THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 32/2016

In the matter between:

NUANCE INVESTMENTS (PTY) LTD	**APPELLANT**
and	
MAGHILDA INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
JONATHAN BRUCE SANDLER NO	**SECOND RESPONDENT**
GEOFFREY ALAN WEST NO	**THIRD RESPONDENT**
CHRISTOPHER HARDY BOULE NO	**FOURTH RESPONDENT**
REGISTRAR OF DEEDS	**FIRTH RESPONDENT**
CENTURUS (PTY) LTD	**SIXTH RESPONDENT**
INVESTEC BANK LIMITED	**SEVENTH RESPONDENT**

Neutral Citation: *Nuance Investments v Maghilda Investments & others* (189/2016) [2016] ZASCA 190 (1 December 2016)

Coram: Tshiqi, Seriti, Willis, Van Der Merwe JJA and Nichols AJA

Heard: 2 November 2016

Delivered: 1 December 2016

Summary: Prescription : No evidence that the appellant knew or could by the exercise of reasonable care, have acquired knowledge of the facts giving rise to the invalidity of the sale agreement before the effluxion of the three year period of prescription : Counterclaim : the individual registrations and transfers of ownership in the three individual portions of land with their own cadastral descriptions were effected by separate real agreements and were not prohibited by law.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie J sitting as court of first instance):

1 The appeal is upheld with costs including costs of two counsel.

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

2.1 'It is declared that;

(a) the purported sale agreement dated 21 November 2007 is null and void from the outset with no legal force and effect;

(b) the purported incidental development agreement dated 21 November 2007 is null and void from the outset with no legal force and effect;

(c) the purported lease agreement dated 15 January 2008 is null and void from the outset with no legal force and effect;

3 The special plea of prescription raised by the First to Fourth Defendants is dismissed:

4 Against the transfer of the Remaining Extent of Portion 6 of the Farm Elandsdrift 527 JQ to the First Defendant, free from any mortgage bond held by Investec Bank Ltd, the First Defendant is ordered to pay an amount of R17, 343, 214 to

the Plaintiff; together with interest on the amount of R17, 343, 214 at the prescribed rate of 9% per year calculated from the date of demand herein (which is 23 June 2009) to the date of payment thereof;

5 Against the transfer of the Remaining Extent of Portion 4 of the Farm Elandsdrift 527 JQ and the Remaining Extent of Portion 39 of the Farm Elandsdrift 527 JQ to the Second to Fourth Defendants jointly, free from any mortgage bond held by Investec Bank Ltd, the Second to Fourth Defendants jointly are ordered to pay an amount of R42, 656, 786 to the Plaintiff; together with interest on the amount of R42, 656, 786 at the prescribed rate of 9% per year calculated from 23 June 2009 to the dated of payment thereof.

6 The counter-claim of the First to Fourth Defendants is dismissed:

6.1 The First Defendant and the Second to Fourth Defendants, jointly in their capacities as trustees of the Sanjont Trust, are ordered to pay the costs hereof jointly and severally, the First Defendant paying the Second to Fourth Defendants to be absolved and the Second to Fourth Defendants jointly paying the First Defendant to be absolved, with such costs to include the costs of two counsel.'

JUDGMENT

Tshiqi JA (Seriti, Van Der Merwe JJA and Nichols AJA concurring)

[1] I have read the dissenting judgment of Willis JA and regret that I cannot agree with him that the appellant, Nuance Investments (Pty) Ltd (Nuance) could, by the exercise of reasonable care, have acquired knowledge of the invalidity of the agreement well before the effluxion of the three year period of prescription. I also do not agree that Plan Practice, a firm of town planners which had initially acted on behalf of Maghilda Investments (Pty) Ltd (Maghilda) and Sanjont Trust but which,

after the conclusion of the agreement subsequently acted for Nuance, must have known that the necessary consent was not obtained. Unlike Willis JA, I hold the view that the correspondence between the parties subsequent to the transfer shows that they were unaware that the relevant ministerial consent for the sale in terms of s 3*(e)* of the Subdivision of Agricultural Land Act 70 of 1970 (the Subdivision Act) had not been obtained. To my mind the correspondence only shows that the parties concerned themselves about the further subdivisions of the land, and not ministerial consent for the sale. For the reasons that follow, I hold the view that all the parties to the sale agreement thought that the agreement was valid and that nothing could have alerted Nuance to the fact that the required written ministerial consent had not been obtained before the agreement was concluded. I also find that the respondents have failed to prove that the claim has prescribed.

[2] Nuance was the plaintiff, in the court a quo and the first respondent, Maghilda, together with the second to fourth respondents (the trustees of the Sanjont Trust) (Sanjont) were the defendants in an action by Nuance arising out of the following three agreements, which were all part of one overall scheme, and concluded in pursuit of a proposed development of agricultural land:

a) A written sale agreement entered into on 21 November 2007 in terms of which Nuance purchased five portions of the farm Elandsdrift 527 JQ from Maghilda and Sanjont (the sale agreement);
b) A developmental agreement also entered into on 21 November 2007 between Maghilda, Sanjont, Nuance and the sixth respondent, Centurus (Pty) Ltd (Centurus) in terms of which it was agreed that the proposed development would be undertaken by Nuance and a certain development structure of the land was agreed upon (the incidental development agreement); and
c) A long-term lease agreement entered into around 15 January 2008 between Nuance and Maghilda (the lease agreement).

[3] In compliance with the terms of the agreements Nuance paid an amount of R60 million to Maghilda and Sanjont. On 13 May 2008, three of the portions were transferred to and registered in the Deeds Registry in the name of Nuance. Simultaneously with the transfers, mortgage bonds in favour of Investec Bank and Maghilda and Sanjont were registered. It is common cause that there was no

compliance with the provisions of s 3 of the Subdivision Act, before the sale and lease agreements were concluded in that the written ministerial consent prescribed in subsecs 3*(d)* and *(e)* had not been obtained. Such ministerial consent was necessary because two portions of the land were yet to be subdivided. The three portions that were transferred, however, had historically been subdivided and were thus three individual portions with their own cadastral descriptions and no ministerial consent would have been required if the agreement concerned only those three portions. This distinction is irrelevant for the purposes of prescription but is determinative of the counterclaim.

[4] On 29 May 2009, Maghilda and Sanjont's legal representatives addressed a letter to Nuance alleging that Nuance had breached the agreements in several respects and demanded that Nuance should remedy the respective breaches within 30 days after the date of the notice. In response, Nuance sent a letter dated 23 June 2009 recording inter alia, the amounts it had already paid in terms of the sale agreement and in consideration for the transfer of the properties to Nuance. It noted that only three of the five properties had already been transferred and that a second bond had been registered over the transferred properties for the balance of the purchase price, even though two properties still had to be transferred. It also stated:

'3. It appears from the agreement of sale that these two properties (to be subdivided portions of portion 46 and 5 of Elandsdrift 527 JQ respectively) were at the time of conclusion of the agreement, and in fact still are, portions of agricultural land and subject to the provisions of [the Subdivision Act]'.

4. As you are aware any agreement of sale of a portion of agricultural land entered into prior to having obtained the Minister of Agriculture's consent for such subdivision, is void.

5. It was at all times contemplated by the parties that the sale of the properties would be one indivisible transaction . . .

6. Although it is attempted in clause 41 of the agreement to provide for all transactions to be severable from the others, it should be clear that this was due to a common mistake of the parties, as such provision would inter alia render impossible the method of payment of the balance of the purchase price of the already transferred properties.

7. We are respectfully of the opinion that the agreement as a whole is therefore invalid *ab initio*, and that restitution should take place. Our client hereby tenders re-transfer of the transferred properties to your client upon repayment of the amount of R60 000 000.

8. With reference then to your letter of demand of 29 May 2009, it follows that should the sale agreement be void *ab intio*, the "further agreement" would also not be applicable, as it was (in clause 3 thereof) suspensive upon the conclusion of the sale agreement . . . .'

The letter further recorded that the lease agreement was also void on the basis that it 'relate[d] to a subdivided portion of agricultural land' and that the 'Minister of Agriculture ha[d] not granted its consent to such lease'.

[5] Subsequently, on 19 March 2012, Nuance issued summons against the first to the seventh respondents in the North Gauteng High Court, Pretoria claiming repayment of the amounts paid on the basis that the sale, lease and incidental development agreements were null and void from the outset, being in breach of s 3 of the Subdivision Act, alternatively that the sale agreement was invalid as it was in breach of the Alienation of Land Act 68 of 1981(the Alienation of Land Act). The action was subsequently withdrawn against the fourth and fifth respondents. In their plea, Maghilda and Sanjont averred that the sale agreement was both illegal and invalid, and simultaneously raised a special plea of prescription in terms of s 11*(d)* read with s 12(3) of the Prescription Act 68 of 1969 (the Prescription Act) alleging the following:

'Prescription in respect of any of the actions by Nuance … based on the illegality or voidness of the sale agreement, incidental development agreement and … [the] lease agreement commenced running on the dates of such illegality and voidness, ie 21 November 2007 (in the case of the sale agreement and incidental development agreement) and 15 January 2008 (in the case of the lease agreement).'

[6] They alleged that any action based on the voidness and the illegality of the sale agreement and the incidental development agreement ought to have been brought by no later than 20 November 2010, and that in respect of the lease agreement, by no later than 14 January 2011. In the alternative, they alleged that in the event that the court found that prescription arose when the payments were made, ie on 13 May 2008, then the action ought to have been instituted by no later than 12 May 2011. In the further alternative it was pleaded that prescription commenced on a

date after 13 May 2008. Simultaneously they also filed a counterclaim alleging that by virtue of the fact that no legal consequences flowed from the void sale agreement, they remained owners of the portions of land already transferred and the Register of Deeds fell to be rectified.

[7] The matter proceeded before Fourie J, who upheld the plea of prescription and dismissed Nuance's claim for repayment. He also upheld the counterclaim and ordered rectification of the Deeds of Transfer. The effect of his order was that Maghilda and Sanjont would retain the amount of R60 million and that the land should also be re-registered in its name.

[8] It was accepted by the parties during the trial that the defendants (Maghilda and Sanjont) bore the onus to prove that the claim had prescribed. To this end the evidence of the second respondent, Mr Jonathan Bruce Sandler was led. Mr Sandler was one of Maghilda's directors at the time the agreement was concluded and took part in the negotiations between the parties prior to, and after the agreement was concluded. No other witnesses were called and Nuance closed its case without calling any witnesses.

[9] Mr Sandler testified about the discussions that had taken place during the several meetings held by the parties and provided insight into some of the correspondence that was exchanged between the parties, as well as letters exchanged with the Department of Agriculture. The gist of Sandler's evidence was that during the negotiations, everyone who was involved in the project knew that they were dealing with agricultural land. According to him they were all experienced in property sales and development and therefore Nuance's representatives must have known that ministerial consent for subdivision was necessary. This, he stated, was because 'they had an obligation to do whatever they needed to do, to get the requisite permissions to do the development'. He however conceded that there was never any discussion concerning authorisation, consent, or approval or about the provisions of the Subdivision Act. He also stated:

'[Mr Oosthuizen]: So when you signed this agreement on 21 November 2007, you believed it to be a valid and binding agreement.

[Mr Sandler]: We all did, M'Lord. A large amount of money was transacted.'

[10] During his evidence, Mr Sandler was also referred to the following correspondence. The first is a letter dated 5 May 2009 written by Nuance's attorneys to the Department of Agriculture. It stated:

'REMAINING EXTENT 5 OF THE FARM ELANDSDRIFT NO. 527 JQ. GAUTENG PROVINCE

We refer to the discussions between Lebo from our offices and … Mr Makhubela from your offices and confirm that we need the Department's confirmation in writing that the abovementioned property does not fall under [the Subdivision Act].'

The department responded on 9 June 2009 and said:

'According to my records the above-mentioned land, the farm Elandsdrift No. 527 J.Q is still Agricultural Land in terms of the [Subdivision Act]. A formal application must be lodged for the subdivision thereof.'

[11] Mr Sandler was further referred to earlier correspondence between Plan Practice, Nuances town planners and representatives, and the department. This correspondence similarly raised questions concerning subdivision and did not deal at all with ministerial consent required before an agreement concerning sale of agricultural land may be concluded. He was also referred to the letter written by Nuance's attorneys to the attorneys representing Maghilda and Sanjont on 23 June 2009. This letter made the allegation that the sale agreement was void for the first time.

Prescription

[12] Section 12(3) of the Prescription Act 68 of 1969 provides:

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if could have acquired it by exercising reasonable care.'

[13] As mentioned, the onus of proving that Nuance's claim had prescribed by 19 March 2012 when it served summons, was on Maghilda and Sanjont (See *Gericke v Sack* 1978 (1) SA 821 (A) at 828C. In order to meet the requirements of s 12(3) they had to show the facts that Nuance was required to have knowledge before prescription could commence running. This is so because the applicable period of prescription is three years. They also had to prove that Nuance knew those facts before the date on which prescription was alleged to have commenced running. (See *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC) para 24. The facts that must have been known are those that are material to the debt.

[14] In terms of s 3 of the Subdivision Act there are seven different activities which individually require ministerial consent in writing. (See section 3(1)(*a) – (g)*). The knowledge at issue is confined to the entering of the lease agreement in respect of a portion of agricultural land as envisaged in s 3*(d)* and the selling of a part of agricultural land as envisaged in s 3*(e)* and does not relate to the other activities contained in s 3. It is the duty of the owner of the land, wishing to lease or sell a portion of agricultural land to obtain ministerial consent before concluding an agreement. (See s 4 of the Subdivision Act). The facts that are material to the debt and which Nuance must be held to have known or deemed to have known are that Maghilda and Sanjont did not obtain the necessary ministerial consent in terms of subsecs 3*(d)* and *(e)* before the agreements were concluded. It is not whether or not, the parties knew that the land was classified as agricultural land or whether ministerial consent is a requirement for subdivision of agricultural land.

[15] Mr Sandler's evidence did not shed any light on whether Nuance or its agents, Plan Practice, had the subjective knowledge that Maghilda and Sanjont had not obtained written consent from the Minister for the sale before the contract was concluded. As stated above, his stance was that they ought to have known this because they had vast experience in property sales and development and should have known that they were dealing with agricultural land. This evidence however does not suggest that they knew that ministerial consent for the sale had not been obtained. Counsel for Nuance was prepared to accept that Nuance probably knew, generally, that ministerial consent was required before the activities listed in s 3(*a)*–

(g) are undertaken and that it may be inferred from the correspondence exchanged between the parties that the requisite consent for the subdivision of the land had not yet been obtained. He however submitted that this was irrelevant as it did not relate to knowledge that ministerial consent for the sale agreement had not been obtained. I agree with this submission.

[16] There was no evidence at all that Nuance knew that Maghilda and Sanjoint had failed to obtain the ministerial consent. Neither can such knowledge be inferred from the fact that the parties had vast experience in property sales and development. Such a conclusion would amount to sheer speculation. In *Minister of Finance & others v Gore NO* 2007(1) SA 111 (SCA) it was stated:

'[17] This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably".

[18] … Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true . . . is also insufficient. For there to be knowledge, the belief must be justified.

[19] It is well established in our law that:
(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.
(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.
(c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.
It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction. '
(Footnotes omitted.)

[17] I must thus accept the contention by Nuance that until the lack of the ministerial consent for the sale was mentioned for the first time in the letter dated 23 June 2009 from its attorneys, all the parties were under the impression that the agreements were valid. I am fortified in this reasoning by the fact that in their letter dated 29 May 2009, Maghilda and Sanjont placed Nuance on terms, alleging breach of what they also perceived to be a valid contract. If Maghilda and Sanjoint thought the agreement was valid, it is not clear to me on what basis I should find that Nuance held a contrary view.

[18] There can be no reliance on the correspondence between Nuance, Plan Practice and the Department of Agriculture as this correspondence only dealt with the fact that the land was classified as agricultural land, and that consent was required for its subdivision.

[19] The next question is whether Nuance could, by the exercise of reasonable care, have known that the ministerial consent had not been obtained before the agreements were signed. Reasonable care for the purposes of s 12(3) of the Prescription Act is not measured by the objective standard of the hypothetical reasonable or prudent person but by the more subjective standard of a reasonable person with the creditor's characteristics. (See M M Loubser *Extinctive Prescription* (1996) at 105-106.) Mr Sandler confirmed that all the parties believed that the agreement was binding at the time it was signed. There was no evidence that subsequent to this, there was anything or any incident that should have warned Nuance that ministerial consent for the sale had not been obtained. It is to my mind inconceivable that Nuance, and its team of experts, would proceed and focus on the future implementation of a development for which they had expended R60 million with knowledge or deemed knowledge that it may not have been above board. The queries sent by Nuance and Plan Practice to the Department, concerning the subdivision of the land suggest to me that they were careful and wished to ensure that the project was above board.

[20] It must thus be concluded that there was also no deemed knowledge on their part. Consequently the only probable conclusion is that the first time that the lack of

the ministerial consent came to their knowledge was around 23 June 2009, when their attorney conveyed this to Maghilda and Sanjont's attorneys.

[21] Regarding the non-compliance with the Alienation of Land Act, the same considerations apply. Sandler in his examination in chief suggested that the parties intended the sketches, identifying certain areas of land as the objects of the sale agreement, to be rough assessments or provisional sketches only. He however continued and stated that the subdivisions were fairly identifiable and that these sketches were last elements in terms of finalising the transaction. During cross examination it became clear that the parties thought and believed that they had sufficiently identified the areas of land in question and that they thought and believed that they had a binding and valid sale agreement. In any event there is no evidence to the effect that Nuance knew or could be deemed to have known that the scale, configuration, description and detail on the sketches were such that it was not possible to identify the property sold. The first occasion on which the parties would probably detect the defect would have been after the approval of the development, when it would have been necessary to re-transfer the relevant portions of land to Maghilda and Sanjont.

The counterclaim

[22] The counterclaim was based on the proposition that ownership of the three cadastral properties did not in law pass to Nuance, despite the registration of transfer thereof to its name. As I will show herein below, ownership passes on registration if there is a real agreement to do so, that is, an intention to transfer and receive ownership. It is clear from the evidence that a real agreements existed in respect of the three properties. What Maghilda and Sanjont had to show in order to succeed in their counterclaim was that there was a defect in the real agreements.

[23] In *Legator McKenna Inc & another v Shea & others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA), Mr Michael McKenna, an attorney in Legator McKenna Inc, an incorporated firm of attorneys was appointed a *curator bonis* to the estate of Ms Clare Shea, who, at the time was not able to conduct her affairs after she sustained injuries as a result of a car accident. McKenna purported to sell her house in his capacity as

a *curator bonis* but concluded the sale agreement before he was issued with letters of curatorship by the Master as required in terms of the Administration of Estates Act 66 of 1965 (the Administration of Estates Act). Ms Shea miraculously recovered from the injuries and was again able to conduct her affairs. She sought an order to set aside the sale and the return of her house on the basis that there was non-compliance with the Administration of Estates Act. The purchasers, Mr and Mrs Erskines claimed damages for the loss they would allegedly suffer through McKenna's breach of an implied warranty that he was authorised to sell Ms Shea's house. The trial court declared the contract of sale both illegal and void, and directed the Registrar of Deeds to cancel the registration of transfer of the house to the Erskines, against repayment of the purchase price by Ms Shea. This court held a contrary view to that of the trial court concerning the legal status of the registration and transfer process. It said:

'[20] ….Should the transfer of the house to the Erskines be regarded as valid despite the invalidity of the underlying sale which was the *causa* for the transfer? The [Erskines'] contention that it should, was rooted in the assumption that the abstract theory – as opposed to the causal theory – of transfer has been adopted as part of our law. According to the abstract theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction such as, in this case, the contract of sale. The causal theory, on the other hand, requires a valid underlying legal transaction or *iusta causa* as a prerequisite for the valid transfer of ownership. With regard to the transfer of movables our courts, including this court, have long ago opted for the abstract theory in preference to the causal theory.

[21] Some uncertainty remained, however, with regard to the transfer of immovable property. In the High Courts that uncertainty has been eliminated in a number of recent decisions where it was accepted that the abstract system applies to movables and immovables alike. ... These decisions are supported by academic authors advancing well-reasoned arguments. … In view of this body of authority I believe that the time has come for this court to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well.

[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely the 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… 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.

Regarding the facts of the matter the court said:

'[23] The court a quo found that in this case ownership did not pass because of two defects in the real agreement. The first defect, so the court held, was that McKenna's intention to transfer ownership had been motivated by the mistaken belief that he had entered into a valid agreement of sale… In this light, so the court held, it cannot be inferred that McKenna intended to transfer the property even if the sale agreement turned out to be null and void. In the same way as the court a quo, I also believe that McKenna – as well as the Erskines, for that matter – probably thought that the sale agreement … was valid and enforceable. And, albeit for different reasons, I also share the court a quo's view that the parties were mistaken in that belief. But I do not agree that a mistake of that kind could in itself render the real agreement void. If that were the position, we would effectively revert to the causal theory of transfer which we have jettisoned in favour of the abstract theory. I say that because I believe that very few parties (if any) to real agreements would deliberately give and receive transfer pursuant to an underlying transaction which, to their knowledge, is void. If a mistaken belief of this kind - whether unilateral or common were therefore to render the real agreement invalid, there would not be much left of the abstract theory of transfer.'

[24] For those reasons the court concluded that the house was validly transferred to the Erskines and that the court a quo had erred in upholding Ms Shea's claim for the restoration of her property.

[25] The three portions of land transferred were each a separate unit of land with its own cadastral description. Sections 3(*d)* of the Act prohibits a lease in respect of a portion of agricultural land without ministerial consent and s 3*(e)* prohibits sale of a portion of agricultural land, whether surveyed or not, without the requisite consent. The phrase 'agricultural land' refers to a separate unit of land with its own cadastral description as registered in the Deeds Registry. In *Adlem & another v Arlow* [2012] ZASCA 164; 2013 (3) SA 1 (SCA) paras 13-14, the phrase 'portion' in ss 3(*d)* and *(e)*

of the Act was interpreted as meaning a part of property as opposed to the whole property registered in the Deeds Registry. This court held that s 3*(d)* was not applicable to the lease in question in that matter, because the whole of the property owned by the respondent was the subject of the lease agreement. None of the three portions of land transferred is a portion of agricultural land as envisaged in s 3. It follows that the individual registrations and transfers of ownership in the three individual portions of land with their own cadastral descriptions were effected by separate real agreements and were not prohibited by law.

I make the following order:

1 The appeal is upheld with costs including costs of two counsel.

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

2.1 ‘It is declared that;

(a) the purported sale agreement dated 21 November 2007 is null and void from the outset with no legal force and effect;

(b) the purported incidental development agreement dated 21 November 2007 is null and void from the outset with no legal force and effect;

(c) the purported lease agreement dated 15 January 2008 is null and void from the outset with no legal force and effect;

3 The special plea of prescription raised by the First to Fourth Defendants is dismissed:

4 Against the transfer of the Remaining Extent of Portion 6 of the Farm Elandsdrift 527 JQ to the First Defendant, free from any mortgage bond held by Investec Bank Ltd, the First Defendant is ordered to pay an amount of R17, 343, 214 to the Plaintiff; together with interest on the amount of R17, 343, 214 at the prescribed rate of 9% per year calculated from the date of demand herein (which is 23 June 2009) to the date of payment thereof;

5 Against the transfer of the Remaining Extent of Portion 4 of the Farm Elandsdrift 527 JQ and the Remaining Extent of Portion 39 of the Farm Elandsdrift 527 JQ to the Second to Fourth Defendants jointly, free from any mortgage bond held by Investec Bank Ltd, the Second to Fourth Defendants jointly are ordered to pay an amount of R42, 656, 786 to the Plaintiff; together with interest on the amount of R42, 656, 786 at the prescribed rate of 9% per year calculated from 23 June 2009 to the dated of payment thereof.

6 The counter-claim of the First to Fourth Defendants is dismissed:

6.1 The First Defendant and the Second to Fourth Defendants, jointly in their capacities as trustees of the Sanjont Trust, are ordered to pay the costs hereof jointly and severally, the First Defendant paying the Second to Fourth Defendants to be absolved and the Second to Fourth Defendants jointly paying the First Defendant to be absolved, with such costs to include the costs of two counsel.'

_____

ZLL Tshiqi

Judge of Appeal

Judge N P Willis

[26] This case concerns, primarily, the legal implications of a written agreement that included the sale of both as yet undivided portions of agricultural land as well as other transactions relating to portions of land that had, historically, been subdivided as so-called 'cadastral units'. After this agreement had been entered into, the transfer of certain cadastral units of agricultural land to the appellant had taken place. There was no transfer of any of the undivided portions to which the agreement refers. At issue is an intricate web of tangled questions of law, including those affecting the

question of prescription, where there has been a contravention of s 3(1)*(e)*(i) of the Subdivision of Agricultural Land Act 70 of 1970 (SALA) inasmuch as the prior written consent of the Minister of Agriculture (the Minister) had not been obtained. These questions of law are not straightforward.

[27] The appellant, Nuance Investments (Pty) Ltd (Nuance), was the plaintiff in the in the court a quo. It claimed the repayment of moneys ('the purchase consideration') against a retransfer by it of the remaining part of the remaining extent of Portion 6 (a part of Portion 1) and the remaining extent of Portion 4 (a part of Portion 1) of the farm Elandsdrift 527 JQ. The aggregate of the amount claimed is in excess of R60 million. Relying on the nullity of the transaction, Nuance contended that it was entitled to the relief claimed in terms of an enrichment action (whether this was the *condictio ob turpem vel iniustam causam* or the *condictio indebiti*). In the alternative, on the supposition that the transfer of land could not be reversed, Nuance relied on the *rei vindicatio* to seek the eviction of Maghilda Investments (Pty) Ltd (Maghilda), the first defendant in the court a quo and first respondent in the present appeal, from those portions of the land that it occupied, being the remaining extent of Portion 39 and Portion 51 of the farm Elandsdrift 527JQ

[28] The first to fourth defendants in the court a quo not only resisted the claim for the repayment of the money in a special plea of prescription but also brought a counterclaim that a declaratory order be made that they remained the owners of the properties in question and that the Registrar of Deeds (the fifth respondent) cancel the transfers conferring title of the properties on Nuance. Moreover, the first to fourth defendants in the court a quo sought an order cancelling the mortgage bonds registered over the properties, including those in favour of Investec Bank Limited (the seventh defendant a quo). In colloquial terms, the first to fourth defendants wanted to 'have their cake and eat it'. They succeeded. The Gauteng Division of the High Court, Pretoria (D S Fourie J) dismissed the plaintiff, Nuance's claim and upheld the first to fourth respondent's counterclaim. The appeal is with the leave of the court a quo. Investec, the seventh defendant a quo, initially entered an appearance to defend the action but later filed a notice of withdrawal.

The relevant facts

[29] On 21 November 2007, Nuance, Maghilda and the trustees of the Sanjont Trust (the second, third and fourth respondents) (the Sanjont Trust) entered into a single, joint, comprehensive written agreement in terms of which:

(a) Maghilda sold the remaining Extent of Portion 6 (a part of Portion1) of the Farm Elandsdrift No. 527, Registration Division JQ, Gauteng Province, measuring 42,1878 hectares (Portion 6) to Nuance for R23 909 536;

(b) the Sanjont Trust sold to Nuance the remaining Extent of Portion 4 (a part of Portion 1) of the Farm Elandsdrift No. 527, Registration Division JQ, Gauteng Province, measuring 22,5734 hectares (Portion 4) for R30 702 018;

(c) Maghilda sold to Nuance the remaining Extent of Portion 46 (a part of Portion 7) of the Farm Elandsdrift No. 527, Registration Division JQ, Gauteng Province, measuring 17,3355 hectares (Portion 46) for R6 113 234; and

(d) Maghilda sold to Nuance the remaining Extent of Portion 5 (a part of Portion 1) of the Farm Elandsdrift No. 527, Registration Division JQ, Gauteng Province, measuring 21,53 hectares (Portion 5) for R29 248 427.

All these properties are in the area commonly known as Lanseria, which in recent decades has undergone a boom in development. The second respondent, Mr Jonathan Sandler, is a director of Maghilda.

[30] In addition, this same agreement of 21 November 2007 provided for the sale by the Sanjont Trust of its ‘hospitality business’ to Nuance for R42 656 786. The ‘hospitality business’ comprised the remaining Extent of Portion 39 of the Farm Elandsdrift No. 527 Registration Division JQ, Gauteng Province, measuring 42,1878 hectares (Portion 39), together with a five year lease agreement between the Sanjont Trust as lessor and Maghilda as lessee for R30 702 018. On 15 January 2008, Nuance and Maghilda entered into a separate agreement to develop Portion 39 and to extend Maghilda’s rights as lessee for a period of five years from the registration of the transfer to Nuance of Portion 39, with yet a further option for Maghilda to extend for a further five years thereafter. In the trial action, Nuance challenged the validity of this lease agreement contending that inasmuch as the period of the lease was for ten years or more and had not been approved by the Minister, it contravened the

provisions of s 3*(d)* of SALA. With this proposition Maghilda and the Sanjont Trust agreed.

[31] The sale in respect of Portion 39 was subject to 'an excluded portion' thereof being retransferred and that portion was reflected in a sketch plan and described therein as 'figure A'.

[32] In the agreement, Nuance is defined as 'the purchaser'. In that agreement, clause 34.1 specifically provides that the purchaser shall, at its own cost do 'all such things as are necessary to endeavour to procure the excluded part of Portion 39, the excluded part of Portions 46, 5 and Portion 51 become registrable'.

[33] Clause 28.2 of the agreement provides that:

'Transfer of the excluded portion of 39 by the Purchaser back to the Trust shall be effected by the Trust's attorneys on or as soon as possible after the land is registerable, and at the cost of the Trust.'

[34] Clause 41 of the agreement expressly provides as follows:

'**SEVERABILITY**

41.1 Notwithstanding the form of this agreement as a single document, this agreement, will be severable with respect to each transaction as contemplated in Part 2 to Part 7 (both inclusive).

41.2 Any provision which is or may become illegal, invalid or unenforceable in any jurisdiction affected by this agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated *pro non scripto* and severed from the balance of this agreement, without invalidating the remaining provisions of this agreement or affecting the validity or enforceability of such provision in any other jurisdiction.'

Notwithstanding the existence of this severability clause, the contending parties all agreed in the pleadings that the entire agreement (and not only a few transactions contemplated therein) was invalid. I am not sure that this is correct but, in the end, it makes no difference to the outcome of the case.

[35] Moreover, on 21 November 2007, Nuance, Maghilda, the Sanjont Trust and Centurus (Pty) Ltd (Centurus) (the sixth defendant in the court a quo and sixth

respondent in the present appeal) entered into a quadrate 'incidental development agreement' in terms of which the properties in question would be developed by Nuance with Centurus guaranteeing that it would administer and control its subsidiary, Nuance. Nuance claimed that, as the underlying substratum of its agreement was invalid, so too was the development agreement itself. Centurus has agreed to abide the decision of this court. Maghilda and Sanjont Trust do not take issue with Nuance in this regard.

[36] The remaining Extent of Portion 6 (a part of Portion 1), the remaining Extent of Portion 4 (a part of Portion 1) and the remaining Extent of Portion 39 were all transferred to Nuance by the Registrar of Deeds, Pretoria on 13 May 2008. In each case, the deed of transfer makes reference to the sale agreement of 21 November 2007. Simultaneously with the registration of transfer, the mortgage bonds to which reference has been made were also registered. These transfers did not, however, give effect to the anticipated further subdivisions to which reference was made in the agreement. The transfers were all of subdivisions that had been approved historically, prior to the agreement having come into existence.

[37] No evidence was led on behalf of Nuance. Mr Sandler, the second respondent testified. The thrust of his evidence was to the effect that, at all relevant times, everyone was aware of the relevant provisions of SALA.

[38] A letter from Mr Naidu, the financial director of Centurus to Mr Sandler makes it clear that in October 2007, the two of them were well aware of the fact that the written approval of a subdivision of the properties in question was required. This aspect was confirmed by Mr Sandler in his evidence in the trial. Part of his evidence was that he was an honest, experienced businessman who would have had no reason, in his dealings with Nuance, to disguise the truth about the requirement of ministerial consent and that, on the contrary this was openly discussed with them during their negotiations. He may well have been unaware, at that time, that the absence of ministerial consent to a subdivision would have invalidated any agreement of sale of that subdivision. I shall deal with this aspect later.

[39] Indeed, the agreement itself defines 'registrable' as meaning:

'capable of registration in the Deeds Office once approval by all competent authorities has been obtained whether in terms of a land development application in terms of the DFA [Development Facilitation Act 67 of 1995] or a subdivision application in terms of any other law.'

[40] In a letter to the Department of Agriculture written on 13 May 2008 – the very day upon which the properties had been transferred – Plan Practice, town planners employed as such by Nuance, described itself as Nuance's 'authorised agent'. Plan Practice were experts in the field of property development. They had originally acted as consultants to Maghilda and the Sanjont Trust in regard to the development of the properties in question and were 'taken over' by Nuance. On 20 January 2009, Ms Jeanne Fourie, writing to the Department of Agriculture, on behalf of Plan Practice wrote to enquire whether the farm Elandsdrift was 'excluded from the provisions' of SALA.

[41] Even if Nuance had been unaware, on the date of the agreement of 21 November 2007, that the sales in question would have required written ministerial approval, Plan Practice must have been aware of this requirement by no later than 28 July 2008, when it received confirmation thereof in a letter from the Department of Agriculture. The summons was served on 19 March 2012 – more than three years after Plan Practice became aware of this requirement of ministerial consent in terms of ss 3*(d)* and 3*(e)*(i) of (SALA).

[42] A letter written on behalf of the Minister to Nuance's attorneys in June 2009, read together with a letter sent by them to Maghilda and the Sanjont Trust's attorneys in the same month, makes it clear that the invalidity of the sale of the undivided portions without the prior approval of the Minister was known to Nuance at that time. About this there is no dispute. Insofar as prescription is concerned, the critical issue is, obviously, when did Nuance become aware of this fact – or at what point in time may this knowledge be imputed to it?

The parameters of the issues in question

(a) The significance of the fact that the land is 'agricultural'

[43] The definition of 'agricultural land' in SALA is widely cast but for most practical purposes means any land, except land situated in the area of jurisdiction of municipalities. There is no dispute between the parties – and none seems possible – that all the portions of land affected by the relevant agreement are 'agricultural land' as defined in SALA.

[44] The relevant part of s 3*(e)*(i) of SALA provides that:

'[N]o portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale . . . unless the Minister [of Agriculture] has consented in writing.'

In similar vein, s 3*(d)* provides that:

'[N]o lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into… unless the Minister [of Agriculture] has consented in writing.'

(b) The special plea

[45] A special plea is one that raises a defence that does not dispute the allegations of a plaintiff in either its declaration or particulars of claim but is independent and separate therefrom.[1] At first blush, it may therefore seem logical first to consider the defendants' special plea of prescription. There is, however, no requirement in our law that a special plea should be considered first or even separately from any other defence.[2]

[46] In *Schierhout v Minister of Justice* 1926 AD 99, Innes CJ, delivering the unanimous judgment of this court held that: 'It is a fundamental principle of our law

[1] In *Brown v Vlok* 1925 AD 56 at 58, Innes CJ said that a special plea 'is one which, apart from the merits, raises some special defence, not apparent *ex facie* the declaration – for in that case it would be taken by way of exception – which either destroys or postpones the operation of a cause of action.' In the past, a 'special plea' was more commonly known either as a 'plea in bar' or a 'plea in abatement' respectively. See for example *Glennie, Egan & Sikkel v Du Toit's Kloof Development Co (Pty) Ltd* 1953 (2) SA 85 (C) at 88; *Jaffe & Co (Pty) Ltd v Bocchi & another* 1961 (4) SA 358 (T) at 371A-B; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759H-760D; *Avex Air (Pty) Ltd v Borough of Vryheid* (2) SA 1972 (4) SA (N) at 678A-B as contrasted with *Brown v Vlok* (above). See also *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W).

[2] See for example *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 277J-282D.

that a thing done contrary to the direct prohibition of the law is void and of no effect.'[3] The principle is trite. Counsel for both sides argued before us that this principle operated in their favour. Reliance was also placed on *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (4) S 474 (CC), to argue that the nullity that arises from an unlawful juristic act, transcends any claim of prescription. In that case, it was said that: 'It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition – that would be inimical to the principle of legality and the rule of law.'[4] I shall therefore first deal with this argument, that Maghilda and the Sanjont Trust's defence of prescription was trumped by the allegedly unlawful transfers of the properties.

No prior written consent by the Minister – the question of unlawfulness

[47] I turn now to turn to the question of ministerial consent. The transfer of an immovable property is not necessarily final, in the sense of not being irreversible. For example, this court has made it clear that, where an underlying sale agreement was tainted by fraud, the registration of transfer did not divest the seller of ownership of the immovable property in question.[5]

[48] Nuance is correct, however, in its alternative argument before us that SALA was not aimed at prohibiting the sale and transfer of cadastral units of land or, put differently, agricultural land, having its own cadastral description, and that had previously been registered in the office of the Registrar of Deeds as such.[6] What was prohibited was the sale of undivided portions or 'parts' of agricultural land, whether conditional or not and unless and until the subdivision had actually been approved by the Minister.[7]

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[3] At 109.
[4] Paragraph 55.
[5] See *Preller & others v Jordaan* 1956 (1) SA 483 (A) at 496; *Meintjes NO v Coetzer & another* [2010] ZASCA 32; 2010 (5) SA 186 (SCA) para 9; *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others* [2012] ZASCA ; 2012 (3) SA 35 (SCA) paras 10, 11 and 50; and *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* [2013] ZASCA 150; 2014 (3) SA 96 (SCA) para 27.
[6] The meaning of 'cadastral' was described in *National Director of Public Prosecutions v Mohunram & others* [2006] ZASCA 12; 2006 (1) SACR 554 (SCA) para 4, as 'the property as described in the deeds office. See also *Dlamini & another v Joosten & others* [2005] ZASCA 138; 2006 (3) SA 342 (SCA) paras 10 to 17, where the terms is used.
[7] *Geue & another v Van der Lith & another* [2003] ZASCA 118; 2004 (3) SA 333 (SCA) para 15 at 344A-C. See also *Adlem & another v Arlow* [2012] ZASCA 164; 2013 (3) SA 1 (SCA) paras 12 and 13.

[49] Commonly in South Africa, with the demands of urbanisation, farms have had to, over time, be subdivided into portions. These historical subdivisions into portions are so-called cadastral units. SALA does not prohibit the sale of agricultural land that had, prior to that agreement, been subdivided into so-called 'cadastral units'. Otherwise, the Minister would have to approve the sale of every farm in the country. Mr Oosthuizen, who appeared for Nuance conceded that such an absurd result could not have been intended. After all, *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) at 160E-F and 162B-H, makes it clear that the purpose of SALA is not so much to restrict either freedom of contract or testation or even to make of the Minister a purchaser's nanny. SALA is designed to ensure that agricultural land is not, through uncontrolled subdivision, rendered economically unviable for the purpose of farming. Ironically, the reason for which agreements of the kind in question are entered into, namely the conversion of agricultural land to uses other than farming, as a result of rapid urbanisation, was not the 'mischief' against which SALA was directed.[8] That cadastral units fall outside of the scope of ss 3*(d)* and 3*(e)*(i) and (ii) of SALA was made clear by this court in *Adlem & another v Arlow* [2012] ZASCA 164; 2013 (3) SA 1 (SCA), when it was stated that (paras 12 and 13):

'The Act does not confer on the Minister the power to control the use of agricultural land absent a contemplated subdivision, whether in the literal sense as envisaged in s 3*(a)* and *(e)*(i), or the extended sense as envisaged in s 3*(d)* (a lease for 10 years or longer) and 3*(e)*(ii) (a right for 10 years or longer).

The correct interpretation in my view is that advanced on behalf of the appellants, namely that the word "portion" in s 3*(d)* and in s 3*(e)*(i) and (ii) means a piece of land that forms part of a property registered in the Deeds Registry; and, on the authorities I have quoted, the prohibition is aimed at preventing physical fragmentation of the property, and the use of part of the property under a long lease — as well as, I would add, the granting of a right for an extended period in respect of the property. In other words, the word "portion" in, inter alia, s 3*(d)* must be interpreted as meaning a part of a property (as opposed to the whole property) registered in the Deeds Registry, and not as having the meaning used in the deeds registry to describe the whole property.'

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[8] *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) at 160D-162H.

[50] Even the most well-intentioned legislation may have unintended consequences. Nevertheless, a sensible result in this case is facilitated by bearing in mind the ‘mischief’ that the Legislature had in mind, rather than adopting an ‘armchair’ approach. Sight should also not be lost of the fact that the helter-skelter transfiguration of agricultural land into urban settlements may also be a ‘mischief’ requiring Ministerial control.

[51] Often, a proposal to convert agricultural land into an urban aggregation will require considerable preparatory investment in, for example, surveying, research on the provision of utilities such as water and electricity, town and regional planning, etc. In the nature of things, it will more often be the proposed developer rather than the farmer who has resources of this magnitude available. Understandably, a prospective developer will be reluctant to commit funds for these purposes without the assurance that, if the venture is approved at the level of government, it will have the right to embark on the venture, rather than anyone else. This was an aspect that was discussed with counsel during the course of argument. It is perhaps a matter that needs carefully considered legislative review.

[52] Whatever lacunae may exist in SALA, it is clear that it does not require the Minister to approve the sale of portions of agricultural land for which approval had previously been granted – namely, cadastral units such as those which were transferred in the present case. The sale and transfers of the remaining Extent of Portion 6 (a part of Portion 1) and the remaining Extent of Portion 4 (a part of Portion 1) were not unlawful. I am fortified in this view by the severability clause in the agreement that each transaction was severable from the others and that the invalidity of one transaction would not affect the validity of the others. As I have observed, the fact that, on the pleadings it was common cause that the agreement was invalid is perhaps surprising but as I hope will soon become clear, this is not dispositive of the issue of the reversibility of the transfer of the properties in question.

[53] Any agreement for the sale of agricultural land concluded in contravention of s 3*(e)*(i) of SALA is null and void.[9] The parties agree that this is so. The parties also agreed that the lease agreement and the development agreement would, by parity of reasoning, also be null and void. The parties even agreed that the sale agreement did not comply with the formalities required by s 2(1) of the Alienation of Land Act 68 of 1981 inasmuch as the descriptions of Portions 39 and 46 were so defective that they could not properly be identified. However, for reasons that follow, these aspects are irrelevant to the determination of the issues.

[54] Insofar as the transfer of the remaining Extent of Portion 39 is concerned, even if the agreement to retransfer some of it, to develop it and the sale of the hospitality business were invalid – as the decisions of this court in *Geue & another v Van der Lith & another* [2003] ZASCA 118; 2004 (3) SA 333 (SCA) and *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC & another* [2015] ZASCA 121; 2016 (1) SA 257 (SCA) paras 9 to 11 make clear – this does not necessarily affect the validity of the 'saaklike ooreenkoms' to transfer Portion 39 according to its historical cadastral description.[10] In *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* [2013] ZASCA 150; 2014 (3) SA 96 (SCA), this court, following the abstract theory of transfer approved in *Legator McKenna Inc & another v Shea & others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) paras 20 to 22, emphasised that 'a valid underlying agreement to pass ownership, such as in this instance a contract of sale, is not required [in order to pass ownership].'[11] The transfers constitute separate real agreements.[12] This is underlined by the fact that clause 28.2, which specifically envisages first a transfer of the excluded part of Portion 39 to Nuance and then a subsequent 'transfer back' to the Sanjont Trust.

[55] If, as counsel for Maghilda and the Sanjont Trust accept, the abstract theory applies in regard to the transfer of immovable property, then surely the correct

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[9] See *Geue & another v Van der Lith & another* [2003] ZASCA 118; 2004 (3) SA 333 (SCA) para 15; and *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC & another* [2015] ZASCA 121; 2016 (1) SA 257 (SCA) paras 9 to 11.
[10] See for example *Legator McKenna Inc & another v Shea & others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) paras 20 to 22; *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* [2013] ZASCA 150; 2014 (3) SA 96 (SCA) paras 24 and 25.
[11] Paragraph 26.
[12] *Legator McKenna Inc v Shea* (above) paras 20 to 22.

question to ask is whether the transfer itself gives effect to that which is prohibited? The answer to this question must surely be: No! None of the anticipated further subdivisions agreed upon by the parties in the agreement were transferred. The subdivisions that were transferred had been past, historical subdivisions, approved prior to the parties entering into the agreement in question. The transfers in question did not dissemble any illegality. What may matter is whether any of the transfers gave effect to any unlawful agreement of sale.[13]

[56] In summary, by reason of the fact that –

(a) SALA does not prohibit the sale and transfer of agricultural land according to its existing or 'historically approved' subdivision, ie of cadastral units; and

(b) the transfers were, in fact, of cadastral units;

the orders granted by the High Court in terms of the counterclaim were wrong and the counterclaim ought to have been dismissed with costs.

This leads to the question of prescription.

Defence of prescription

Background and first principles relating to the invalidity of the agreement

[57] If I understood Mr Oosthuizen, who appeared for Nuance, correctly, he submitted that s 3*(e)*(i) of SALA meant that the Minister could approve a sale of a portion of agricultural land, once he had approved the subdivision thereof. This is not correct. The Minister cannot, *ex post facto*, validate or approve an invalid act. A plain reading of the subsection is that the Minister must have approved the subdivision *before* any sale of any portion resulting therefrom may be concluded. *Geue v Van der Lith* (above) at 344A-C and *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC* (above) paras 9 to 11, both of which were decided in this court, make this clear. In *Four Arrows Investments*, Swain JA observed that (para 10):

'[T]he object of the legislation was not only to prohibit concluded sale agreements, but also preliminary steps which may be a precursor to the conclusion of a prohibited agreement of sale.'

To my mind, it could hardly be plainer that the agreement, at least with regard to the non-cadastral portions of agricultural land, was stillborn. It could not be revived,

[13] See for example *Gainsford & others NNO v Tiffski Property Investments (Pty) Ltd & others* [2012] ZASCA ; 2012 (3) SA 35 (SCA) para 38.

resuscitated or resurrected by the Minister bestowing his consent at some time after the parties had conceived it.

Prescription in relation to the claim for the reversal of the transactions

[58] When it comes to the claim to reverse the transactions, the period of prescription may be different from that which applies in Nuance alternative claim for eviction. Logically, it seems sensible to deal with the claim in respect of the reversal of the transactions prior to the alternative claim for eviction. In terms of s 11*(d)* read with s 12(1) of the Prescription Act 68 of 1969 ordinary civil debts (described as 'any other debt') become prescribed three years from when they became 'due' – in other words, prescription commences 'to run as soon as the debt is due'. In terms of s 12(3) of the Prescription Act a debt shall not be deemed to be due until the creditor has knowledge of (a) the identity of the debtor and (b) the facts from which the debt arises. Nuance, at all relevant times, had knowledge of the identity of both Maghilda and the Sanjont Trust.

Prescription and ignorantia juris

[59] Section 12(3) of the Prescription Act also provides that 'a creditor shall be deemed to have such knowledge [of the facts] if he could have acquired it by exercising reasonable care'. I shall assume, in favour of Nuance, that the invalidity of the agreement from the moment it was entered into, by reason of the Minister not having consented in writing to the subdivisions referred to in the agreement, was the relevant *fact* in this case, rather that its being a discrete question of law. The question that then arises is this: could Nuance, by the exercise of reasonable care, have become aware of this fact before the debt as it were prescribed?

[60] I am mindful of the fact that I may have been excessively generous towards Nuance in making the assumption that I have. A series of decisions of both this court and the Constitutional Court have made it clear that, when it comes to prescription, a clear distinction exists between the necessary factual ingredients that found a cause of action upon which a litigant relies and must prove and the legal conclusions that

are to be drawn from those facts.[14] In *Van Staden v Fourie* 1989 (3) SA 200 (A), this court said (at 216D-E):

'Artikel 12(3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van "die feite waaruit die skuld ontstaan''.'

This may be translated as follows:

'Section 12(3) of the Prescription Act does not postpone the commencement of prescription until the creditor has knowledge of the full extent of his rights. The concession which the Prescription makes in this regard is limited to knowledge of "the facts from which the debt arises."' (My own translation.)

This passage was referred to with approval in *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 18.

[61] In summary, I can do no better than to quote the following by Lewis JA in *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (para 15):

'These cases clearly do not leave open the question posed and not answered in *Van Staden*. They make it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others. The principles laid down have been applied in several cases in this court, including most recently *Yellow Star Properties v MEC, Department of Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) para 37 where Leach AJA said that if the applicant "had not appreciated the legal consequences which flowed from the facts" its failure to do so did not delay the running of prescription. See also *ATB Chartered Accountants (SA) v Bonfiglio* [2011] 2 All SA 132 (SCA) paras 14 and 18.'

[62] There is accordingly more than much to commend the submission of Mr Fine, who appeared in this court for Maghilda and the Sanjont Trust, that the only relevant fact, regarding prescription in this case, was that the parties had entered into an agreement that provided for the subdivision of agricultural land, without the written consent of the Minister, the rest being pure questions of law. Nevertheless, for

[14] See for example *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H-I; *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) paras 17 to 19; *Minister of Finance & others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) paras 17 to 19; *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC) paras 31 to 35; *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 para 188.

reasons that follow, Maghilda and the Sanjont Trust will not be prejudiced by any generosity of assumption on my part, in favour of Nuance.

[63] If I understood the argument of Mr Oosthuizen correctly, while he accepted that Nuance may have known from a time before prescription would have run to its completion that the consent of the Minister was required in order for the subdivision to occur, it would not have known before 18 March 2009 that the agreements in question had not been validly entered into.

[64] In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* 1992 (4) SA 202 (A), this court made it clear that the *ignorantia juris non excusat* rule in terms of which 'everyone is presumed to know the law' or 'ignorance of the law is no excuse' has, for a considerable period of time, not been of general application in South African civil law.[15] The court held that 'the age-old distinction between errors of law and fact for the repayment of money duly paid in error' should no longer be maintained.[16] In *Willis Faber*, the court followed the principle set out in *S v De Blom* 1977 (3) SA 513 (A).[17] Nevertheless, *De Blom* asserted the principle that where a person engages in activity that he or she could be expected to know is regulated, that person can be expected to take the necessary steps to be informed as to how the law in that field of activity may affect him or her, more especially in regard to specific juristic acts.[18] How much more so must this apply in the field of property developments involving millions of rand? Nuance did engage the services of experts in property development. Significant legal consequences derive therefrom. As was noted in *De Blom*, in a modern State, our lives are highly regulated in almost every field of activity.[19] Property development is no exception.

[65] In *De Blom* the example of an angler was given.[20] If a fly-fisherman is expected to familiarise himself with the regulatory environment pertaining to his

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[15] At 223D-E. As Lord Atkin made clear in *Evans v Bartlam* [1937] AC 473 at 479, the position has never, in English law, been as crude as to create a presumption that 'everyone knows the law'. This position, in South African law, was affirmed in *S v De Blom* 1977 (3) SA 513 (A) at 529H.
[16] Ibid.
[17] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* 1992 (4) SA 202 (A) at 223E.
[18] At 528H-533B.
[19] At 532A-B.
[20] At 532A.

sport, how much more so can a developer of land in one of the booming peri-urban areas of Gauteng be expected, *mutatis mutandis*, to do likewise? In a civil case involving prescription this must be an apposite analogy when considering whether Nuance could have required knowledge of what was required for the validity of the agreement by exercising reasonable care. In my opinion, Nuance could, by exercising reasonable care, have acquired knowledge of the invalidity of the agreement well before the effluxion of three-year period of prescription.

The imputation of the knowledge of Plan Practice to Nuance

[66] There are yet further reasons why the defence of prescription must succeed in regard to the claim for the reversal of the transactions in question. On its own version, by no later than 28 July 2008, Nuance's duly appointed town planners, Plan Practice, became aware that certain of the sales in question would have required prior written ministerial approval, from the date upon which they received confirmation thereof in a letter from the Department of Agriculture. Anyone in the position of Plan Practice is expected, in the ordinary course of business, to impart knowledge of such importance and materiality to its principal.[21] The approval of the Minister, antecedent to the agreement of sale, is not merely important; it is, in a quite literal sense, vital. In the language of lawyers, it is the *sine qua non*, which means that it is an indispensable and essential condition. Indeed, as mentioned earlier, in a letter to the Department of Agriculture written on 13 May 2008 – the very day upon which the properties had been transferred – Plan Practice describes itself as Nuance's 'authorised agent'. In all probability, Nuance became aware of the requirement of ministerial approval in terms of ss 3*(d)* and 3*(e)*(i) of SALA soon after 28 July 2008 – if they were not, in fact, aware of it very much earlier. This too was the evidence of Mr Sandler, the second respondent.

A summary in regard to the prescription of Nuance's claims for a reversal of the transactions

[67] In my opinion, the fatal flaw in Nuance's argument that its claim has not prescribed is exposed by asking a single question: why does it persist in seeking to

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[21] See for example *Van Staden No & another v Firstrand Ltd & another* 2008 (3) SA 530 (T) para 34. See also *Town Council of Barberton v Ocean Accidents and Guarantee Corporation Ltd* 1945 TPD 306 at 311; *Blackburn, Low Co v Vigors* (1887) 12 AC 531 (HL). In *Blackburn* Lord Halsbury LC said, at 537: 'When a person is the agent to know, his knowledge does bind the principal.'

reverse the transfers that have taken place? Any concern that it may have had about the invalidity thereof is laid to rest by the application of the abstract theory of transfer of property. Where is the legally recognised enrichment at its expense? I regret to conclude that no other reason presents itself other than a buyer's remorse. The opportunism inherent in this stance casts a shadow over its reliance upon the fact that there is no direct evidence that, until its attorneys received a letter written on behalf of the Minister in June 2009, it was aware that the agreement was void. Having elected not to give any evidence itself to that effect, Nuance took a risk. Part of that risk was that the conclusion that it did know the position very much earlier may be drawn by inference. More especially, and of particular importance in deciding the issue of prescription is not only that it could, by exercising reasonable care, have known so earlier but also that the knowledge of Plan Practice in this regard may be imputed to it.

[68] If one has regard to the principles and criteria set out in *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) para 5,[22] the probabilities are that, well before the effluxion of the period of prescription, Nuance became aware not only that ministerial consent was required but also that any agreement that was conditional upon his approval was invalid. In *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A), Holmes JA said (at 159B-C):

'As to the balancing of probabilities, I agree with the remarks of Selke J, in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734, namely

"… in finding facts or making inferences in a civil case, it seems to me, that one may, as Wigmore conveys in his work on *Evidence,* 3rd ed., para 32, by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion is not the only reasonable one."'

[22] See also *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199; *AA Onderlinge Assuransie Assosiasie v De Beer* 1982 (2) SA 603 (A) at 614H; *Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W) at 425; *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237; *National Employers' General Insurance v Jagers* 1984 (4) SA 432 (ECD) t 440E-441A; *Baring Eiendomme Bpk v Roux* [2001] 1 All SA 399 (A) para 7 in which the passage by Ecksteen AJP in *National Employers' General Insurance v Jagers* (above) at 440E-441A was unanimously approved by this court and *Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W) at 425.

This *dictum* has been referred to with approval in numerous cases.[23]

[69] As has been said in the oft-quoted passage from *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A), decided in this court (at 614H):

'Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings.'

This may be translated as follows:

'It is, in my opinion, not necessary for a plaintiff that relies on circumstantial evidence in a civil case must prove that the inference which he asks the court to draw must be the only reasonable inference. He will discharge the onus that rests upon him if he can persuade the court that the inference that he advances is the most plausible and cogent of a number of possible conclusions.' (My own translation.)

This passage has also been referred to with approval in numerous cases.[24] The parties agreed that Maghilda and the Sanjont Trust bear the onus of proving prescription. *Mutatis mutandis*, the same principle applies.

[70] As mentioned previously, the summons in this case was served on 19 March 2012. This was more than three years after Nuance became aware of the facts upon which it relies in seeking the relief. Even if this conclusion is incorrect, the knowledge of its duly appointed town planners concerning the validity of dealings in agricultural land must be imputed to Nuance. Even if that conclusion is incorrect, Nuance could, by the exercise of reasonable care, have acquired the requisite knowledge well before the prescriptive period had run. Accordingly, any action it may have had to recover by way of an enrichment action what it paid for the sale and transfer of the properties to it had prescribed.

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[23] See, for example: *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 713 E-G; *Smit v Arthur* 1976 (3) SA 378 (A) at 386B-D; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1028B-C; *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at para 14; *Jordaan v Bloemfontein Transitional Local Authority* 2004 (3) SA 371 (SCA) at para 379; *De Maayer v Serebro; Serebro v Road Accident Fund* 2005 (5) SA 588 (SCA) at para 18.

[24] See, for example, the judgment of Zulman JA in *Cooper & another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) para 7; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) para 9.

The question of eviction

[71] Sight must not be lost of the fact that, in the alternative, Nuance claimed the eviction of Maghilda from the remaining Extent of Portion 39 and Portion 51 of the farm Elandsdrift, relying on the *rei vindicatio*. In *ABSA Bank Ltd v Keet,* this court held that a vindicatory claim, because it is based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act and has 30 years to run before it prescribes.[25] In *Staegemann, which was approved in Absa v Keet,* Blignault J said: 'The *rei vindicatio* is clearly a claim to ownership in a thing. It cannot on any reasonable interpretation be described as a claim for payment of a debt.'[26] Accordingly, Nuance must succeed in its alternative claim for the eviction of Maghilda. This would obviously have a bearing on costs.

Summary of conclusions

[72] For reasons that are different from those of the high court, I agree that the Nuance's claims for the repayment of monies against a retransfer by it of the remaining extent of Portion 6 and the remaining extent of Portion 4 of the farm Elandsdrift were correctly dismissed with costs. These claims have prescribed. The alternative prayer by Nuance for the eviction of Maghilda should, however, have succeeded. The counterclaim is defeated by the applicability of the abstract theory in regard to the transfer of property. The appeal against the counterclaim should be upheld and replaced with an order dismissing the counterclaim with costs. Insofar as costs are concerned, some kind of proportionality in regard to the respective success of the parties should, naturally, be reflected in the award of costs, were this judgment to have prevailed.

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N P Willis

Judge of Appeal

[25] *ABSA Bank Ltd v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA); [2015] 4 All SA 1 (SCA) paras 10-25.

[26] Paragraph 21.

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