NOT KNOWING AND PRESCRIPTION

Brits v Kommandantsdrift CC and Others (143/2021) [2022] ZASCA 41 (5 April 2022)

The judgment tells a story of the on-sale of a farm that was subdivided and consolidated over years, so that later on both purchasers and sellers had the same misapprehension as to what was really the farm that was sold. This is something that can happen easily, especially in the sale of farms where the boundaries are less obvious than in residential properties. The judgment highlights how to go about rectifying a title deed in these circumstances, if you believe and can show what actually was bought and sold.

The Judgment can be viewed here.

FACTS

Onder Zandrift No 119 was originally registered in the name of the grandparents of three Le Roux brothers (Michael, Nico and Meyer Jnr). In 1962, the original farm was transferred to the father of the three brothers, Mr Le Roux Snr who, 1993, subdivided the original farm and then consolidated other parts. This resulted in:

- The creation of a separated piece of land ('the wedge'). Mr Le Roux Snr then transferred the wedge to his oldest son Michael who, in turn consolidated it with land he already owned ('Michael's farm') and the consolidated farm was thereafter known as Oude Zandrift 446 ('Farm 446').
- A consolidation of two pieces of the original farm, which was thereafter known as Middel Zandrift. In 1995, Le Roux Snr transferred Middel Zandrift to Kommandantsdrift CC, a close corporation ('the CC'), which has Meyer Jnr as its sole member.

In 1997, Michael and his wife transferred Farm 446 to the CC, which then owned both Middel Zandrift and Farm 446. In **2000**, the CC sold Farm 446 to Nico. Thereafter, in **2008**, Nico sold Farm 446 to Brits.
At the time of both sales, all the parties held the same (mistaken) understanding that the wedge was *not* part of the piece of land that was being purchased and sold. Thus, after conclusion of both the contracts of sale (the 2000 sale of farm 446 by the CC to Nico and the 2008 sale by Nico to Brits), the wedge continued to be farmed by Meyer Jnr, on behalf of the CC, as part of its land on the farm known as Kommandantsdrift (the CC's farm), and Brits farmed on 'Michael's farm'. Brits never farmed on the wedge. The wedge remained part of Kommandantsdrift CC in practice, and the latter not only farmed on the wedge, but also invested substantial amounts of money in establishing irrigated fruit orchards on the wedge from 2003 onwards.

In 2013, five years after of taking transfer of Farm 446, Brits sued the CC for occupation of the wedge. This litigation was not taken to its conclusion, and was superseded by the present matter. In 2015, both the CC and Nico instituted two separate actions in the Cape Town High Court laying claim to the wedge; both sought a declaration that the respective sales of Farm 446 (the 2000 contract concluded between the CC and Nico, and the 2008 contract concluded between Nico and Brits) were void. By agreement between the parties both the cases were consolidated in one action and this matter deals with the appeal on the outcome of that matter.

The CC essentially sought an order that it be declared the owner of Farm 446 and that the deeds office records and title deed should be rectified accordingly. This, because there was a common error on the part of all the parties to both contracts (the 2000 contract between the CC and Nico in 2000 for the sale of 'Michael's farm' to Nico; and the 2008 contract for the sale of 'Michael's farm' by Nico to Brits involving the wedge) which vitiated the contracts. The common error was the assumption on the part of all the contracting parties, at the time of the conclusion of the contracts, that the wedge formed part of the CC's farm and that it was not part of what was to be sold and purchased.

Brits disputed that this common error vitiated the two contracts and also raised a special plea of prescription contending that any claim for the re-transfer or rectification would have prescribed in terms of the Prescription Act 68 of 1969, as the cause of action/debt would have arisen more than three years prior to the summons in this matter, which was issued in 2015.

In the High Court, the parties had agreed that the issues that were to be determined were whether the transfers of the property from the CC to Nico through to Brits were void; and concomitantly whether the CC was entitled to claim that the deeds office registries be amended in order to reflect the CC as the true and correct owner of the wedge; as well as any plea of prescription first to be decided separately; and that all other issues shall stand over for later determination. The High Court ordered that both the 2000 and 2008 contracts are void ab initio due to a common error on the part of all the contracting parties, relating to a material term. The present matter deals with Brits' appeal.

HELD

Prescription

- It is trite that a party who raises prescription bears the onus of poof thereof. Thus, it fell upon Brits to allege and prove the date upon which Meyer Jnr, on behalf of the CC, became aware of the facts that underpinned its claim, as well as the identity of the debtor. Alternatively, Brits had to prove the date on which the CC would have acquired the relevant knowledge had it exercised reasonable care.
- Brits did not present any evidence and neither did he establish an inception date during the proceedings. He did not plead a date upon which the CC became aware of the requisite facts, nor the identity of the debtor, nor did he plead a date upon which the CC should have acquired such knowledge. All that Brits pleaded was that the actual or constructive knowledge occurred more than three years prior to the service of summons. In the circumstances, Brits did not make out a case for the prescription he relied upon.
- In contrast, the High Court was faced with the direct evidence of both Nico and Meyer Jnr, who testified that they only became aware that the wedge was part of farm 446 when Brits issued summons against them for occupation of the land in 2013. Their evidence - that they had been completely unaware of the wedge having been consolidated with other land to comprise farm 446 in 1993 - was significant; particularly since there was no evidence to gainsay this testimony.
- The High Court was therefore correct in concluding that neither Nico nor Meyer could, as reasonable persons, acting reasonably and with the diligence of a reasonable person have established the facts on which the debt and therefore their claims have arisen prior to 2013. The minimum facts necessary to institute an action only became known to them or more importantly could only have become known to them in 2013.
- Thus the plea of prescription raised by Brits had not been proved.

Ownership of the wedge

- It was undisputed that at the time both contracts of sale (the 2000 and 2008 contracts) were signed, all the parties to the contracts were under the common error that the wedge was not part of farm 446, but rather part of the CC's farm. This was also supported by the evidence of the estate agent: The extent of the land was pointed out to indicate the farm's boundaries; the parties thought that the wedge was part of the CC's farm, and they thought that they were selling and buying only Michael's farm.
- Thus, this common mistake was fundamental to the material terms of the agreement as to the identity of what was being sold and bought. A common error as to a material term renders the contracts void.
- At the time of the contract, Brits was not aware that the title deed did not accord with what was bought and sold. Clearly, in 2000, Nico and Meyer Jnr contracted under the common misapprehension that the wedge formed

part of Kommandantsdrift's farm. They were also unaware that the wedge had been consolidated with Michael's farm. In 2008, Nico and Brits also laboured under the same common misapprehension when they concluded the contract.

- It appears that the conduct of the parties pre-and post-conclusion of the contracts is indicative of their understanding of the position at the time of the conclusion of the contracts. Furthermore, by the time he served the summons, Meyer Jnr had been actively farming the wedge, and had invested substantial amounts of money to establish fruit orchards on the wedge. The consequence must be that the contracts are void. Thus, the high court correctly found that both the 2000 and 2008 contracts were both void.
- Regrettably, the High Court failed to deal with the issue as to whether the CC was entitled to claim that the deeds office registries be amended in order to reflect the CC as the true and correct owner of the wedge, which was the essence of the CC's claim. The matter has to be remitted to the high court to decide this issue.

The appeal against the High Court judgment was dismissed and the remaining issue referred for adjudication.

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