THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

No precedential significance

Case no**:** 116/10

In the matter between:

BONHEUR 76 GENERAL TRADING (PTY) LTD	**First Appellant**
THE MORNINGSIDE WEDGE OFFICE PARK OWNERS ASSOCIATION (ASSOCIATION INCORPORATED UNDER SECTION 21)	**Second Appellant**
LESLIE WILLIAM LOB	**Third Appellant**
and	
CARIBBEAN ESTATES (PTY) LTD	**First Respondent**
WEDGEPORT (PTY) LTD	**Second Respondent**
MARTIN ETTIN	**Third Respondent**
DEREK GREENBERG	**Fourth Respondent**
GREGORY FRANCIS PORTEOUS	**Fifth Respondent**
DOUGLAS WILLIAM PORTEOUS	**Sixth Respondent**
REGISTRAR OF DEEDS, PRETORIA	**Seventh Respondent**

Neutral citation: ***Bonheur v Caribbean*** **(116/10) [2011] ZASCA 19 (17 March 2011)**

Coram: HARMS DP, LEWIS, PONNAN, MALAN and THERON JJA

Heard: 8 March 2011

Delivered 17 March 2011

Summary: Right of pre-emption to share in immovable property not created through unsigned agreement: party with no right to share cannot prevent its alienation.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Van Eeden AJ sitting as court of first instance).

The appeal is dismissed with costs including those of two counsel.

JUDGMENT

LEWIS JA (HARMS DP and PONNAN, MALAN and THERON JJA concurring)

[1] This dispute concerns an undivided share in residential property in Morningside, Johannesburg. The property is adjacent to an office park and a shopping centre developed by the first appellant, Bonheur 76 General Trading (Pty) Ltd (Bonheur), and governed by the second appellant, Morningside Wedge Office Park Owners Association (the Association), of which all the owners of the office park and the centre are members. The third appellant is Mr Leslie Lob, who is also a director of Bonheur and who deposed to the founding affidavit.

[2] The appellants sought an order in the South Gauteng High Court setting aside the sale by the first respondent, Caribbean Estates (Pty) Ltd (Caribbean), to the second respondent, Wedgeport (Pty) Ltd (Wedgeport), of its 46 per cent undivided share in the property; setting aside a mortgage bond registered over that share of the property in favour of the third and fourth respondents, Mr Martin Ettin and Mr Derek Greenberg, and interdicting the respondents (the fifth and sixth respondents being respectively Mr Gregory Porteous and Mr Douglas Porteous, members of Caribbean and authorized to represent it) from alienating the share other than in terms of various contracts, and the memorandum and articles of association of the Association, to all of which the appellants asserted the respondents were party. The seventh respondent is the Registrar of Deeds, who played no role in the litigation.

Van Eeden AJ dismissed the application with costs on the attorney and client scale[1] but granted leave to appeal to this court.

[3] The property was created on 16 November 2005 by virtue of a subdivision. A 46 per cent share was acquired by Riverbend Trade and Investment 4 (Pty) Ltd (Riverbend) and a 54 per cent share was acquired by Vinella Investments (Pty) Ltd (Vinella). Shortly thereafter, in January 2006, Riverbend sold its 46 per cent share to Caribbean and Vinella sold its 54 per cent share to Bonheur. It is the share acquired by Caribbean that is in dispute. I shall refer to it for convenience as the Caribbean share.

[4] On 25 September 2008 Caribbean sold its share to Wedgeport. Transfer was effected on 1 December 2008 and on the same day a mortgage bond was registered over the Caribbean share in favour of Ettin and Greenberg as security for a loan made to Wedgeport.

[5] The grounds on which the appellants initially claimed relief were that Bonheur had what they termed a 'de facto' right of pre-emption in respect of the Caribbean share, and that Wedgeport was precluded from buying or taking transfer of the share without first becoming a member of the Association. The second ground was founded in the supposed principle that co-owners of undivided shares in property cannot alienate their shares without the approval of other co-owners. This ground was extended during the hearing of the appeal to encompass an oral agreement of partnership between Bonheur and Caribbean which precluded the sale or mortgaging of the Caribbean share without the consent of Bonheur. And in its reply to Caribbean's founding affidavit Bonheur had raised a further ground: that the sale by Caribbean to Wedgeport, a loan to it by Ettin and Greenberg, and a mortgage securing payment of the loan, were 'sham transactions'.

The right of pre-emption

[6] The 'de facto' right of first refusal was alleged to arise from three sources: the articles and memorandum of association of the Association; a co-owners' agreement and a joint venture development agreement (the JVD agreement). The high court found that there was no such right. Neither Bonheur nor Caribbean was a member of

[1] The judgment is reported: 2010 (4) SA 298 (GSJ).

the Association and had not been required to become such when they acquired their respective shares from Riverbend and Vinella. They were thus not bound by the articles and memorandum of association.

[7] The co-owners' agreement relied on by Bonheur was concluded on 12 August 2005, before the subdivision and before the shares in the property were transferred to Bonheur and Caribbean. It created pre-emptive rights in respect of some of the properties, but not the residential property the shares in which were acquired by Bonheur and Caribbean. In any event, it was common cause that this agreement had not been signed on behalf of either Bonheur or Caribbean. Thus it too did not confer on Bonheur any right of pre-emption.

[8] The third agreement relied on was foreshadowed in a letter of intent signed on 12 August on behalf of Bonheur and Caribbean, and also by Ettin and Greenberg. It referred to the proposed co-ownership agreement, and also, inter alia, to the JVD agreement. That too was never concluded. Although a draft agreement was attached to the founding affidavit of Lob it was not actually agreed to or signed. Since a right to purchase land must be in writing, signed by the parties or their duly authorized agents (s 2(1) of the Alienation of Land Act 68 of 1981), no valid right of pre-emption came into existence. The high court thus correctly found that Bonheur had no right to demand that the Caribbean share be sold or transferred to it.

Oral agreement of partnership

[9] In argument at the hearing of the appeal Bonheur conceded that it had no right of pre-emption given the requirements of s 2(1) of the Alienation of Land Act. Counsel thus changed tack, submitting that as a partner of Bonheur, Caribbean was precluded from alienating partnership property without the consent of Bonheur. He argued that there was a partnership agreement, concluded orally, the terms of which were to be found in the draft of the JVD agreement read with the letter of intent. The latter recorded that the parties (in fact the predecessors of Bonheur and Caribbean) would not make material decisions about the common property without unanimous agreement. And the former provided for a 'buy-out' procedure and would have imposed a duty of good faith and an obligation to share information upon the parties.

[10] Bonheur argued that the letter of intent and the unsigned draft of the JVD agreement proved that there was an agreement, albeit oral or tacit, that there would be a partnership between it and Caribbean, precluding the alienation of the Caribbean share. The terms were exactly the same as those of the draft JVD agreement and the date when the partnership came into existence was the date of the letter of intent – 12 August 2005.

[11] This was not the case made in the application. Nor was it presaged in the heads of argument for Bonheur. There is nothing to support the contention. On the contrary, the founding and subsequent affidavits deposed to on behalf of Bonheur were firmly based on the alleged de facto right of pre-emption arising inter alia from the draft JVD agreement. Moreover, the parties to the latter agreement would have included Lob and Vinella. The rabbit pulled out of counsel's hat bore no resemblance to a partnership between the co-owners. This argument too must fail.

Alienation of share without all co-owners' consent

[12] The appellants argued, thirdly, that Caribbean is precluded by the common law principles regulating co-ownership from selling the Caribbean share to Wedgeport; and that Wedgeport was precluded by the same principles from mortgaging the Caribbean share to Ettin and Greenberg. However, as found by the high court, s 34(1) of the Deeds Registries Act 47 of 1937 expressly allows for such alienation. Should a co-owner wish to alienate only a fraction of his share, a certificate of registered title has to be furnished to the Registrar. But should the full share be sold or mortgaged no such certificate is required. The conclusion to be drawn from this provision alone is that such alienation is permitted. The section does not require the consent of the other co-owners. That is settled common law as well.

[13] Each co-owner of property is entitled to dispose of his share without the consent of the others.[2] The right of disposal is not fettered unless by agreement. Of course one co-owner may not use or deal with the common property as a whole without the consent of all the co-owners.[3] But the sale of a share, or its

[2] See C G van der Merwe 'Things' *Lawsa* vol 27 (First reissue) paras 409 and 412 and P J Badenhorst, Juanita M Pienaar and Hanri Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) p 133 ff.

[3] See generally, for example, *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W). The position is different where the co-ownership is 'tied', as it is where the co-owners are married to each

hypothecation, does not affect the property as a whole. The sale to Wedgeport, and the mortgage of the Caribbean share in favour of Ettin and Greenberg, did not in my view require the consent of Bonheur. The application was correctly refused on this ground as well.

[14] However, the high court gave leave to appeal to this court when referred to *Mazibuko v DPP*[4] which held that where co-ownership is 'tied' because it arises from a marriage in community of property, and the husband's share should be forfeited in terms of the Prevention of Organized Crime Act, the wife's share had also to be forfeited (although she would share in the proceeds of the realization of the property). But the court there distinguished this type of co-ownership from ordinary co-ownership.[5] Bonheur submitted (and the high court in giving leave must have thought there was some merit in this contention) that there might be some jeopardy to Bonheur's share should Wedgeport's share be realized in a similar way. Its 'constitutional' right to property might (if I understand the argument) be placed in jeopardy should the sale to Wedgeport not be set aside.

[15] Bonheur, on appeal, argued that this was so because various statutes regulating municipal affairs imposed taxes on co-owners jointly and severally. If Wedgeport failed to pay its pro rata share then Bonheur might be deprived of its share in the property. The argument is entirely speculative. And it bears no relation to the case made out in the application. No more need be said of it.

Were the sale, loan and mortgage sham transactions?

[16] In response to Caribbean's answering affidavit Bonheur alleged that the sale of its share to Wedgeport, the loans to Wedgeport of the purchase price by Ettin and Greenberg, and the mortgage bond registered as security, were all simulated transactions. The high court rejected this ground as well, finding that the submission was 'far-fetched and speculative'.[6] The reason for the sham, Bonheur contended, was to prevent Lob from enforcing any judgment that it might obtain against

other in community of property: *Mazibuko & another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA).

[4] Above.

[5] Paras 47-48.

[6] Note 1 above, para 17.

Caribbean in a counterclaim against it. The high court found that there was no evidence of a sham.

[17] Bonheur nonetheless persists with the contention on appeal. The argument is that the shareholders and directors of Wedgeport are also directors of Caribbean; the purchase price was not actually paid by Wedgeport, but would be effected through 'cash advances and by way of loan account and book entries', Ettin and Greenberg retained control of the Caribbean share through having lent the purchase price to Wedgeport, and having secured a mortgage bond over the share; the sale and loan agreements have different provisions as to the payment of the price; and Ettin and Greenberg agreed to lend not only the price but also the funds required to pay rates, taxes and other expenses for a three-year period. Moreover, Wedgeport undertook not to sell or alienate the Caribbean share without the written consent of Ettin and Greenberg. A genuine purchaser would not, Bonheur argued, have accepted such limitations on its rights.

[18] The contention that the transactions are simulated was supported, Bonheur argued, by the fact that Caribbean, or Ettin and Greenberg, paid the outstanding and future rates on the Caribbean share to ensure transfer of the property. The payment included the amount owed by Bonheur yet was made without reference to Bonheur.

[19] As the high court found, Bonheur has not adduced evidence of an intention on the part of any of the respondents to disguise their transactions. Nor was there evidence of any apparent reason why they should have done so. And Caribbean had, shortly before selling its share to Wedgeport, offered it for sale to Bonheur, which had declined. That there was no intention to avoid paying the fiscus is shown by the fact that VAT on the transaction had been paid. Nor did Bonheur show any basis on which it was entitled to require that contracts between other parties be set aside.

[20] As to the interdicts sought as an alternative to the orders setting aside the contracts and transfers in question, Bonheur did not show any basis for anti-dissipatory relief. It sought interim interdicts pending the referral of the dispute to oral evidence. It does not persist in asking for a referral. And it cannot prevent the disposal of property to which it has no right. Such relief would thus not be competent.

[21] In the circumstances the appeal is dismissed with costs including those of two counsel.

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C H Lewis

Judge of Appeal

APPEARANCES:

APPELLANTS:	M Nowitz
	Instructed by Errol Goss Attorneys
	Matsepes Inc
	Bloemfontein
RESPONDENTS:	D Fine SC (with him P M Cirone)
	Instructed by Glyn Marais Inc
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