PRESCRIPTION OF CLAIM TO UNDO SALE AND TRANSFER OF LAND

Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd and Others (15914/2012) [2015] ZAGPPHC 683 (23 September 2015)

From time to time contracting parties look for ways to undo their performance in terms of a sale agreement, especially in a case such as the present, where a developer realizes that due to restrictions imposed by the Subdivision of Agricultural Land Act, certain envisaged plans may not succeed. But such a claim can prescribe and the court in this instance laid down guidelines on how the prescription period will be calculated.

The Judgment can be viewed here.

FACTS

Maghilda Investments (Pty) Ltd (Maghilda) and the Sanjont Trust (the Sellers) entered into three agreements with Nuance Investments (Pty) Ltd (Nuance). The agreements were all part of one overall scheme in pursuit of a proposed development of land and consisted of:

- a sale agreement entered into on 21 November 2007 in terms whereof five portions of farmland were sold to Nuance;
- a development agreement entered into on the same date whereby the development structure of the land was agreed upon; and
- a long term lease.

In May 2008 transfer of three of the five properties were registered in the name of Nuance, against payment by the latter of the purchase price of R60 million.

The sale agreement, development agreement and lease agreement were inextricably interlinked and formed part of one indivisible transaction. It became apparent that these agreements were null and void from the outset because:

- the sale agreement was entered into in contravention of the Subdivision of Agricultural Land Act No 70 of 1970 in that some of the land concerned was undivided portions of agricultural land which was sold without the written consent of the Minister of Agriculture; and
- the sale agreement did not comply with the formalities required by the Alienation of Land Act No 68 of 1981.

The development agreement was dependent on and connected to the sale agreement and as a result also null and void.

Nuance instituted proceedings against the Sellers for the repayment of the purchase price of R60 million against re-transfer of three portions of farmland back to the Sellers. The action was based on the common law claim for unjust enrichment resulting from partial performance in terms of the illegal sale agreement and two other related agreements.

The Sellers raised a special plea of prescription against Nuance's claim (for the repayment of the purchase price). They also raised a counterclaim in terms whereof they sought rectification in the Deeds Registry in respect of the registration of transfer, averring that since the sale agreement was null and void from the outset, ownership did not pass to Nuance.

With regard to the prescription claim, they argued that, on the basis of the illegality of the agreements in question, prescription had commenced running on the date that the agreements were concluded, i.e. 21 November 2007; or in the alternative, that any cause of action arose, by the very latest, on 13 May 2008 which was the date on which the purchase price was paid (and the properties transferred). Since summons was served only on 19 March 2012, the claim had prescribed, Nuance having had actual knowledge of the facts giving rise to its claim more than three years prior to this date.

Nuance defended the matter and argued that (i) it only became aware of the facts from which its claim arose on 9 June 2009 so that prescription only commenced running from this date; and (ii), alternatively, that the Sellers' claim based on enrichment is reciprocal to return of ownership of the properties transferred, so that repayment of the R60 million would only become due after return/re-transfer of the three properties.

HELD:

The prescription plea

- The facts showed that, at the time of concluding the sale agreement, Nuance was aware of the fact that the properties sold were agricultural land and that ministerial consent would be a requirement. Prescription accordingly commenced running on the date of concluding the sale and the claim for return of the purchase price (against retransfer of the properties) had prescribed.

Reciprocity

- The word 'debt' referred to in the Prescription Act refers to a claim and not the cause of action.

- A complete cause of action would require restoration (if there was indeed a transfer of ownership), but the right to claim payment or to institute action is not dependent on actual restoration which must have already taken place, as long as there is an offer to restore in the pleadings.

- In other words, actual restoration is not a precondition to a successful claim or action.

The reciprocity argument on the side of Nuance therefore had to fail.

Nuance's counterclaim

- In the counterclaim the Sellers sought rectification in the deeds registry in respect of the three portions of land. They contended that this was not a claim for delivery, but for rectification, to reflect the true state of affairs, as there was no passing of ownership to Nuance due to the invalidity of the underlying agreements.

- The legal position with regard to the underlying contract (e.g. a sale) and the so-called "real agreement" points out that 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.

- In accordance with the abstract theory, the requirements for the passing of ownership are twofold, namely 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".

- However, our Supreme Court of Appeal pointed out that this does not apply where there is a defect in the "real agreement" and it is a principle of our law that something done contrary to the direct prohibition of the law is generally void and of no effect.

- The abstract theory thus does not apply in circumstances where the underlying transaction is illegal as opposed to one which is invalid. In the present case the underlying transaction was not only invalid (due to failure to comply with the formalities required by the Alienation of Land Act), but also illegal due to non-compliance with the Subdivision of Agricultural Land Act. The abstract theory was therefore not applicable.

- The Subdivision of Agricultural Land Act is not aimed at prohibiting the transfer of cadastral units, but is aimed at prohibiting sales of undivided portions of agricultural land without the consent of the Minister. This is what happened in this case. Portion

39, which was transferred to Nuance, was subject to the re-transfer of the "excluded portion of Portion 39". That term was defined in the parties' agreement to be "a portion of Portion 39 represented by the a figure on a sketch plan measuring 0.9 hectares". The prohibition therefore still applied to the transaction in question as it contemplated the re-transfer of an undivided portion of Portion 39.

- There was therefore no "real agreement" to justify the transfer of ownership, as the real agreement itself was not only defective, but also illegal.
- There was also no passing of ownership to Nuance in respect of these portions.

The Sellers' counterclaim therefore succeeded.

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