THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 118/2019

In the matter between:

FRAAI UITZICHT 1798 FARM (PTY) LIMITED	**APPELLANT**
and	
RAYMOND MICHAEL McCULLOUGH	**FIRST RESPONDENT**
SUSAN MARIE CASHIN	**SECOND RESPONDENT**
GRAHAM BLAIR MACMILLAN	**THIRD RESPONDENT**
KRANSKOP WYNE (PTY) LIMITED	**FOURTH RESPONDENT**
HARRY CECIL SEFTEL	**FIFTH RESPONDENT**
THE REGISTRAR OF DEEDS, CAPE TOWN	**SIXTH RESPONDENT**
KLAASVOOGDS WATER USERS ASSOCIATION	**SEVENTH RESPONDENT**
DEPARTMENT OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE	**EIGHTH RESPONDENT**
DEPARTMENT OF ENVIRONMENTAL AFFAIRS	**NINTH RESPONDENT**
DEPARTMENT OF WATER AND SANITATION	**TENTH RESPONDENT**

Neutral citation: *Fraai Uitzicht 1798 Farm (Pty) Limited v McCullough and Others* (118/2019) [2020] ZASCA 60 (5 June 2020)

Coram: PETSE DP and SALDULKER, VAN DER MERWE, NICHOLLS and MBATHA JJA

Heard: No oral hearing in terms of s 19*(a)* of the Superior Court Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 9H45 on 5 June 2020.

Summary: Rescission of judgment – whether an order granting a right of way of necessity can be rescinded on the basis of fraud or *justus error* – insufficient evidence to prove respondents' knowledge of fraudulent misrepresentation – no basis for finding that court a quo would have granted a different order had the true facts been known to it – appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court (Slinger AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Nicholls JA (Petse DP, Saldulker, Van Der Merwe and Mbatha JJA concurring):

[1] This is an appeal against the decision of a single judge of the Western Cape Division of the High Court refusing an application for the rescission of an order granted by agreement on 2 November 2011. The sole issue on appeal is under what circumstances a judgment can be set aside on the grounds of fraud, alternatively *justus error*.[1] The appeal is with the leave of the court a quo.

[1] Justus error means justifiable mistake

[2] The appeal concerns the grant of an access road (the disputed road) in the scenic winelands of the Western Cape. It involves five properties colloquially known as Ligspel, The Hope, Kranskop, Heuningberg and Fraai Uitzicht. The disputed road travels in close proximity to the residence and luxury guesthouse which is run on Fraai Uitzicht. It is only Kranskop that conducts active farming operations, a winery and fruit farming. The appellant is Fraai Uitzicht 1798 Farm (Pty) Limited, the registered owner of Fraai Uitzicht. The first and second respondents, Mr R M McCullogh and Ms S M Cashin are the registered owners of Ligspel. The third to fifth respondents, Mr G B MacMillan, Kranskop Wyne (Pty) Ltd and Prof H C Seftel are the registered owners of The Hope, Kranskop and Heuningberg, respectively. The sixth respondent is the Registrar of Deeds, Cape Town. The seventh respondent, Klaagsvoogds Water Users Association is a co-operative established in terms of the National Water Act 36 of 1998. The eighth to tenth respondents are government departments – Transport and Public Works, Western Cape; Environmental Affairs; and Water and Sanitation. No relief is sought against the sixth to tenth respondents who took no part in the litigation.

[3] Ligspel, The Hope and Heuningberg are all ‘landlocked’ whereas Kranskop and Fraai Uitzicht are not. The crux of the dispute between the parties is whether it is Kranskop or Fraai Uitzicht that should allow them access to the outside world via the public road, DR1366 (the public road). The three landlocked properties are located on the western side of the Klaasvoogds River while Fraai Uitzicht is on the eastern bank. Kranskop lies to the west and south of the river. The public road runs roughly parallel to the Klaasvoogds River on the eastern side and traverses Fraai Uitzicht. The DR77 is a gravel road which traverses Kranskop parallel to the river on its western bank and runs in a northerly direction until it reaches The Hope and Ligspel, where it turns east, travelling along the border between Ligspel and Kranskop. It then traverses Fraai Uitzicht and crosses a bridge on Fraai Uitzicht to join the public road. It is this portion of the DR77 which runs in an easterly direction perpendicular to the river which constitutes the disputed road. The DR77 in the south is connected to the public road by the DR78 which runs across Kranskop, in a similar manner and parallel to the disputed road further north. Prior to 2011

the landlocked properties primarily used the disputed road to gain access to the public road although, periodically, access was via that portion of the DR77 which traversed Kranskop and linked with the public road further south by crossing the river at a bridge on the DR78 that is located on Kranskop.

[4] The matter has its genesis in an urgent application launched by the first to fourth respondents during September 2011 against the appellant after flooding damaged the bridge on the disputed road. The appellant refused to permit repair thereof. The respondents sought a right of way of necessity using the disputed road which traverses Fraai Uitzicht for approximately 80-100 metres. On 2 November 2011, and by agreement, the first to third respondents were declared entitled to use the disputed road by way of a *via necessitatis*[2] and were granted the right to register a notarial servitude. Included in the order was the right to use a bridge over the Klaasvoogds River on Fraai Uitzicht. The first to third respondents were granted access to repair the bridge at their own cost, which would be supervised by an engineer with experience in the field of bridge engineering.

[5] On 27 November 2017, a little more than six years later, the appellant sought to rescind that order on the basis that it had been obtained by fraud by the first to fourth respondents, alternatively on the ground of *justus error* on the basis of missing or lost documents, the so-called *instrumentum noviter repertum*. The appellant further sought an order that the Registrar of Deeds cancel the notarial deed of servitude and that the first to third respondents demolish and remove the bridge. The only relief sought in this appeal is the setting aside of the order concerning the *via necessitatis*, the rest having been abandoned by the appellant.

[6] When the respondents brought the initial application in 2011 it was stated that Mr T D Smit, on behalf of his father, Mr M D Smit, the previous owner of Kranskop, applied for the deproclamation of that part of DR77 which runs through Kranskop, stopping short of the disputed road. The first respondent said that according to Mr T D Smit the Provincial Roads Department had erroneously included the disputed road in the deproclamation

[2] Right of way of necessity.

order, which nevertheless continued to be used as a public road. The fourth respondent, as the present owner of Kranskop, stated that it had granted the first, second, third and fifth respondents access to the DR77 via Kranskop only as a temporary concession, without any obligation to do so. Because the potential dust of vehicular traffic could cause damage to the nectarine and grape crops, the fourth respondent was considering withdrawing this concession. This would result in Ligspel, The Hope and Heuningberg being landlocked.

[7] A further complication in the 2011 application was the disappearance of documentation pertaining to Mr M D Smit's application for the deproclamation of DR77, including the record of the decision to deproclaim the said road. The first respondent stated that Mr T D Smit, confirmed to him that he had never applied for the disputed road to be deproclaimed. Mr T D Smit was made aware that the entire road had been deproclaimed only when he received a letter from the Department of Transport and Public Works, Western Cape stating that it would not consider the reproclamation of DR77. As I shall explain, the appellant's case was that this evidence in the 2011 application was false to the knowledge of the respondents.

[8] The appellant's case was based on the discovery of new documents. Some years after the court order was granted, documents previously believed to have disappeared came to light. Around the end of 2015, the appellant's attorney, Mr Feenstra, conducted a deeds office search which established that a notarial deed of servitude had been registered in 1945 which granted Heuningberg access to the public road using the DR77 and the DR78. This route was in a southerly direction traversing Kranskop and crossing a bridge further down from the one on Fraai Uitzicht. The deeds office search further established that Mr M D Smit, the then owner of both Kranskop and Heuningberg, in addition to registering a notarial right of servitude in 1945, agreed that his successors-in-title would be entitled to a servitude right of way via Kranskop.

[9] These discoveries caused Mr Feenstra to doubt the veracity of the respondents' claims made in the 2011 application. Attempts to trace the missing DR77 file yielded no

success so Mr Feenstra conducted a search at the South African Archives in October 2016. There he obtained the following documents:

1. A letter by Mr T D Smit, apparently as a representative of his father, Mr M D Smit, dated 15 September 1998 to the secretary of the Divisional Council, Robertson, conveying his reasons for wanting to deproclaim DR77. These were, inter alia, that it runs approximately 6 meters from the residences; that it results in farmland in the immediate vicinity being rendered useless; that it is abused by youngsters racing on the road over weekends; and that it causes difficulties with irrigation. He mentioned that there is another road which links Klaasvoogds east and west, rendering DR77 redundant. Mr T D Smit added that his neighbour Mr De Witt, (the previous owner of The Hope) who owned the only other property along the road, was amenable to the deproclamation sought. The appellant contends that the only residences that he could have been referring to were the houses situated on Ligspel (where he was living until 1990) and Kranskop. The alternative road being referred to was the D78 further south on Kranskop which linked to the public road DR1366.

2. An internal memorandum by the Head of Roads, Winelands Divisional Council to the secretary of the Divisional Council, Robertson dated 20 October 1988, attaching a plan of the area and the road in question. From this, says the appellant, it is apparent that the intention was always to deproclaim the entire road, including the disputed road.

3. A proclamation dated November 1989 deproclaiming DR77, including the disputed road.

[10] A further document on which the appellant relies is a letter written by Mr T D Smit dated 6 September 2011, addressed to ‘whom it may concern’. It was attached as an annexure to the respondents’ opposing affidavit in the application for rescission. In the letter Mr Smit stated that he specifically excluded the disputed road from his application for deproclamation, and was most surprised to find out 20 years later that it was no longer a public access road. He said he stopped short of applying for the deproclamation of the

disputed road because it would have deprived other owners of access to DR1366. Further, it was close to his house so he was the only user of that section of the road.

[11] As a result of the discovery of the above four documents the appellant launched an application for rescission of the judgment based on fraud, alternatively *justus error*. On the strength of these documents it also alleged that there were fraudulent misrepresentations on the part of the respondents. These are:

1. The first respondent had been informed by Mr T D Smit that the deproclamation of the disputed road was a mistake by the relevant roads department and he had never applied for its deproclamation. This was a blatant untruth as his letter of 15 September 1988 to the Divisional Council shows.

2. The suggestion by the first respondent that he had recently discovered the deproclamation was untrue when viewed in the light of Mr T D Smit's evidence that he had advised the first respondent long before.

3. The allegation that the present owners of Kranskop had permitted use of the alternative route recently and merely as a temporary courtesy to the other respondents because the bridge on the disputed road was damaged as a result of flooding. This statement was false as Mr M D Smit was the previous owner of Kranskop and Ligspel. Because he knew that his actions were the cause of the properties being landlocked, he had always provided them access via Kranskop.

4. The first respondent failed to disclose that at the time of launching the application he was in possession of a written statement of Mr T D Smit (the letter of 6 September 2011) that explained how the deproclamation was made and that contained a number of material misrepresentations.

[12] On the basis of the above alleged misrepresentations, the appellant asserted that Mr Smit had sold Kranskop and Ligspel with the full knowledge of the deproclamation of

DR77 including the disputed road. In addition, Kranskop had always provided access to its landlocked neighbours. Even if the respondents did not actively participate in Mr Smit's fraud, it was, nevertheless, contended that he was their own fraudulent witness on whom they positively relied. The denial by the respondents of the existence of the deproclamation documents, led the appellant to the same false conclusion regarding the deproclamation. The respondents deliberately withheld Mr T D Smit's letter of 6 September 2011 as well as the existence of a notarial servitude of access over Kranskop. These actions, the appellant contended, amounted to fraud on the part of the respondents.

[13] Pursuant to an application for oral evidence during the course of the rescission application, Mr T D Smit testified on 20 June 2018. He said that his request for deproclamation stopped short of including the disputed road. Initially he testified that the closure of the entire road was the result of a misunderstanding. He cited various reasons for excluding the disputed road. One reason was that he wanted the council to continue to bear the cost of maintaining the disputed road which it would only do if it were a public road. Later he said he excluded the disputed road because he did not want to deprive the other owners of access. He had no explanation for the contradiction between his letter of 6 September 2011 and the fact that he had applied to deproclaim the entire road. In short, Mr Smit was an unreliable and untruthful witness who lied when he said the disputed road had been erroneously included in the deproclamation.

[14] While correctly rejecting Mr T D Smit's evidence, the court a quo dismissed the rescission application on the ground that appellant had failed to make out a case of fraud or *justus error*. Relying on decisions of this Court, it held that the test for rescinding judgments was more stringent in contested proceedings.[3] It also held that the application had not been brought within a reasonable time. The court found that, notwithstanding the falsity of the evidence of Mr T D Smit, it did not follow that the respondents were aware that Mr T D Smit's statements were untrue when they launched their application in 2011.

[3] *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others* [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508 (SCA).

Their version was that Mr T D Smit informed them that the disputed road was erroneously included in the deproclamation. They believed him and had no reason to doubt his honesty.

[15] Although leave to appeal was granted to this Court in respect of the whole judgment, the reasons stated by the court a quo in its judgment on application for leave to appeal were whether it had correctly dealt with the *instrumentum noviter repertum* maxim and whether it had misinterpreted *Childerley Estate Stores v Standard Bank of SA Ltd*.[4]

[16] In spite of being a 1924 decision, *Childerley* remains good authority regarding the circumstances under which a court can grant *restitutio in integrum* against a judgment. Following *Childerley* our courts have repeatedly stated that a judgment induced by fraud to which one of the parties was privy, cannot stand.[5] It was held that in order to succeed on this ground there are three requirements that a plaintiff must prove: (1) the defendant gave incorrect evidence at the initial trial; (2) that the defendant did so fraudulently with the intention to mislead the court; and (3) that such false evidence diverged from the true facts to such an extent that the court, had it been aware thereof, would have given a different judgment.[6]

[17] Whilst not calling these requirements into question, the appellant argued that they have been 'watered down' by this Court in *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others*[7] and that the successful litigant need not have committed fraud itself but merely be a party to the fraud. It is unclear to me how the conclusion is reached that the fraud requirements have been watered down. To justify this submission the appellant seized upon a phrase in *Moraitis* that the fraud only has to be 'brought home to the successful party'[8]. This phrase is taken out of context without regard to the preceding sentence of that judgment where this Court categorically stated

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[4] 1924 OPD 163.
[5] *Schierhout v Union Government* 1927 AD 94 at 98. *Rowe v Rowe* 1997 (4) SA 160 (SCA); [1997] 3 All SA 503 (A) at 504. *Makings v Makings* 1958 (1) SA 338; [1958] 1 All SA 510 (A) at 342H-345A.
[6] *Childerley* at 169.
[7] Footnote 1 above.
[8] Ibid para 12.

that only when there is fraud, usually in the form of concealed or perjured evidence to which the successful litigant was a party, can a judgment be set aside. Therefore, in its context, the statement that the fraud must be 'brought home to the successful party' means nothing more than that the successful party must have been privy to the fraud. This Court went on to say that a wrong judgment as a result of perjured evidence is insufficient ground for setting aside a judgment.

[18] The court a quo cannot be faulted for finding that there was no evidence to suggest that the respondents were aware of the falsity of Mr T D Smit's statement. Thus, they cannot be said to have been party to the fraud. Nor can it be said that Mr T D Smit's falsity ought to be 'brought home' to the respondents. Mr T D Smit admitted in evidence that he gave the first respondent the letter of 6 September 2011. That the first respondent took it at face value cannot constitute fraud. As for the alleged fraudulent misrepresentations, it was never stated that the first respondent had 'recently' discovered that the entire road had been deproclaimed. It was the brother of Mr T D Smit, Mr D Smit, who on 26 November 2010 addressed an email to both the first respondent and the appellant that his brother had 'recently confirmed' that during the 1980s he specifically asked that the disputed road not be closed. The further alleged misrepresentation was that Mr T D Smit had always granted access to the landlocked respondents via Kranskop though the respondents stated that this was a temporary measure. This is a fact peculiarly within the knowledge of the Smit family. None of the present respondents were owners in 1988 and it was not denied that the route via Kranskop had been used previously. The 1945 servitude was referred to in the surveyor general's diagram filed in 1986 which was annexed to the replying affidavit in the 2011 application. It is not an undisclosed document that has recently come light. As regards the missing proclamation documents, both the respondent and the appellant searched for them unsuccessfully. There is no suggestion, nor can there be, that the respondents played any role in their disappearance, or were aware that they might be at odds with what was told to them by Mr T D Smit about the disputed road. Accordingly, the appellant's relentless search for the documents which ultimately yielded positive results is not a factor that can count against the respondents.

[19] On these facts no case has been made out for the rescission of the judgment on the basis of fraud to which the respondents were party. In any event, it has not been shown that had the court been aware of the alleged fraud, it would have come to a different conclusion than that agreed upon by the parties. Sight must never be lost that a way of necessity must take the shortest route to the public road and that which causes the least damage to the servient tenement.[9] This is not an inflexible rule[10] but it is clear that the disputed road is by far the shortest route to the public road and would cause the least damage. Other than the allegation that it runs close to a luxury guesthouse on Fraai Uitzicht there is nothing to indicate that the disputed road is not the most convenient access for the landlocked properties. These facts are immutable and the knowledge that the disputed road had been deproclaimed does not change anything.

[20] What then remains is the question of *justus error* and whether the appellant has shown an entitlement to rescission of the order as a result of the four missing documents. The general principle enunciated in *Childerley* is that non-fraudulent misrepresentation is not a ground for setting aside a judgment and *justus error* can be a ground only in rare and exceptional circumstances.[11] After considering Roman and Roman Dutch authorities, De Villiers JP concluded:

'We arrive at this position then that so far as *justus error* is concerned default judgments may in some cases be set aside under the Roman-Dutch Law on the ground of *justus error*, and that judgments, whether by default or not, may be set aside in the seven exceptional cases above-mentioned on the ground of i*nstrumentum noviter repertum,* though evidently some of those cases are nowadays obsolete and inapplicable. . . . There may be other exceptional circumstances. But I must say that I know of no such further general application of the doctrine of *justus error* to judgments as would entitle the vanquished party to bring an action to set aside a judgment only on the ground that the Court gave the judgment in *error*, even if such error was just and induced by a non-fraudulent misrepresentation made by the other party to the case.'[12]

Without considering the exceptions described above, this Court subsequently affirmed this principle in *Moriatis*.

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[9] 24 *Lawsa* 2 ed para 560.
[10] *Aventura Ltd v Jackson NO* 2007 (5) SA 497 (SCA).
[11] *Childerley* at 166.
[12] *Childerley* at 168.

[21] The appellant's argument is that the missing documents amount to one of the exceptions described in *Childerley*. It submits that the court a quo did not correctly interpret *Childerley* and that the only requirement for *justus error* on the basis of lost documents is that the documents must have gone missing through no fault on the part of the party seeking rescission. This cannot be. At the very least the documents should be of such significance that they would materially alter the outcome of the case. The missing documents in this matter cannot be categorised as such. I am unpersuaded that had the new documents been placed before the court in the 2011 application, this would have altered the outcome. If there is no reason to believe that a court would have come to a different conclusion on the basis of the fraudulent non-disclosure of the documents, it is difficult to envisage a different outcome where the misrepresentations are non-fraudulent. The landlocked properties still required access to the public road and the disputed road remained the shortest and most convenient right of way, irrespective of the status of deproclamation.

[22] The four missing documents upon which the appellant relies do not qualify as one of the exceptions referred to in *Childerley*. Nor am I persuaded there was any non-disclosure that can be laid at the door of the respondents. The 1945 servitude, which was annexed to the replying affidavit in the initial application, cannot be said to have been missing. As regards the proclamation documents, after an unsuccessful search by the respondents, the appellant and the provincial authorities, they were considered to have been lost. The letter of 6 September 2011 did nothing more than corroborate what the first respondent had already been told by Mr T D Smit, albeit an untruth, that he did not apply for the deproclamation of the entire road. The missing documents cannot lay the basis of one of those rare and exceptional circumstances where a rescission of judgment can be justified on the ground of justus error.

[23] As regards the delay in bringing the application for rescission, it is difficult to conceive of a situation where the setting aside of a judgment on the grounds of fraud by the successful litigant would be denied on the basis that the application was not brought

timeously. However, in light of my conclusion that the judgment cannot be set aside either on the grounds of fraud or *justus error*, no finding in this regard is necessary.

[24] In conclusion, I am of the view that the appellant has not shown that had the missing documents been available at the time, the court a quo would have granted a different judgment. Without evidence of fraudulent misrepresentation on the part of the respondents, the application for the rescission of the judgment is stillborn. The appeal must accordingly fail.

[25] In the result I make the following order:
The appeal is dismissed with costs.

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C H NICHOLLS
JUDGE OF APPEAL

APPEARANCES

For the appellant:	R S Van Riet SC (with him W H Van Staden)
Instructed by:	Roelof Feenstra Incorporated, Stellenbosch
	Lovius Block Attorneys, Bloemfontein
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