REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 3128/08

In the matter between:

DU TOIT GROUP (PROPRIETARY) LIMITED	Plaintiff
and	
DANIE VAN BREDA	First Defendant
KULUMELA (PROPRIETARY) LIMITED	Second Defendant
THE MINISTER OF AGRICULTURE	Third Defendant

JUDGMENT DELIVERED ON 16 OCTOBER 2009

GAMBLE AJ:

Introduction

[1] This exception raises the interesting question as to the circumstances under which the transfer of immovable property may occur without an underlying written deed of alienation.

[2] The Plaintiff has issued summons against the First and Second Defendants in which it claims *inter alia* the following relief:

2.1 A declaratory order that the Plaintiff is entitled to transfer of certain agricultural land in the district of Riebeeck-Kasteel, certain water use

rights and cellar shares, subject to any applicable statutory approvals that may be required;

2.2 An order directing the First and Second Defendants (or the Sheriff, in the event of default) to sign all necessary documents to enable the Plaintiff's portion of the aforesaid agricultural land to be transferred to it, after the relevant statutory approvals have been obtained;

2.3 In the alternative, and in the event that transfer of Plaintiff's portion of the property into Plaintiff's name has, for any reason, become impossible, damages in the sum of R13 712 895.00.

[3] The First and Second Defendants have noted an exception to the Plaintiff's particulars of claim alleging that:

3.1 Firstly, the Plaintiff's reliance on an oral contract allegedly concluded with the First Defendant is bad in law in that such agreement should have been reduced to writing in accordance with the provisions of the Alienation of Land Act, 68 of 1981 ("The Alienation Act") in order to be valid and legally enforceable; and

3.2 Secondly, the agreement purportedly relied upon by the Plaintiff involves the subdivision of agricultural land and the sale of a portion thereof and accordingly, in terms of the Subdivision of Agricultural Land Act, 70 of 1970 ("The Subdivision Act"), such agreement could not be of any force and effect without the written permission of the Third Respondent (the Minister of Agriculture), which it has not been alleged has been obtained.

[4] The Third Respondent does not participate in the proceedings at this stage.

Approach on Exception

[5] Where an exception is taken, the Court must look at the pleading excepted to as it stands.[1] No facts outside of those set out in the pleading can be considered[2] and the allegations of fact relied upon in the pleading must be taken to be correct.[3]

[6] The purpose of an exception is to dispose of the case either in whole or in part. Accordingly an exception cannot succeed unless no cause of action is disclosed on all reasonable constructions of the pleading in question.[4]

The Particulars of Claim

[7] The Plaintiff's particulars of claim (which are drafted in Afrikaans) contain the following primary allegations of fact:

7.1 On 30 August 2006 and at Tulbagh the Plaintiff, represented by Mr G du Toit, concluded an oral agreement with the First Defendant ("Van Breda");

7.2 In terms of the oral agreement, Van Breda was appointed as the agent and nominated trustee of the Plaintiff[5] for the purposes of the joint purchase[6] of the farm Malrug situated at Riebeeck-Kasteel.

[8] The express, material and relevant terms of the aforementioned oral agreement are alleged to be the following:

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[1] **Burger v Rand Water Board** 2007 (1) SA 30 (SCA) at 32D
[2] **Johnson v Leal** 1980 (3) SA 927 (A) at 937H
[3] **Michael v Caroline's Frozen Yogurt Parlour (Pty) Ltd** 1999(1) SA 624 (W) at 632C
[4] **Amalgamated Footwear and Leather Industries v Jordan and Company Limited** 1948 (2) SA 891(C); **Michael v Caroline's Frozen Yoghurt Parlour,** *supra* at 632D
[5] "… agent en genomineerde trustee van die Eiser aangestel …".
[6] " … hulle gesamentlike aankoop…".

8.1 Van Breda was appointed as the Plaintiff's agent and nominated trustee to conduct the necessary discussions and to purchase the farm;

8.2 Van Breda, as the Plaintiff's nominated trustee would procure the following rights of ownership[7] on behalf of the Plaintiff and as its nominated trustee:

8.2.1 the rights of ownership[8] in that portion of the farm consisting of approximately 90 hectares of land (including about 40 hectares of vineyard) as depicted on an attached sketch plan;

8.2.2 certain water use rights[9] allocated to the farm by the Berg River Scheme;

8.2.3 certain cellar shares and grape processing rights[10] accruing to the owner of the farm.

For the purposes of convenience in the pleading the various rights referred to in 8.2.1 – 8.2.3 above were collectively referred to as "the Plaintiff's portion of Malrug".[11]

8.3 Van Breda would procure for himself ownership[12] of the balance of the land, comprising some 820 hectares in extent and as depicted on the same attached sketch plan.

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[7] "Eienaarsregte".
[8] "Eienaarsregte".
[9] "Watergebruiksregte"
[10] "Kelderaandele en parsregte"
[11] "Eiser se gedeelte van Malrug"
[12] "Eienaarsregte"

8.4 In order to acquire (both for himself and the Plaintiff) the various rights described above, Van Breda would conduct negotiations with a certain Mr Loubser, the erstwhile owner of the farm.

8.5 For the purposes of conducting negotiations to acquire the said rights of ownership, Van Breda was to make the following proposals on behalf of the Plaintiff and himself to Mr Loubser:

8.5.1 To pay a total of R9,5m for the whole of the farm and the additional rights referred to.

8.5.2 In the event that such an offer was accepted the parties would contribute to the purchase price proportionally – the Plaintiff paying R2,5m for its portion of the farm and Van Breda R7m for his portion.

8.5.3 In the event that the offer was not acceptable to Mr Loubser, Van Breda could use his discretion to increase the offer to a maximum of R10,18m and any such increase in the purchase price would be shared by the parties in the following proportions: Plaintiff 26,32% and Van Breda 73,68%.

8.5.4 Possession of the entire property and the additional rights would be given by the seller on 1 April 2007.

8.5.5 A pro-rated deposit of 10% would be payable to the seller; and

8.5.6 The seller would be liable for any agent’s commission.

8.6 In the event that Van Breda, (in his alleged capacity as the Plaintiff's nominated trustee) bought the whole of the farm (including the Plaintiff's portion) and registered it in his own name (or that of an entity effectively controlled by him), he (or such entity) would hold the Plaintiff's portion of the farm as the Plaintiff's trustee and nominee[13] and would be liable to transfer such portion to the Plaintiff upon the latter's demand.[14]

[9] The Particulars of Claim seek to draw the following conclusions of law:

9.1 A contractual relationship arose between the Plaintiff and Van Breda (as the Plaintiff's agent and/or nominated trustee) in terms whereof Van Breda was obliged to negotiate with the owner of the farm in the Plaintiff's best interests (for the purchase of the farm) in pursuance of the terms of the parties' oral agreement; and

9.2 Van Breda was accordingly bound to exhibit the utmost good faith vis-à-vis the Plaintiff during such negotiations.[15]

[10] It is then alleged that, pursuant to the agreement between the Plaintiff and Van Breda, the latter successfully negotiated the purchase of the farm within the ambit of the terms agreed upon between the Plaintiff and Van Breda. Consequent thereupon, the whole of the farm was bought, transferred into, and registered in, the name of the Second Defendant by Van Breda.

[13] "Eiser se trustee en genomineerde"
[14] "… en dat dit teen Eiser se versoek op Eiser se naam oorgedra sou word".
[15] "(D)ie Eerste Verweerder regtens verplig was om in die Eiser se beste belang met die eienaar van Malrug ooreenkomstig die terme en voorwaardes mondelings tussen die Eiser en Eerste Verweerder ooreengekom te onderhandel met die doel om Malrug aan te koop en daartydens die hoogste goeie trou teenoor die Eiser te openbaar".

[11] The nub of the Plaintiff's case is set out in paragraph 12 of the Particulars of Claim in which it is alleged that:

11.1 Van Breda failed to act in the Plaintiff's best interests and did not exhibit the necessary good faith towards it by contending, after he had purchased the whole farm, that he and/or Second Defendant were entitled to exclusive registration of the entire farm (including the Plaintiff's alleged portion);

11.2 The farm had been registered in the name of the Second Defendant for the exclusive benefit of Van Breda and Second Defendant; and

11.3 The Plaintiff's right to transfer of its portion of the farm was accordingly denied.

[12] The relief then sought is that set out in paragraph 2 hereof.

<u>The basis for the exceptions</u>

[13] In relation to the first exception, Mr Farlam, for the First Defendant, argued that the attempted acquisition by the Plaintiff of its portion of Malrug was nothing short of an alienation as defined under the Alienation Act and that the formalities prescribed by that Act had to be complied with. The particulars of claim, he said, clearly did not rely on a written document which complied with the statute and the claim was therefore bad in law.

[14] In relation to the second exception, Mr Farlam contended that the Minister's consent to the subdivision of agricultural land was a prerequisite which had to be procured before the Plaintiff could take transfer of its portion of Malrug. He argued

that in the absence of an allegation to this effect, the Plaintiff was precluded from demanding transfer.

[15] Mr Le Roux SC, for the Plaintiff, took issue with the First Defendant's interpretation of the particulars of claim. While accepting that there had not been compliance with the Alienation Act, he argued that this was not required since the acquisition by the Plaintiff of the land was not pursuant to an alienation as defined in that statute. In regard to the second exception, he contended that it was sufficient to demand transfer "subject to statutory compliance" and that the absence of an allegation that the Minister had consented to the subdivision was not fatal to the Plaintiff's cause of action. Such consent, it was argued, could be procured later provided of course that this took place before registration of transfer.

The Statutory Framework

[16] In 1957 certain uniform requirements for formalities in respect of contracts of sale of land were introduced into our law by way of national legislation. Prior to that there had been various pieces of subordinate legislation governing the position. Since 1957 there have been various revisions of this statutory regime culminating in the Alienation Act which is the legislative instrument applicable *in casu.*

[17] Almost a century ago[16] Rose-Innes J summarised the rationale behind this sort of legislation as follows:

> *"Recognising that contracts for the sale of fixed property were, as a rule, transactions of considerable value and importance, and that the conditions attached were often intricate, the legislature, in order to prevent litigation and to remove a temptation to perjury and fraud, insisted upon their being*

[16] **Wilken v Kohler** 1913 AD 135 at 139

reduced to writing. Whether all things considered, such a provision is desirable, whether it does not create as great hardships as it presents, is a matter upon which opinions may differ: but I am satisfied that the provision was adopted not for the advantage of any particular class of persons, but on grounds of public policy".

[18] In Johnston v Leal[17], Corbet JA put it thus:

> *"The reason why the Legislature selected, inter alia, contracts for the sale of land for such special treatment as far as formalities of contract are concerned, was, no doubt, that it recognised that such contracts are generally transactions of considerable value and importance and that the terms and conditions attached thereto are often intricate".*

[19] Turning to the statute itself one finds that, in terms of Section 2 (1) of the Alienation Act:

> *"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".*

The provisions of Section 28 are not relevant for present purposes.

[20] Under Section 1 (1) of the Alienation Act, the following definitions are important:

20.1 *"'Alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a*

[17] 1980 (3) SA 927 (A) at 939 D

suspensive or resolutive condition, and alienation has a corresponding meaning".

20.2 *"Deed of alienation" means a document or documents under which land is alienated.*

20.3 *"Land" includes "any right to claim transfer of land"*.

[21] It is common cause that a contract of sale of land which does not comply with the provisions of Section 2(1) of the Alienation Act is null and void *ab initio*. This is in accordance with our law over many decades in relation to the various statutes referred to above which have governed the formalities regarding the sale of immovable property.[18]

[22] In relation to the second ground of exception, the relevant terms of Section 3 of the Subdivision Act provide as follows:

"Subject to the provisions of Section 2 –

(a) agricultural land shall not be subdivided;

(b) no undivided share in agricultural land not already held by any person, shall vest in any person;

(c) no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;

(d) ….

[18] See, for example, **Wilken v Kohler**, supra; **Magwaza v Heenan** 1979 (2) SA 1019 (A); **Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd** 2001 (4) SA 1315 (SCA); **Christie**, Law of Contract, 5th Ed p 122

(e) no portion of agricultural land … shall be sold or advertised for sale, except for the purposes of a mine … ; …

(f) …

(g) …

unless the Minister has consented in writing".

[23] Recently, the Constitutional Court was required to deal with the applicability of certain provisions of this Act.[19] In the course of the majority judgment of the Court, Kroon AJ confirmed that the Minister (i.e. the Third Defendant *in casu*) still enjoys the wide discretional power conferred on her under Section 3 and that any purported sale of agricultural land which was not in compliance with that section was null and void.

The first exception

[24] In argument Mr Le Roux referred to a number of reported decisions in which the transfer of immovable property had been effected without the existence of a written deed of alienation.[20] As those cases demonstrate, there are certain specific circumstances where the particular relationship between the transferring parties may obviate the necessity for an underlying written agreement. Mr Le Roux accordingly urged the Court to carefully examine the nature of the underlying agreement between the Plaintiff and the First Defendant and, in particular, to consider whether there was an "alienation" (as defined) between the parties to that agreement. If there

[19] **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another** 2009 (1) SA 337 (CC)

[20] Cf **Adam v Jhavary** 1926 AD 147; **Strydom en 'n Ander v De Lange** 1970 (2) SA 6 (T); **Dadabhay v Dadabhay and Another** 1981 (3) SA 1039 (A) **Botha v Van Niekerk en 'n Ander** 1983 (3) SA 513 (W); **Menelaou v Gerber and Others** 1988 (3) SA 342 (T); **Hoeksma and Another v Hoeksma** 1990 (2) SA 893 (A); **Admin Estate Agents (Pty) Ltd t/a Larry Lambrou v Brennan** 1997 (2) SA 922 (E);

was not such an alienation then, he argued, a written instrument was not prescribed. In my view this is the correct approach.

[25] Mr Le Roux referred to paragraphs 5, 6.1, 6.2, 6.5.7 and 7 of the particulars of claim and pointed out that the Plaintiff had alleged therein that the relationship between it and the First Defendant was contractual in nature. In these paragraphs it is contended that the substance of that agreement (allegedly oral) was that the First Defendant was required to:

25.1 act as the Plaintiff's agent and 'nominated trustee[21]', the latter phraseology being used in the rather more general sense at common law[22] than within the specific ambit of the Trust Property Control Act of 1988;

25.2 act for the purposes of their joint acquisition of the farm[23];

25.3 conduct the necessary negotiations to effect the purchase of the farm;

25.4 when negotiating with the seller, to act in the best interests of the Plaintiff and to exhibit the utmost good faith towards it.

[26] Authority recognising this sort of legal relationship is to be found in the **Dadabhay case** *supra*. That case involved the purchase of land from a statutory board by the respondent who was thereafter required to transfer the land to the appellant in terms of an oral agreement. It was alleged that in so doing the respondent would be acting as the applicant's "nominee". The respondent purchased the property and took transfer thereof into his own name. When called

[21] "Genomineerde trustee"
[22] **Adam v Jhavary**, *supra* at pp 150 – 1
[23] "vir die doeleindes van hulle gesamentlike aankoop van die plaas"

upon by the applicant to effect transfer to her the respondent refused and the applicant sued him for transfer.

[27] In the Appellate Division Holmes AJA dealt with the use of the relevant terminology and the legal position as follows[24]:

> *"On appeal to this Court there was argument as to the meaning of 'nominee' … It was contended that the respondent was the appellant's agent; and reliance was placed on* ***Sammel and Others v President Brand GM Co Ltd*** *1969 (3) SA 629 (A) at 666 in fin; and* ***Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd*** *1976 (1) SA 441 (A) at 453 A.*
>
> *It must be remembered, however, that those two references relate to 'nominee' in the special context of company law, which came to us form England. The nominee shareholder takes his instructions from the beneficial shareholder. The word found its way into our statutes relating to companies e.g. S 24 bis (4) of Act 46 of 1926 and S 39 (4) of Act 61 of 1973. It is not statutorily defined and, indeed, Buckley on the Companies Acts 12th Ed states at 76: "The expression is a commercial rather than a legal one".*
>
> *Furthermore, in the appellant's particulars of claim the word 'agent' is specifically used in paragraphs 1 and 2 supra in relation to another aspect. Hence it would seem that 'nominee' was used, in paragraph 1 (b), with some other meaning.*
>
> *In my view, in the context of the particulars of claim, the word 'nominee' may well have been used to denote that the respondent would act as a trustee in buying the property and would thereafter sign all documents, when called upon by the appellant, in order that it could be registered in her name. The*

[24] At p 1047 C *et seq*

> *word 'nominee', in such a context, presented no difficulty to the Court in* ***Strydom en 'n Ander v De Lange en 'n Ander*** *1970 (2) SA 56 (T); and in* ***Jassat v Jassat and Community Development Board and Another*** *1976 TPD (unreported). A similar type of trust was in no way frowned upon by Innes CJ, Solomon J and Mason J in* ***Lucas' Trustee v Ismail and Amod*** *1905 TS 230".*

[28] In the light of this *dictum* (and the earlier cases referred to therein) there can be no objection in principle to the manner in which the relationship between the Plaintiff and First Defendant is formulated in the particulars of claim. But that is not the end of the matter. The next leg of the enquiry is whether the enforcement of the alleged oral agreement between the Plaintiff and the First Defendant is hit by the provisions of the Alienation Act.

[29] In the **Dadabhay case** Holmes AJA found that the oral agreement there pleaded was enforceable. That case was decided under the General Law Amendment Act, No 68 of 1957 ("the 1957 Act") which then governed the formalities relating to the sale of land.

Section 1 (1) of the 1957 Act read as follows:

> *"No contract of sale or cession in respect of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this section unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority".*

That Act contained no definitions' section.

[30] Having found that the oral agreement in the **Dadabhay case** was *"in **no** sense a contract of sale"*, (emphasis added) Holmes AJA proceeded to examine whether it constituted a cession in respect of any interest of land. After an exhaustive consideration of the authorities the learned judge found that the word cession in the 1957 Act was intended to mean "cession in the nature of a sale", and went on to hold that the contract before him was neither a contract of sale nor a cession in the nature of a sale. Importantly, in making that finding the learned Judge noted that pleadings before him included allegations that:

30.1 There was an oral agreement between the Appellant and the Respondent that the Respondent would buy the property from the statutory board;

30.2 That the Respondent would do so as a "nominee" for the Appellant;

30.3 There was no mention of "monetary consideration" for this service; and

30.4 When called upon to do so the Respondent would sign the necessary documents to effect transfer into the name of the Appellant.

The Appellate Division accordingly found that the oral agreement was not hit by Section 1 (1) of the 1957 Act.

[31] In 1969 the 1957 Act was replaced by the Formalities in Respect of Contracts of Sale of Land Act, 71 of 1969 ("the 1969 Act"). Section 1 (1) of that Act is identical to Section 1 (1) of the 1957 Act, save that the reference to a cession was deleted in the 1969 Act.

[32] The 1969 Act was in turn replaced by the Alienation Act of 1981, the material sections whereof have been set out above. A cession is no longer one of the juristic acts necessitating a written deed. Now it is only a sale, a donation or an exchange which triggers the application of Section 2 (1).

[33] On the facts pleaded, the Plaintiff does not have the right to demand transfer to it by Van Breda of the Plaintiff's share of Malrug without tendering to pay to Van Breda an amount to be calculated according to an agreed formula dependant upon the price ultimately negotiated between him and Mr Loubser. For that very reason the case differs from the factual scenario in the **Dadabhay case** in which there was no monetary consideration payable for the "service" rendered by the trustee.

[34] In my respectful view, the enquiry then is the following. Does the alleged performance demanded of Van Breda (to sign all transfer documents etcetera) against the tender of counter performance by the Plaintiff (payment of an agreed sum) bring the arrangement within the meaning of "sell", "exchange" or "donate" as contemplated in the definition of "alienate" in Section 1 (1) of the Alienation Act? If not the transaction does not fall within the ambit of the Alienation Act.

[35] The concept of "exchange" was dealt with by Nienaber AJA in **Hoeksma and Another v Hoeksma**[25]:

> *"Exchange differs from sale, historically its precursor and now its counterpart, in the nature of the reciprocal consideration which is promised for the res sold or exchanged: with sale the agreed co-ordinate is essentially the payment of money; with exchange it is the delivery or transfer of another asset (cf **Clements v Simpson** 1971 (3) SA 1 (A) at 7C – G), so too, in exchange, the*

[25] *supra* at p 897 B

commodities exchanged must both be capable of proper identification. If not, the transaction, whatever else it might or might not be, would not be an exchange".

[36] In light of this, the arrangement between the parties (which contemplates the payment of money) by the Plaintiff to Van Breda is clearly not an exchange. Similarly, it is not a "donation" since there is to be a counter performance (or *quid pro quo*) by the Plaintiff: the essence of a donation being an act of pure generosity with no counter performance by the donee[26].

[37] That leaves the last category of commercial arrangement contemplated by the Alienation Act – sale.

[38] The requirements for a contract of sale are set out as follows by Prof Kerr in **The Law of Sale and Lease** (3rd Ed) at p 1:

> *"When parties who have the requisite intention agree together that the one will make something available to the other in return for the payment of a price the contract is a sale. The one who agrees to make the thing available is the seller, and the one who agrees to pay the price is the buyer or purchaser. The contract may include provisions on many other matters as well, but agreement on other matters is not essential. All that is necessary in non-statutory law is that there be agreement, which need not be in writing, on the thing to be sold and the price to be paid. In the absence of agreement on these two matters there is no sale. Statutory law requires formalities in certain cases. In others, reduction to writing may be necessary because the parties, or one of them, requires or desires it".*

[26] **Avis v Verseput** 1943 AD 331 at 353 – 5

[39] Absent for the moment the provisions of the Alienation Act requiring a written recordal of the transaction, what the Plaintiff is contending for *in casu* in my view embraces all of the classic elements of a sale[27]. The agreement as pleaded by the Plaintiff is to the following effect:

> *"You (Van Breda) go and buy Malrug from Mr Loubser for R9,5m for our joint benefit and when you have done so, subdivide it and sell me a part thereof for R2,5m. And if Mr Loubser wants more you may go up to R10,18m and I will pay you a maximum of R2 679 376 for my share".*

[40] In my view, the facts pleaded in the present case show that there is to be transfer of a defined portion of the land as against payment of a sum of money calculated in accordance with an allegedly agreed formula. That sort of relationship has all the hallmarks of an agreement of sale. Most importantly, there are reciprocal obligations on the parties to the alleged agreement and Van Breda can resist the obligation to transfer until there is payment by the Plaintiff of whatever amount is ultimately found to be due to him. That sort of defence is not open to one who holds as a nominee of another.

[41] It has often been pointed out that the purpose of a statutory provision such as Section 2 (1) (and its various predecessors) is to cover contracts as are in the <u>nature</u> of a sale[28]. On the facts as pleaded, I consider that the arrangement between the Plaintiff and Van Breda, is just such a case for the reasons which I have already set out above. The agreement was allegedly conditional upon Van Breda being able to conclude a binding deed of sale with Mr Loubser and of transfer of the property

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[27] In the **Law of Sale and Lease**, *op cit* at p 6 fn 40 reference is made to the Roman law approach to sale in which the elements were said to be: "Consent – Thing – Price".

[28] **Pretoria Townships Ltd v Pretoria Municipality** 1913 TPD 362; **White v Collins** 1914 WLD 35; **Uxbury Investment (Pty) Ltd v Sunbury Investments (Pty) Ltd** 1963 (1) SA 747 (C); **Dadabhay's case**, *supra*

having being effected to him. Those eventualities having taken place, the Plaintiff is now entitled to assert its side of the bargain.

[42] The alleged facts of the present case have one important, but in my view critical, point of distinction when compared to the **Dadabhay case** *supra*. In that matter, the party who relied upon the "nominee" relationship and who called for transfer pursuant thereto, had himself already paid the seller (the Board) for the land in full. There could, in such circumstances, be little debate about any *pretium* payable and the party demanding transfer was not required to tender any counter performance to the registered owner of the land.

[43] In none of the other cases referred to above, where the Courts sanctioned the transfer of immovable property without a written deed of alienation, was there a situation of true reciprocal obligations.

[44] In **Adam v Jhavary**[29], the transfer of the land by a father to his sons was disguised as sale but there was no purchase price or other consideration paid (or intended to be paid). The father left the country to visit India and the object of the transfer was to enable the family to raise money against the property to keep the family business going in his absence. Upon his return to South Africa the father merely demanded return of the property alleging that his sons held it in trust for him.

[45] In **Strydom en 'n Ander v de Lange en 'n Ander**[30] the property in question was purchased and fully paid for by the first appellant as the nominee of the second respondent, and was registered in the name of the first appellant "as mere nominee". The same person was appointed as agent of the second respondent. The first

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[29] 1926 AD 147
[30] 1970 (2) SA 6 (T)

appellant then purported to sell the property and claimed commission from the second respondent, who refused to confirm the sale and denied the first appellant's right to deal with the property without his consent. The second respondent notified the first appellant of his intention to take transfer of the property and then occupy it. Litigation ensued in regard to occupation of the property, culminating in ejectment proceedings. The Court held that the second respondent was the beneficial owner and that the first appellant had bare *dominium* in the property subject to the terms of an informal trust. Once again, there was no question of reciprocal obligations before transfer could be effected.

[46] Finally, there is the decision of the Land Claims Court in **Hadebe v Hadebe**[31], in which the home of the plaintiff, a Black African female, was registered in the name of her son because she was statutorily precluded from doing so at the time[32]. The plaintiff had paid the purchase price on the land and had also paid for the costs of erecting a dwelling thereon – all from her own funds. She then applied to the Court under Section 3 of the Restitution of land Rights Act for a declaratory order that she was entitled to take transfer of the property from her son, who did not defend the action.

[47] In the course of his judgment granting the plaintiff the relief sought, Gildenhuys J referred to the decisions in **Adam v Jhavary**, *supra*, **Dadabhay's case**, *supra*, and **Strydom's case** and said the following:

> *"[17] The legal relationship between the plaintiff and the first defendant which emanated from the facts set out above, is that of an informal trust whereunder the first defendant (as "nominee", which could also*

[31] [2000] 3 All SA 518 (icc)
[32] Under the erstwhile Natal Code of Bantu Law

mean trustee) would hold the property for the plaintiff. The defendant has no more than the bare dominium of the property. The beneficial ownership (genotsregte) vests in the plaintiff. Until the dominium in the property is transferred to the plaintiff, the plaintiff has the right to, not the right of ownership. The terms of the oral agreement between the plaintiff and the first defendant, as set out by the plaintiff, do not include a right for the plaintiff to claim transfer of the property. Such right may be a tacit or essential term of the nominee agreement. Be that as it may, Section 3 of the Restitution of Land Rights Act provides the plaintiff with the right to claim title to the property.

[18] I conclude that the plaintiff is entitled to relief under Section 3 of the … Act. The Section entitles her "to claim title in" the property. This means that she may claim transfer of the property, not that she has already become owner of the property. That interpretation conforms with the tenor of a nominee agreement, as examined above".

[48] In my respectful view these cases demonstrate the typical factual settings in which an informal trust/nominee arrangement may be found to exist. However, where there are reciprocal obligations of a commercial nature which are to be discharged by the parties before the transfer of the land in question can be effected, in my view it cannot be said that one is then dealing with a relationship of informal trusteeship / nominee.

[49] In the circumstances, I do not consider that the facts presently pleaded by the Plaintiff are sufficient to sustain such a relationship between the parties. The legal relationship between the Plaintiff and the First Defendant is, in essence, a contract

of sale which must be in compliance with the Alienation Act if it is to have any legal validity.

[50] I would add, that for the reasons referred to by Corbett JA and Rose-Innes J above, this is a case *par excellence* where, *inter alia*, the intricate conditions of the contract, the value of the transaction and the necessity to avoid fraud or disagreement leading to litigation, demonstrate precisely why it is desirable that the parties' agreement be reduced to writing.

[51] It follows that the first exception falls to be upheld.

The second exception

[52] In order to succeed with its claim to transfer a part of the farm Malrug the Plaintiff would clearly have to obtain the consent of the Third Respondent thereto, the land having been sold and transferred to Second Respondent as one undivided piece of agricultural land.

[53] I did not understand Mr Le Roux to dispute that the land in question was agricultural as defined in the Subdivision Act nor that the Minister's consent to the subdivision thereof would ultimately be required before the Plaintiff could take transfer thereof.

[54] Rather, Mr Le Roux argued, the relief sought in prayers (a) and (b) of the particulars of claim was made subject to the procurement of any applicable statutory approvals. These, he said, could be procured at any stage provided that this was before transfer.

[55] Mr Farlam referred in particular to the provisions of Section 3 (e) (i) of the Subdivision Act which preclude a person from advertising for sale or selling a portion of agricultural land "unless the Minister has consented in writing". This, he said, meant that the Third Respondent's consent had to be procured *ante omnia*.

[56] The present case does not involve any advertisement for the prospective sale of agricultural land which has not yet been subdivided and which has not been sanctioned.

[57] I have already found that the agreement relied upon by the Plaintiff is a contract of sale. To the extent that that agreement has been concluded (be it expressly or tacitly) subject to the procurement of the necessary statutory approval, it only acquires contractual force once the ministerial consent has been obtained: the necessity for such approval would constitute a "true" suspensive condition of the agreement of sale[33].

[58] Accordingly, although the verb in the proviso[34] to Section 3 of the Subdivision Act may be said to imply that the legislature requires ministerial consent as a necessary pre-condition to any of the other steps contemplated therein, I find nothing objectionable in a pleading containing a prayer for a declaratory order which is to be granted subject to the furnishing of any such statutory approval. This would accord with the approach contemplated in the **Corondimas** and **Sentraalwes Personeel** cases, *supra*.

[59] In my respectful view therefor the second exception falls to be dismissed.

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[33] **Corondimas and Another v Badat** 1945 AD 548 at 551; **Sentraalwes Personeel Ondernemings v Nieuwoudt** 1979 (2) SA 537 (C) at 544

[34] "unless the Minister has consented" (emphasis added)

Costs

[60] In my view, the First Respondent has been substantially successful in these proceedings, notwithstanding the dismissal of the second exception. Further, the bulk of the time spent in argument before us was directed at the first exception. In the circumstances, I consider that it would be fair that the First Respondent should be awarded the costs of the proceedings.

Order

[53] In the circumstances I would make the following order:

A. The First Defendant's first exception is upheld;

B. The First Defendant's second exception is dismissed;

C. The Plaintiff's Particulars of Claim are hereby set aside;

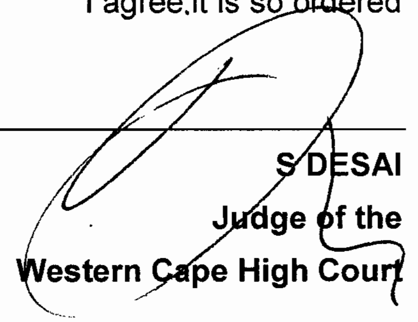
D. The Plaintiff is given leave, should it so wish, to take such steps as are necessary to file amended particulars of claim within six weeks of this order;

E. The Plaintiff is to bear the First Defendant's costs of suit in respect of both exceptions.

P A L GAMBLE
Acting Judge of the
Western Cape High Court

Desai J:

I agree,it is so ordered



S DESAI
Judge of the
Western Cape High Court