

THINK 'DEEDS OFFICE' WHEN YOU SUBDIVIDE OR CONSOLIDATE

Malan v Die Gerhard Labuschagne Familie Trust & Another (Case no 44/2021) [2021] ZASCA 171 (9 December 2021)

Ms N, happy with a recent property purchase from the G Trust, was keen to acquire an additional piece of adjacent land on which there was a flatlet. The whole of the adjacent land belonged to the G Trust which had sold a subdivided portion thereof to Ms N. Thus her agreement with the G Trust included an option to purchase part of the Trust's remaining land, still to be subdivided. She had in the meantime leased and lived on this part.

A year after taking transfer, she exercised the option and paid for the additional piece of land; she obtained the necessary approval from the Surveyor General's office to join this additional piece of land with her property, but then left things in limbo. Two years later she is sequestrated and her insolvent estate's trustee sells the land to Mr M, without knowledge of these dealings in respect of the additional piece of land. Some 10 years later, Mr M - who was also living on the 'additional' land which he thought was part of the property he had acquired - is served with an eviction notice from the purchaser of the G Trust's land.

Sadly, the Court could not assist Mr M in an application for rectification of his title deed or sale agreement, because Ms N never attended to registration of her rights in the deeds office. The judgment summary below explains why this was so and highlights how important it is to procure registration in a deeds office of rights with regard to land.

The Judgment can be viewed [here](#).

FACTS

In **July 1998**, the Gerhard Labuschagne Familie Trust ('the Trust') took transfer of Erf 25 Schweizer Reneke. Two months later, it obtained permission to subdivide Erf 25 into:

- a) Portion 1 of Erf 25, 547 square metres in extent ('Portion 1'); and
- b) Remainder of Erf 25, 2308 square metres in extent ('the Remainder').

In **June 2000**, Ms Nel purchased Portion 1 from the Trust. The agreement included an option to purchase *part* of the Remainder on which there were pigeon coops and also a flat ('the disputed property'). The material terms relating to the option were that it would be valid for 5 years; that the purchase price would be R30 000; that should Ms Nel wish to exercise the option, she would give the Trust written notice thereof; and, if the option was exercised, Ms Nel would then be responsible for (i) subdividing the disputed property from the Remainder; (ii) consolidating the disputed property with Portion 1, at her cost. (Subsequent registration hereof in a deeds office by Ms Nel was assumed.)

The parties also agreed that Ms Nel would lease the flat on the disputed property (on the Remainder) from the Trust for a period of 5 years. Thus, upon transfer of Portion 1 into her name in September 2000, Ms Nel also took occupation of the disputed property. Shortly thereafter, she advised the Trust that she was exercising the option to

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purchase (the disputed property) and paid R30 000 over to the Trust. By **January 2002**, the Surveyor-General approved a subdivision of the Remainder into:

- a) Portion 2, in extent 226 square metres, which reflected the disputed property. When consolidated with Portion 1, the two would become Portion 3.
- b) A remainder, in extent 2082 square metres.

The registration of the subdivision, transfer of the disputed property and consolidation in terms of the option and the subsequent plans, were never effected. As such, the Remainder, registered in the Deeds Office as being owned by the Trust, consisted of the original subdivision of Erf 25 in 1998, in extent 2308 square metres, which included the disputed property.

In **November 2003**, Ms Nel's estate was finally sequestered. The trustee of Ms Nel's estate sold Portion 1 to Mr Malan. The agreement described the property purchased as 'Portion 1 of Erf 25, Schweizer-Reneke ...'. (The trustee of Ms Nel's insolvent estate did not know of the exercise of the option by Ms Nel.) Mr Malan, believing that the property he purchased included the disputed portion, took occupation of Portion 1 as well as the disputed property. In time he also effected improvements to the disputed property.

Years later, in **December 2012**, the Trust sold the Remainder (which still included the disputed property) to C & C Delwerye CC ('the CC').

The CC, without knowledge of Ms Nel's personal rights in terms of the option, informed Mr Malan that it had purchased the Remainder and that Mr Malan had to vacate the disputed property on pain of proceedings to evict him.

This prompted Mr Malan to approach the High Court, essentially for an order to rectify the sale agreement and title deed to record that it pertained to Portion 1 and the disputed property. show that he was the owner of Portion 1 as well as disputed portion (i.e., the area that would have been Portion 3 had Ms Nel proceeded with the consolidation and transfer of the property acquired by exercising the option). The CC lodged a counter-application for Mr Malan's eviction from the disputed property.

The High Court found in favour of Mr Malan, but an appeal to a full bench of the High Court was upheld. The present matter deals with Mr Malan's appeal to the Supreme Court of Appeal.

HELD

The legal position at the time of Ms Nel's sequestration

- When Ms Nel was sequestered, she was the registered owner of Portion 1. In addition, and pursuant to her exercise of the option, she had a personal right to take transfer of the disputed property and, on transfer or thereafter, to consolidate the disputed property with Portion 1 into Portion 3 (as per the 2002 plans).
- This being the case, the trustee of Ms Nel's insolvent estate could not sell something more than this to Mr Malan. In other words, the trustee could not pass transfer of the disputed property to Mr Malan.

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Rectification – of the title deed and/or the sale agreement?

- Mr Malan's claim was for rectification both of the deed of sale and the Title Deed. Rectification of the Title Deed would reflect Mr Malan as owner of both Portion 1 *and* the disputed property. On that basis, rectification would result in a legal position reflecting that ownership of the disputed property was transferred to Mr Malan at the time of transfer.
- Clearly this could not be achieved because Ms Nel never had real rights to or ownership of the disputed property; rather, she had a personal right to have it transferred to her. The agreement could not be rectified to achieve a contrary outcome, as if she in fact owned the property.
- There was a further compelling reason why the relief sought by Mr Malan was not competent. This is because transfer of the disputed property to Ms Nel never took place and the disputed property continued to be owned by the Trust as part of the Remainder. This is also what was reflected in the Deeds Office at the time of the sale by the trust to the CC in 2012.
- What was sold by the Trust, and subsequently transferred to the CC, was the Remainder created by the original subdivision in 1998. The CC thus took transfer, and is the present owner, of the disputed property. The CC has a real right in the remainder, including in the disputed property.
- In circumstances where the Remainder has been transferred, unless the CC had knowledge of the right to claim transfer of the disputed property at the time of taking transfer, the title of the CC to the disputed property is unimpeachable. This is because in our law, the rule is that if a party has knowledge of someone with a prior personal right concerning the property (Ms Nel's personal right flowing from the exercise of the option), and takes transfer knowing of the prior personal right, that person would be bound thereto despite lack of registration. Thus, if in the present matter, the CC had had knowledge of the right of Ms Nel and her successor in title to take transfer of the disputed portion at the time the CC took transfer of the Remainder, the transfer to the CC could be set aside. This however was not the case here.

CONCLUSION

The appeal is dismissed.

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