting on their written authority' when he wrote the very letter that the appellants now seek to regard as constituting that written authority.

[14] Finally, the appellants relied on the fact that Coetzee had apparently sent the same letter in which he exercised the option on more than one occasion. But once it is accepted that the statement in the letter did not in itself constitute compliance with s 2(1), mere repetition of the same statement could not meet that requirement. Moreover, there is no evidence that the appellants had read the letter or that they were otherwise aware of the written representation of authority that it contained, when it was sent on the second or subsequent occasions. Whether it would make any difference if they had that knowledge, is once again unnecessary to decide. In this light, the court a quo, in my view, rightly held that Coetzee had failed to satisfy the requirement of s 2(1) when he purported to exercise the option on the appellants' behalf and that in consequence the contract of sale relied upon by the appellants as the basis of their claim for transfer, was never concluded. A further consequence is that the option then lapsed through effluxion of the stipulated period of two months after the death of the deceased and that in the event the appellants no longer derived any rights from the option agreement,

[15] An alternative argument raised by the appellants for the first time on appeal was that even if the exercise of the option was held to be invalid, the doctrine of notice allows them to claim transfer of the farm directly from the first respondent. As authority for that proposition, the appellants sought to rely on this court's judgment in *Bowring NO v Vrededorp Properties CC* (supra) paras 13-18. What this court held in the part of the judgment relied upon, is that although the doctrine of notice normally entitles the first purchaser, B, to set aside the transfer to the second purchaser, C, which then opens the way for B to claim transfer from the original seller, A, B may sometimes be allowed to claim transfer directly from C. Since their claim for transfer is directly against the first respondent, in the position of C – so I understood the appellant's argument – it matters not that the exercise of their option was invalid vis-à-vis the original seller, A, simply because they are not claiming from A. I find this argument fundamentally flawed. The flaw seems to lie in a complete misunderstanding of the judgment in *Bowring.* The

reasoning in *Bowring* clearly pre-supposes that the first purchaser, B, has a valid claim for transfer. This court could not and did not suggest that B would be entitled to claim transfer from anybody without any right to support that claim at all. Once this is understood, it should be apparent that the appellants can derive no support from *Bowring*. Absent the valid exercise of the option in their favour, they simply have no right to claim transfer from anybody.

[16] This brings me to the appellants' application to amend their pleadings so as to introduce their contention based on the doctrine of fictional fulfilment. The contention relies entirely on the judgment of this court in *Du Plessis NO & another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA). Indeed, it is apparent from the application itself that it was exclusively inspired by the *Goldco* judgment. Broadly stated the facts of *Goldco* were that the appellant, a trust represented by Du Plessis, granted an option to the respondent, Goldco, to purchase a commercial property. The option agreement pertinently provided a mode of acceptance, namely that it had to take place by way of a written deed of sale prepared by the trust's attorneys, Rossouws, which had to be signed at Rossouws' offices within 24 months. Subsequently the trust, however, decided that it no longer wanted to sell the property at the price stipulated in the option. When *Goldco* thus intimated its intention to exercise the option within the stipulated period, Rossouws refused to draw up the written contract. This court concluded that the trust, through its attorney and agent had deliberately frustrated the respondent's acceptance of the option. On this premise the court then held that, by application of the doctrine of fictional fulfilment, the option must be deemed to have been exercised by *Goldco*.

[17] The doctrine of fictional fulfilment came to prominence in our law in *MacDuff & Co (in liquidation) v Johannesburg Consolidated Investment Co* 1924 AD 573. As concisely held by Innes CJ in that case (at 591) it entails that

'[B]y our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment . . ..'

[18] In *Goldco*, Lewis JA, writing for the majority, accepted that the drafting of a written contract by the trust's attorneys was not a condition in the true sense. At the same time she pointed out that the operation of the doctrine had been extended in earlier cases to the deliberate frustration of contractual performance by the other party. This, she held, is what happened when the attorneys of the trust refused to prepare a written contract. Hence she concluded that the option must, by operation of the doctrine of fictional fulfilment, be deemed to have been accepted, although in fact it was not.

[19] The starting point of the appellants' argument based on *Goldco* is the sale and transfer of the property to the first respondent. By acting in this way, their argument went, the deceased intentionally frustrated the appellants' exercise of the option. This, so the argument concluded, gave rise to the situation recognised in *Goldco* where the option should be deemed to have been validly exercised though in fact it was not. I find this line of argument misguided. Unlike in *Goldco*, the appellants were never prevented from exercising the option. On their case they did in fact do so. Though the deceased may have acted in breach of the option agreement, that breach had nothing to do with the acceptance of the offer contained in the option. If the appellants' purported acceptance of that offer was valid, it would have brought about a binding sale. That sale would by operation of the doctrine of notice, be enforceable against both the deceased and the first respondent, despite the transfer to the latter. After all, this was the nub of the appellants' whole case. Hence the appellants' inability to obtain transfer is not the result of any action on the part of the deceased. It was through the fault of their own attorney who failed to obtain written authority.

[20] In this light the issue that the appellants seek to introduce by way of an amendment to their pleadings is not a 'triable issue' in the parlance of amendment applications (see eg *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & 'n ander* 2002 (2) SA 447 (SCA) para 34). In that context an issue is said to be triable if it is viable in the sense that, if allowed to be raised, it could make a difference to the outcome of the case. Since the issue which the appellants' amendment application seeks to introduce does not make this grade, the application cannot succeed. It follows that the application for amendment should be dismissed and, because I find no merit in the appeal, the application for reinstatement of the appeal should follow the same fate.

[21] It is ordered that:

The application for reinstatement of the appeal is dismissed with costs including the costs of the appeal and the costs of the appellants' application for the amendment of their particulars of claim.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:	C N CUTLER
INSTRUCTED BY:	N M E NILSEN & ASS PAROW
CORRESPONDENTS:	HILL, McHARDY & HERBST INC BLOEMFONTEIN
FOR FIRST RESPONDENT:	D J VAN DER WALT SC
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