REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

8/7/2016.

CASE NO: **46695/2014**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE

8/7/2016
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DATE

In the matter between:

STEPHANIE SLABBERT PLAINTIFF

and

CORNELIS PETRUS SCHUTTE 1ST DEFENDANT

CORNELIS PETRUS SCHUTTE NO 2ND DEFENDANT

J U D G M E N T

MALI J

[1] This is an application in terms of Rule 33(4) of the Uniform Rules of Court. Rule 33(4) reads-

"if, in any pending action, it appears to the court mero motu that there is question of law... which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question..... and the court shall on the application of any party make such order unless it appears that the question cannot conveniently be decided separately".

[2] In **TSHABALALA v MINISTER VAN VEILIGHEID EN SEKURITEIT**[1] it is stated that an important consideration in ordering separation is whether a preliminary hearing will shorten the proceedings.

[3] The application is on the instance of the defendants who are of the view that the question of the validity of the agreement of sale may conveniently be decided separately from the remainder of the trial.

[4] The function of the Court, in an application in terms of Rule 33 (4) such as the present, was stated in **MINISTER OF AGRICULTURE v TONGAAT GROUP LTD** [2] as follows-

"... the function of the Court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantages. If, overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages

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[1] [2001] 3 All SA 620 (W)
[2] 1976 (2) SA 357 (D) at 364D-E

would outweigh the disadvantages, it would normally grant the application."

[5] In **TUDORIC-GHEMO v TUDORIC-GHEMO**[3] it was held that the word 'convenient' in the context of Rule 33 (4) was used to convey not only the notion of facility or ease or expedience but also the notion of appropriateness: The procedure as contemplated in Rule 33 (4) would be ' convenient' if, in all the circumstances, it appeared to be fitting and fair to the parties concerned. (own underlining)

[6] In an unreported case of **JOHAN HENDRIK DE WET AND OTHERS v MEMOR (PTY) LTD**[4] the Court said the following

".....The court has a discretion to grant or refuse an application in terms of Rule 33 (4). The overriding consideration in such application is convenience, in a wide sense, that is to say, the separation must not only be convenient to the person applying for such separation, but must also be convenient to all the parties in the matter inclusive of the court. The determination of such an application requires of the court to make a value judgment in weighing up the advantages and the disadvantages in granting such separation. If the advantages outweigh the disadvantages, invariably, the court should grant the application for separation. The notion of appropriateness and fairness to the parties comes into the equation".

[7] It appears from the above case law that convenience encompasses amongst others appropriateness, therefore the shortening of the proceedings as held in Tshabalala above cannot be the only important consideration. In the the present case the question whether it is convenient for this Court to grant the application for separation of the validity of the sale agreement from the remainder of the trial; can only

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[3] 1997 (2) SA 246 (WLD)
[4] 2009/44153 at page para 6

be answered when the issues defined in the pleadings have been properly established.

[8] The plaintiff is a purchaser of a certain immovable property known as Portion 443 (a portion of Portion 140 of the farm Hekpoort 504 JQ) (*"the property"*).

[9] The plaintiff's claim against the defendant is for the specific performance of a purported sale agreement of the land as well as an addendum thereto annexed as Annexures "A" and "B" to the Plaintiff's Particulars of Claim. The sale is in respect of the property registered and owned by the Trust.

[10] The plaintiff also claims rectification of the agreement of sale and the addendum thereto. The copy of the sale agreement in question refers to the *"Corita Schutte Familie"* Trust being the seller and the plaintiff wants it rectified to refer to the first defendant, because the first defendant purported to represent both trusts. The addendum refers to a different trust, namely "*Cilliers Vijoen Schutte Eiendomme Trust"* and the plaintiff seeks rectification referring to the first defendant as the seller.

[11] As the first alternative claim, the plaintiff seeks to enforce an oral agreement forcing the first defendant to sign a sale agreement and then repeats its claim for specific performance. As a second alternative claim the plaintiff claims that the first defendant should as the agent for the Trust effect the transfer of the property to the plaintiff as a specific performance. As a third alternative the plaintiff claims misrepresentation by the first defendant and alleged consequential damages and as a fourth alternative the plaintiff claims that the Trust had been enriched at the expense of the plaintiff.

[12] In the present matter the provisions of the Alienation of Land Act, No 68 of 1981 ("the Act") are applicable. Section 2 of the Act provides as follows

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[13] The defendant's application amongst other grounds is supported by the abovementioned provisions. The defendant's argument is that the agreement of sale on which the plaintiff seeks to rely on has not been signed by the seller or its authorised agent, therefore it is legally wanting and is of *"no force and effect".* According to the defendant there is even no need to hear other issues except for the *point in limine* in respect of the validity of the agreement of sale; and as a result the plaintiff's claim for rectification of the agreement of sale cannot succeed and must be dismissed.

[14] With regard to the first alternative claim for specific performance the plaintiff relies on an oral agreement of sale of the property. The defendant' contention is the same above, that the oral agreement of sale of the immovable property does not satisfy the legal requirements. At page 338 of Amler's Precedent of Pleadings it is stated that rectification of a contract required by statute to be in writing is possible only if the document is, on its face and before rectification, formally valid in the sense that it complies in form with the statute.

[15] On reading of the relevant statute the question is whether the agreement of sale which is the subject of this matter does in a sense comply in the form with the statute and therefore calls for rectification. The requirements is that a deed of alienation must be signed by the parties thereto or by their agents acting on their written authority. In *casu* the agreement of sale is not signed by neither the seller nor the

agent. The next question to be answered is whether the document sought to be rectified is formally valid in the sense that it complies in the form with the statute.

[16] The plaintiff's argument is that the formality requirements must not be allowed to trump the established legal principle of rectification. In this regard the plaintiff referred the Court to the case of **INTERCONTINENTAL EXPORTS (PTY) LTD v FOWLES**[5] (*"Intercontinental"*). At page 6 -7 paragraph 11 the following is stated:

"Rectification is a well established common law right. It provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement. The requirement of formal validity in the case of a deed of suretyship flows from the Legislature's perceived need to provide safeguards in such matters. To the extent that the need to satisfy the latter may preclude recourse to the former, tension will inevitably exist between the two. While care must be taken not to defeat the object of the Act, the formality requirements must not be allowed to become an unnecessary stumbling-block to rectification and, consequently, to giving effect to the true intention of the contracting parties".

[17] Intercontinental deals with the rectification of the deed of suretyship . Section 6 of the General Law Amendment Act 50 of 1956 requires that the deed of suretyship be embodied in a written document signed by or on behalf of the surety. The main complaint in Intercontinental was that the suretyship incorrectly reflected the agreement between the parties in that the defendant was described as the debtor, whereas the debtor is a company and it was incorrectly indicated that the plaintiff allowed the debtor banking facilities, whereas the plaintiff

[5] 1999(2) SA 1045 (SCA)

was not a debtor. The court of appeal applied the requirements for rectification and granted rectification.

[18] Although the facts in the present matter are not on all fours with those of Intercontinental, a generally accepted approach, the legal principle is the same. It is not in dispute that the first defendant signed the addendum to the agreement of sale albeit the identity of the seller is a different trust from the one named in the agreement of sale. The defendant's argument that the addendum amounts to nothing as the agreement of sale is non-compliant with the law is misplaced in the circumstances. This is because the subject of sale as defined in the agreement of sale is the same in the addendum, being *"Portion 433 of 140 of the farm Hekpoort 504 J.Q Gauteng"* There is some indication of intention to sell the same property to the plaintiff. My view is that based on this and the commonality of the first defendant in both transactions irrespective of his capacity, the emphasis on the formality creates an unnecessary stumbling block.

[19] As indicated above the test for separation of issues is convenience, which interpreted in Tudoric-Ghemo case above as fitting and fair to both parties. It may not be equally fitting and fair as it is obvious in the case of competing parties. My view is that it will be unfair to the plaintiff to decide the question of validity of the agreement of sale separately from the trial on the basis of question of law. It appears to me that the defendants have a case to answer regarding the drafting of the addendum and the first defendant's signature appended thereto. I find that it is fitting and fair to do so together with the issue of the validity of the agreement of sale in the appropriate forum, the trial.

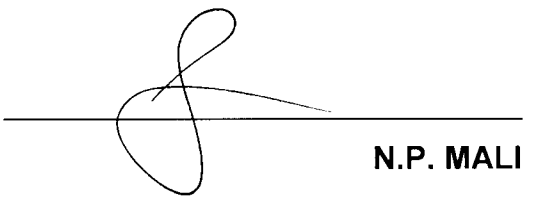
[20] Furthermore it has been submitted on behalf of the plaintiff that the plaintiff claims fraudulent misrepresentation against the defendants. The claim is based on the same events that form the basis of the transaction of sale, therefore there is no real convenience in separation. The defendant's counsel did not address the issue of

fraudulent misrepresentation. As stated in paragraph 18 above, the intention to sell the same property belonging to the trust to the plaintiff needs to be ventilated in a proper forum.

[21] In the circumstances of this matter, I find that it is not convenient to separate the question of validity of the sale agreement from other issues raised in the plaintiff's particulars of claim. Therefore the application must fail.

[22] In the result the following order is made;

[22.1] The application is dismissed with costs.



N.P. MALI
JUDGE OF THE HIGH COURT

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Instructed by:	Martin Grutter Attorneys
Counsel for the Defendant:	Adv. N Davis SC.
Instructed by:	Dawie Beyers Attorneys
Date of Hearing:	01 March 2016
Date of Judgment:	08 July 2016