Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 16182/2012

MALINDA VAN DER MERWE N.O. First Applicant

(In her capacity as executrix in the estate of the late

Hendrik Naude Van der Merwe)

ALWYN PETRUS CONRADIE DU PLESSIS N.O. Second Applicant

(In his capacity as executor in the estate of the late

Hendrik Naude Van der Merwe)

v

PIERRE-ALBERT VAN DER MERWE Respondent

Court: Mrs Justice J I Cloete

Heard: 22 November 2012 and 4 December 2012

Delivered: 28 February 2013

JUDGMENT

CLOETE AJ

Introduction

[1] This is an opposed application in which the issue to be determined is whether s 28(1) of the Alienation of Land Act No 68 of 1981 (*'the Act'*) allows an alienee of land received in terms of a void deed of alienation and who has only partially performed in terms thereof to retain ownership of the land until, simultaneously with transfer back to the alienator, he is compensated for what he has paid in terms of the deed of alienation as well as: (a) interest on such payment; and (b) reasonable compensation for necessary expenditure to preserve or improve the land, or for any improvements effected with the express or implied consent of the alienator which have enhanced the value of the land.

[2] The applicants are the executors in the estate of the late Hendrik Naude Van der Merwe (*'the deceased'*) who was the alienator of the unencumbered land concerned. The first applicant is the deceased's widow and the mother of his three children. The respondent is the deceased's brother and the alienee. The facts, which are common cause, are as follows.

[3] On 29 September 2009 the deceased sold his farm *Prevoyance*, being farm no. 208 Robertson, measuring 181,9564 hectares (*'the farm'*) to the respondent (who is the owner of the neighbouring farm, also known as *Prevoyance*) for the sum of R5.4 million. The sale agreement provided that a portion of the purchase price was payable in cash; another portion was payable to the South African Revenue Services (*'SARS'*) in respect of the deceased's tax liability; but

the major portion was to be paid *'op sodanige datum as wat die partye van tyd tot tyd ooreenkom. Die reëling sal geld vanaf registrasie van transport'.*

[4] The latter term rendered the sale void *ab initio* in terms of s 2(1) of the Act (see eg. *Chretien and Another v Bell* 2011 (1) SA 54 (SCA) at paras [9] to [13]). However this was only established after the deceased had died, and after transfer of the land had passed to the respondent. Transfer was effected on 20 January 2010 and the deceased died on 11 September 2010.

[5] The respondent has only paid a small portion of the stipulated purchase price and the balance of about R4.5 million remains unpaid. The respondent has informed the applicants that he is unable to pay that balance; concedes that the farm must be transferred back to the deceased estate; voluntarily relinquished occupation of the farm on 30 June 2012; and accepts that he has no right of retention over the farm.

[6] However the respondent is not prepared to re-transfer the farm to the deceased estate without the applicants simultaneously settling his claims in terms of s 28(1) of the Act. These he has calculated to amount to some R2.2 million excluding further interest on certain of his claims. The applicants dispute that he is entitled to the full amount that he claims. They also contend that they have a claim against the respondent for the value of his occupation of the farm in terms of s 28(1) of the Act.

[7] The respondent accepts that the estate is unable to meet his demand for payment due to lack of funds; and that the only manner in which he can be paid whatever amount is ultimately agreed upon (or determined) will be from the proceeds of the sale of the farm. There is a purchaser waiting in the wings with whom the applicants have entered into a new sale agreement and who has in fact already taken occupation of the farm.

[8] Herein lies the crux of the dispute. The applicants contend that the respondent cannot rely on the common law principles of restitution but that his claim is based on enrichment and must be dealt with in accordance with the provisions of s 28(1) of the Act as read with ss 26, 35(12) and 50 of the Administration of Estates Act No 66 of 1965 (*'the Estates Act'*). They accordingly argue that the farm must first be transferred back to the deceased estate and that the respondent should thereafter lodge his claim as a creditor of the estate to be dealt with in accordance with the provisions of the Estates Act. The respondent on the other hand contends that he is entitled to rely on restitution and that the provisions of s 28(1) of the Act have not altered that common law position.

[9] The statutory provisions referred to above are set out hereunder.

[10] Section 28 of the Act provides as follows:-

> *'**28. Consequences of deeds of alienation which are void or are terminated.**---(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2 (1), or a contract which has been declared*

void in terms of the provisions of section 24 (1) (c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and ---

(a) the alienee may in addition recover from the alienator ---

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for ---

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may in addition recover from the alienee ---

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.

(2) Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.'

[emphasis supplied]

[11] The relevant provisions of the Estates Act are as follows:-

*'26. **Executor charged with custody and control of property in estate.**— (1) Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books*

and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.'

35 Liquidation and distribution accounts ---

.....

(12) When an account has lain open for inspection as hereinbefore provided and —

(a) no objection has been lodged; or

(b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in subsection (11), and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master's decision; or

(c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, ...'

'50. Executor making wrong distribution.---Any executor who makes a distribution otherwise than in accordance with the provisions of section thirty-four *or* thirty-five, *as the case may be, shall---*

(a) be personally liable to make good to any heir and to any claimant whose claim was lodged within the period specified in the notice referred to in section twenty-nine, *any loss sustained by such heir in respect of the benefit to which he is entitled or by such claimant in respect of his claim, as a result of his failure to make a distribution in accordance with the said provisions; and*

(b) be entitled to recover from any person any amount paid or any property delivered or transferred to him in the course of the distribution which would not have been paid, delivered or transferred to him if a distribution in accordance with the said provisions had been made: Provided that no costs incurred under this paragraph shall be paid out of the estate.'

[emphasis supplied. s 34 refers to an insolvent deceased estate.]

[12] It is against this background that the applicants seek an order compelling the respondent to re-transfer the farm to the deceased estate, together with costs. The respondent in turn counter-applies for an order that the re-transfer of the farm to the deceased estate is to take place simultaneously with payment of any amount due to him in terms of s 28(1)(a) of the Act (i.e. a form of declaratory relief), and costs. The other relief sought by the parties in their respective applications has fallen away.

The applicants' argument

[13] The applicants submit that the question of whether the deceased estate can only obtain re-transfer of the farm against simultaneous payment of the respondent's claim in terms of s 28(1) of the Act falls to be dealt with in terms of the principles of enrichment and not restitution.

[14] In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 SCA at para [15] the Supreme Court of Appeal described the distinction between restitution and enrichment in the realm of contract as follows:-

> *'[15] ... There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in* Baker v Probert *1985 (3) SA 429 (A), a judgment relied on by the Court* a quo) *and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy:* Baker *at 439 A,*

and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van den Heever J said in Pucjlowski v Johnston's *Executors 1946 WLD 1 at 6:*

> *'The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequently become inoperative (*causa non secuta; causa finita).'

*The same principle applies if the contract is void due to a statutory prohibition (*Wilken v Kohler *1913 AD 135 at 149-50), in which case the* condictio indebiti *applies. There is no reason why contractual and enrichment remedies should be conflated.'*

[15] De Vos: *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3rd ed at p197 ft 31 writes that:-

> *'Die geval van 'n ooreenkoms vir die verkoop van grond wat nietig is weens 'n formele gebrek word nou gereël deur Wet 68 van 1981. Art 28(1) bepaal slegs dat elke party van die ander een kan "verhaal" wat hy gepresteer het. (Sien 194 hierbo.) Dit wil voorkom asof die eiser nie teruggawe hoef aan te bied van wat hy ontvang het nie en van 'n terughoudingsreg aan die kant van die verweerder word geen melding gemaak nie. Skynbaar word die* Zweikondiktionentheorie *(sien 132-3 hierbo) hier aangehang. Die verweerder sou natuurlik sy verhaalsreg by wyse van 'n teenaksie kon laat geld.'*

[emphasis supplied.]

[16] De Vos appears to be supported by Du Plessis: *The South African Law of Unjustified Enrichment* at para 4.6.1.1 on p 161 where the author expresses the following view:-

The duty to tender restitution when seeking restitution

When both parties have made transfers in fulfilment of an invalid reciprocal contract, they may seek restitution of their respective undue transfers by way of claims based on unjustified enrichment. It has been suggested that South African law links these claims by requiring that a party who seeks restitution of what he has transferred must tender to restore what he has received from the other party. Here reference has been made to cases that deal with claims for ejectment of purchasers under formally void contracts, where it was held that the seller seeking ejectment must tender restitution of payments already received from the purchaser. These references are not directly in point: the cases either deal with sellers seeking vindicatory relief (to the extent that the sellers retained ownership), or they deal with voidness due to a failure to comply with statutory formalities for the sale of land, which is now governed by a statute that does not link the claims for restitution in this manner. [See s 28(1) of the Alienation of Land Act 68 of 1981.] *However, these cases do support the general inference that if an undue transfer is claimed with an enrichment action, the defendant should be able to resist the action until the plaintiff tenders restitution.'*

[emphasis supplied and footnote reference inserted. In the present matter the applicants do not claim an undue transfer coupled with an enrichment action; they simply claim on the basis of an undue transfer i.e. a re-transfer of the farm to the deceased estate.]

[17] The applicants also rely on the decision in *Visser v Hull and Others* 2010 (1) SA 521 (WCC). In that case the deceased, to whom the applicant widow had been married in community of property, had prior to his death sold an immovable property in the joint estate to his relatives for substantially less than its market value without the widow's knowledge or consent in contravention of s 15(2)(b) of the Matrimonial Property Act No 88 of 1984. In addition the widow contended that the deceased had sold the property in deliberate fraud of her rights in

respect of the joint estate. She thus sought an order setting aside the sale agreement on the basis that it was void *ab initio.* Dlodlo J found in favour of the widow but did not order that the monies paid by the respondents would have to be repaid simultaneously with re-transfer of the property to the deceased estate. He said the following at paras [21] and [22]:-

> *'[21] I have formed a firm view that the agreement, on the strength of which the property relevant to this case was transferred to the respondents, is most certainly null and void, regard being had to the aforegoing discussion. I have good reasons to set aside the agreement of purchase and sale. The consequence will obviously be that the present registration of the property in the names of the respondents will not stand. That in effect will mean that the registration of the property will revert to the name of the deceased. Therefore, the property will form part of the deceased estate jointly owned by the applicant and the deceased. The question then remains, what must happen to the respondents? The fact, that I have found that they took no steps at all to inquire about the matrimonial status between the deceased and the applicant, does not mean they must simply lose the R10 500 they paid to the deceased. If it is so ordered, then it would mean they are being punished for their apparent unlawful conduct in this matter. Our law does not work like that. The deceased estate will be unjustifiably enriched to the extent of this sum of money.*
>
> *[22] ..... Simply put, someone who has paid a sum of money or delivered property to another, believing in error that it was due to such person when in fact it was not, is entitled to recover that sum of money or property from the latter by means of the* condictio indebiti. *See:* Wille's Principles of South African Law *at 636 para 3. It is my view that the respondents are entitled to proceed against the deceased estate in order to recover their R10 500 paid in terms of the abortive deed of sale.'*

[emphasis supplied.]

[18] Although not direct authority for their proposition the applicants submit that *Visser* (*supra*) is a good indicator that in sales of land that are void *ab initio* the alienee is not entitled to be compensated simultaneously with the re-transfer of the land to the alienator.

[19] The applicants submit that to read a "simultaneous linking" into s 28(1) between re-transfer of the land and payment to the respondent conflicts not only with the principles of enrichment, but also with the Estates Act and the law of insolvency.

[20] Section 28(1) of the Act provides that the alienee is entitled to payment of what he has already paid in terms of the void agreement, as well as interest thereon and reasonable compensation for improvements, as earlier indicated. The alienator is in turn entitled to reasonable compensation for the alienee's occupation of the land. Both of the latter claims are illiquid. That they are illiquid supports the contention that there is no obligation on the alienator to pay any amount to the alienee simultaneously against re-transfer, since the alienator's claim may ultimately exceed the claim of the alienee (including any amount already paid in terms of the void agreement). In addition there is nothing in s 28(1) of the Act that simultaneously links these claims.

[21] The applicants also contend that the respondent has lost sight of the clear provisions of the Estates Act that govern the procedure to be followed in the winding up of a deceased estate. The estate is not in the same position as that of the deceased before his death. The applicants are the duly appointed

executors of the deceased estate and as such they are obliged to comply with the provisions of the Estates Act and in particular to gather the assets, liquidate them where necessary, pay the liabilities and distribute the estate in the orderly manner set forth therein. This is an altogether different regime from that which pertained before the death of the deceased.

[22] During his lifetime it was not required of the deceased to effect simultaneous payment to creditors or simultaneous distributions to heirs. The distribution of the assets of a deceased estate is a crucial element of the winding-up and this often involves, as in the present matter, the need to liquidate assets. The attitude of the respondent frustrates the very object of the administration and winding-up of the estate: the farm needs to be liquidated in order to administer and wind up the estate; and this cannot happen for so long as the respondent refuses to re-transfer it to the estate.

[23] The applicants say that were this court to find in favour of the respondent the consequences would be absurd. First, it is common cause that the estate is unable to settle the respondent's claim (whatever it is ultimately determined to be) other than by utilising the proceeds of the sale of the farm. The applicants are precluded from claiming performance in terms of the agreement (i.e. payment of the balance of the purchase price by the respondent) since the agreement is void *ab initio*. There will thus be a stalemate in which the respondent will indefinitely retain an asset worth R5.4 million for which he has only paid the sum of about R900 000 (excluding interest thereon together with

the value of any improvements). The position will be similar if the estate is found to be insolvent.

[24] Second, the respondent will effectively be afforded a right of retention – solely because he is the registered owner of the farm, since he has voluntarily relinquished occupation thereof – in circumstances in which he correctly does not lay claim to such a right; and it is well established that possession is an essential element of such a right. This will enable the respondent to hold the applicants to ransom.

[25] Third, the applicants' claim for the value of the respondent's occupation of the farm – at least notionally – might exceed the value of the respondent's claim, with the result that the latter would in such circumstances gain an unfair advantage by having obtained prior settlement of his claim. Put differently, the respondent will have security for his claim while at the same time the applicants will have no security for theirs when it may ultimately be found to exceed that of the respondent's.

[26] Fourth, the (indirect) heirs as well as the other creditors of the estate will be prejudiced since none of their claims can be met until the farm is re-transferred to the estate and sold (the sole heir is a testamentary trust of which the deceased's three children are the ultimate beneficiaries). S 28 of the Act does not make provision for a person in the position of the respondent to receive security for his claim; and the Estates Act does not permit the applicants to treat what is clearly a concurrent claim as a secured claim. Indeed, if the

applicants were to adopt that course of action it would amount to a payment in breach of s 35(12) of the Estates Act; and would expose the applicants to personal liability to make good any loss sustained in terms of s 50 thereof.

[27] The applicants argue that the respondent is however protected by the provisions of ss 35 (12) and 50 of the Estates Act. The purpose of these sections is to ensure an orderly winding-up and distribution of the deceased estate. The executor of a deceased estate is not obliged to make payment to a creditor until the account in which the claim is reflected has lain for inspection and any objections thereto have been disposed of: see Meyerowitz: The Law and Practice of Administration of Estates and Their Taxation 2010 ed at para 16.3. The respondent is thus not at risk of his claim as a concurrent creditor not being met in the ordinary course, or another creditor being preferred above him.

[28] In any event s 26 of the Estates Act renders it obligatory for the applicants to take possession of the farm in order to liquidate it, since the respondent cannot claim that he is entitled to retain it *'under any contract, right of retention or attachment'*. The respondent accepts that the sale agreement, i.e. the contract, is void *ab initio*; accepts that he has no right of retention; and there is no question of him having any entitlement under an attachment. S 26 is peremptory and the applicants have no discretion in this regard: see Corbett et al: The Law of Succession in South Africa 2nd ed at p589.

The respondent's argument

[29] The respondent maintains that the applicants have misinterpreted the meaning of *'contract'* in s 26 of the Estates Act. This is because the abstract theory of transfer of ownership is part of our law. This theory was explained by the Supreme Court of Appeal in *Legator McKenna Inc and Another v Shea and Others* [2009] 2 All SA 45 (SCA) at paras [20] to [24] as follows:-

> *'[20] This brings me to the next enquiry. Should the transfer of the house to the Erskines be regarded as valid despite the invalidity of the underlying sale which was the* causa *for the transfer? The appellants' contention that it should, was rooted in the assumption that the abstract theory – as opposed to the causal theory – of transfer has been adopted as part of our law. 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. The causal theory, on the other hand, requires a valid underlying legal transaction or* iusta causa *as a prerequisite for the valid transfer of ownership* (see eg. Trust Bank van Afrika Bpk v Western Bank Bpk en Andere *NNO 1978 (4) SA 281 (A) 301H-302H, Van der Merwe,* Sakereg, *2 ed at 305-306). With regard to the transfer of movables our courts, including this court, have long ago opted for the abstract theory in preference to the causal theory (see eg* Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd *1941 AD 369 at 398-9;* Dreyer and Another NNO v AXZS Industries (Pty) Ltd *2006 (5) SA 548 (SCA) para 17).*
>
> *[21] Some uncertainty remained, however, with regard to the transfer of immovable property. In the High Courts that uncertainty has been eliminated in a number of recent decisions where it was accepted that the abstract system applies to movables and immovables alike (see eg* Brits v Eaton NO *1984 (4) SA 728 (T) at 735E;* Klerck NO v Van Zyl and Maritz NNO and Related Cases *1989 (4) SA 263 (SE) 273D-274C;* Kriel v Terblanche NO *2002 (6) SA 132 (NC) paras 26-49). These decisions are supported by academic authors advancing well-reasoned arguments (see eg D L Carey-Miller* The Acquisition

and Protection of Ownership *128-130 and 168; C G van der Merwe* Sakereg op cit *at 305-310; C G van der Merwe and J M Pienaar 2002 Annual Survey* 466 at 481; *Silberberg and Schoeman's* The Law of Property, *5 ed (by Badenhorst, Pienaar and Mostert, 76). In view of this body of authority I believe that the time has come for this court to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well.*

[22] 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'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg Air-Kel (Edms) Bpk h/a Merkel Motors v *Bodenstein 1980 (3) SA 917 (A) at 922E-F;* Dreyer and Another NNO v AXZS Industries (Pty) Ltd *(supra) para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement (see eg* Preller v Jordaan *1956 (1) SA 483 (A) 496;* Klerck NO v Van Zyl and Maritz NNO *(supra) 274A-B; Silberberg and Schoeman* op cit, *79-80).*

[23] The court a quo found that in this case ownership did not pass because of two defects in the real agreement. The first defect, so the court held, was that McKenna's intention to transfer ownership had been motivated by the mistaken belief that he had entered into a valid agreement of sale. In support of this finding the court referred to the power of attorney to pass transfer signed by McKenna, as well as the deed of transfer itself where the sale agreement of 22 April 2002 was cited as the causa for McKenna's intention to transfer the property. In this light, so the court held, it cannot be inferred that McKenna intended to transfer the property even if the sale agreement turned out to be null and void. In the same way as the court a quo, I also believe that McKenna – as well as the Erskines, for that matter – probably thought that the sale agreement of 22 April 2002 was valid and enforceable. And, albeit for different reasons, I also share the court a quo's view that the parties were mistaken in that belief. But I do not agree that a mistake of that kind could in itself render

the real agreement void. If that were the position, we would effectively revert to the causal theory of transfer which we have jettisoned in favour of the abstract theory. I say that because I believe that very few parties (if any) to real agreements would deliberately give and receive transfer pursuant to an underlying transaction which, to their knowledge, is void. If a mistaken belief of this kind – whether unilateral or common – were therefore to render the real agreement invalid, there would not be much left of the abstract theory of transfer.

[24] In any event, a mistaken assumption about the validity of the underlying causa constitutes a mistake in motive. With regard to mistakes of this kind, it was said in Van Reenen Steel (Pty) Ltd v Smith NO *2002 (4) SA 264 (SCA) para 9:*

> *'A party cannot vitiate a contract based upon a mistaken motive relating to an existing fact, even if the motive is common, unless the contract is made dependent upon the motive, or if the requirements for a misrepresentation are present.'*

And in African Realty Trust Ltd v Holmes *1922 AD 389 at 403 it was said:*

> *'But, as a Court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except insofar as they were expressly made part an d parcel of the contract or are part of the contract by clear implication.'*

In consequence, I find that McKenna's mistake about the validity of the sale had no effect on the effectiveness of the real agreement.'

[emphasis supplied. In *Legator McKenna* the purchasers (the Erskines) had paid the purchase price in full.]

[30] The respondent argues that in the present matter the essential elements of a real agreement are present, namely an intention on the part of the deceased to transfer ownership and an intention on the part of the respondent to become owner of the property. Accordingly, applying the abstract theory of transfer of ownership, the word *'contract'* is s 26 of the Estates Act must be interpreted to

include a void deed of alienation such as that faced by the court in the present instance. The applicants are thus precluded from relying on s 26 since the respondent claims to be entitled to retain the farm under "a contract".

[31] The respondent submits that s 28(1) of the Act applies to all cases where deeds of alienation are void or have been terminated, irrespective of whether or not a party to the deed of alienation has since become deceased. S 28(1) does not alter the principles of restitution; rather, it is designed to give content to each party's right of recovery under restitution. The fundamental flaw in the applicant's argument is that the respondent is not a creditor of the deceased estate; he is the owner of the farm pursuant to a real agreement and he is entitled to receive value for his asset simultaneously against re-transfer thereof to the deceased estate. The value which he is entitled to receive is the net value of the farm, i.e. its gross value less the total amount of the respondent's claims.

[32] Although the applicants argue that the ultimate heirs and other creditors will be prejudiced if they are effectively forced to prefer the respondent over others, the reality is that it is the deceased estate that will unfairly benefit in the event that restitution is not ordered. The only major creditors of the estate are the first applicant (for spousal maintenance) and her children (to the extent that they still have such claims; they are aged 27, 25 and 22 years respectively, and from what I can gather at least one is still a student). The applicants aver that the proceeds of the sale of the farm to the new purchaser will be more than sufficient to cover the respondent's claims even if successful in their totality.

However the farm has been sold to the new purchaser for R6 250 000 and the first applicant's maintenance claim alone has been capitalised at about R4 million. The liquidation and distribution account of the deceased's estate reflects that his only other assets were three firearms and a debt owed totalling in all about R44 000. The other estate liabilities amount to some R304 000. The respondent thus contends that it is entirely possible that the estate will not be in a position to meet his full claim. The respondent's stance is also that the applicants' refusal to give effect to restitution is an attempt to enable the first applicant's maintenance claim – which he considers to be exorbitant – to be met in full, while at the same time his claims are "eroded".

[33] The respondent also contends that the Estates Act does not provide him with protection since the applicants as executors can effectively determine the net value of the farm by rejecting the respondent's claims. However this argument does not appear to be supported by s 35(12) of the Estates Act which sets out the process for the lodging of objections to a liquidation and distribution account; and includes provision for: (a) the Master to consider and approve or reject any objection; and (b) for any person aggrieved by the Master's decision to apply to court in terms of s 35(10) for an order setting it aside.

[34] It is the respondent's case that restitution is a "process" and that re-transfer of the farm is the final phase of that process. It would seem that, given his concession that there are no funds in the estate to meet his claims other than from the proceeds of the sale of the farm, the respondent envisages that the re-transfer may be accelerated but only on the basis that he is given the

assurance that his claims will not "wrongly" be treated as concurrent claims against the estate. This, so it was argued, does not equate to a "preferent" or secured claim, since the determination of the respondent's claim is "a step" in the restitution process with the final step being to make available the net value of the farm by way of re-transfer to meet the claims of concurrent creditors and the sole heir of the estate.

[35] The applicants are only entitled to claim the net value of the farm since that is exactly the same position in which the deceased would have found himself had he not passed away. They should not be permitted to obtain an unfair advantage purely by virtue of the provisions of the Estates Act. Accordingly the respective claims of the parties in terms of s 28(1) of the Act must first be determined so that in the "final" step of the restitution "process" the respondent will simultaneously obtain payment against re-transfer. It could never have been the intention of the legislature when enacting s 28(1) that the respondent's restitution claim would have to compete with those of creditors solely because of the intervening death of the deceased.

[36] Expanding on this theme the respondent also submits that since mere re-transfer of the farm to the applicants will not automatically place them in funds to settle his claims, it is "only logical" that his claims will, as a matter of practicality, be settled after the applicants receive the purchase price from the new purchaser against registration of transfer of the farm to that purchaser.

[37] Although not entirely clear whether the respondent sought to introduce a new argument or to substantiate his main argument, he also submitted, in light of the findings in *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd en Andere* [1974] 1 All SA 541 (NC), that the applicants in seeking "restitution" are obliged to simultaneously tender him that portion of the purchase price that he has in fact paid. They cannot withhold payment on the basis of a separate claim against the respondent for his occupation, irrespective of whether it is liquidated or not. The respondent did not however address why he himself believes that he is entitled to withhold re-transfer partly because of his unliquidated claim for improvements.

The decision in Rhoode v De Kock

[38] The present matter was argued before me on 22 November 2012 and 4 December 2012. On 29 November 2012 the Supreme Court of Appeal delivered judgment in *Rhoode v De Kock and Another* (45/12) [2012] ZASCA 179. Both counsel then relied on *Rhoode* as further authority for their respective submissions.

[39] In that case the respondents had sold an immovable property to the appellant for R1.85 million. The deed of sale was subject to the suspensive condition that the appellant would secure a loan (by way of a mortgage bond) for the full amount of the purchase price within 12 months from date of signature thereof. The appellant took possession of the property but never obtained the loan. The parties subsequently twice attempted to extend the sale by substituting two

later dates for the original date of signature on the deed of sale, but one of the sellers did not initial the extended dates and the sale was rendered void. However by that stage the appellant had paid R400 000 on account of the purchase price. No further amounts were paid and transfer of the property did not pass to the appellant.

[40] In the litigation which eventually ensued the respondents sought to evict the appellant from the property on the basis of the *rei vindicatio*. The appellant resisted the application on the grounds that he was entitled to repayment of the R400 000 already paid as well as payment of about R1 million for improvements to the property. The respondents in turn contended that they had a counterclaim against the appellant in respect of his occupation of the property.

[41] One of the issues to be decided on appeal, and which is relevant in the present matter, is whether the respondents' claim for the eviction of the appellant was fatally defective because they had not repaid or tendered to repay the R400 000 paid by the appellant on account of the purchase price.

[42] The court at paras [20] to [25] found as follows:-

> *'RESTITUTION*
>
> *[20] Counsel for the appellant submitted ... that "it is an elementary principle of justice that someone who demands restitution of what he has performed under a contract, which has been cancelled or has otherwise failed, must himself restore, or at least tender to restore, what he received thereunder"; and that the respondents' failure to make such a tender or to repay the R400 000*

paid by the appellant, had the effect that the cause of action was not complete. Counsel relied for this latter proposition primarily on Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd *1974 (1) SA 414 (NC) at 424C-427A.*

[21] [Counsel]... *went further and submitted that although the respondents' claim was couched in the form of a* rei vindicatio, *they had, as a matter of fact, parted with possession of the property in terms of a void contract of sale; and that to avoid an illogical development in the law, they should be required to tender to restore what they had received. Counsel was unable to point to any case that supported this proposition, but referred to* Patel v Adam *1977 (2) SA 653 (A), which he readily conceded did not go as far as he would have wished.*

[22] Bonne Fortune Beleggings *concerned a claim for restitution. It is therefore distinguishable.* Patel's *case is similar to the present matter on the facts, but it contains one important distinguishing feature: there, although the plaintiff relied on the* rei vindicatio *(see p 669B-C) for ejectment of the defendant from the property that had been sold in terms of a contract that was void, he specifically tendered payment of the amount paid to him on account of the purchase price....*

[23] The court in Patel *was therefore not concerned with the question whether the failure to tender return of what had been received under a void contract was fatal to a* rei vindicatio *brought by the owner. In the present matter, the mere fact that the appellant would be entitled to repayment of the R400 000 (absent a defence) in order to prevent the respondents being unjustly enriched, does not mean that he is entitled to resist ejectment until the amount is repaid or tendered: he could do so only if repayment has to take place at the same time that the appellant is ejected – I shall revert to this question; or if a tender to repay is a necessary ingredient of the respondents' claim. And it is not, for the reasons given by Botha J writing for the full court of the Transvaal Provincial Division in* Vogel NO v Volkersz *1977 (1) SA 537 (T) at 554H- 555C:*

*"In my opinion, the principle adopted and applied in [*Akbar v Patel *1974 (4) SA 104 (T)], with which I associate myself, is decisive on the question now being considered. The principle is that the seller of property under an invalid contract of sale has a claim to possession based only on his ownership and the purchaser's possession of the property, in accordance with the general rule propounded in the line of cases running from* Graham v Ridley *1931 TPD 476, to* Chetty v Naidoo *[1974 (3) SA 13 (A)]. Nothing*

more is required to complete the seller's cause of action. It is true that in Akbar's case *TRENGOVE J, referred to the tender of the plaintiff in that case to refund to the purchaser what he had received in respect of the purchase price of the property with the observation 'as he is obliged to do in the circumstances' (at p 110H), but in my respectful view that observation was clearly* obiter *and the learned Judge was not applying his mind to the question whether such a tender was an essential ingredient of the plaintiff's cause of action. To require such a tender would be to negate the very principle upon which the decision was based. If the seller bases his claim to possession simply on his ownership and the purchaser's occupation of the property, as he is entitled to do, it is for the purchaser to raise the point that the seller is obliged to refund what he has received by way of payment of the purchase price of the property. If the point is raised by the purchaser, or by the Court* mero motu, *the Court will obviously make its order against the purchaser to restore possession to the seller conditional upon the seller refunding to the purchaser whatever the latter has paid in respect of the purchase price of the property, but it is not necessary for the seller to tender such a refund."*

[24] I see no conceptual difficulty in following this approach. In some cases, where there has been performance under a void contract, a party would have no option but to sue for restitution and tender restitution of what he or she has received pursuant to the "contract", for example where money has been paid or where the party is not the owner of an article delivered by him or her under the "contract". But where the rei vindicatio *is available, I see no reason why relief should be denied merely because there is another cause of action available that has advantages for the respondent/defendant. Of course the appellant is entitled to return of the R400 000 he has paid (subject to any counterclaim), otherwise the respondents would be unjustly enriched. But that means that the appellant has an action for the money; it does not mean that the respondents were obliged to tender the return of the money to complete their cause of action. The cause of action chosen by them was complete without such a tender.*

[25] I revert to the question whether the order for ejectment should be made subject to repayment of the R400 000. The respondents have asserted a counterclaim for inter alia the period of the appellant's occupation of the property – which began on 9 February 2007 (more than five and a half years ago) and still continues. The appellant has already instituted a claim in the Western Cape High Court for repayment of the money and it seems to me

> *more appropriate for the respondents' liability to be decided in those proceedings. To order repayment now would be to deprive them of the advantage conferred on them by Rule 22(4) which provides that:*
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> *"If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet." '*

[emphasis supplied]

[43] Although distinguishable on the facts since ownership had not passed to the appellant, the applicants submit that the court in *Rhoode* found that the repayment of the R400 000 was not linked to the claim for return of possession of the property. One of the factors considered by the court was that the amount of R400 000 stood to be reduced by the amount of the claim of the sellers for the value of occupation and that those actions stood to be adjudicated upon in other proceedings.

[44] The applicants argue that this is why they contend that the respondent's insistence on being refunded what he has paid cannot be linked to the re-transfer of the farm. The cause of action available to the appellant in *Rhoode* was indeed the subject of an enrichment claim where the claim of the respondents for the value of occupation was also to be adjudicated upon. It was not however linked to the claim of the owner for repossession of the property.

As in *Rhoode*, the applicants simply require the farm back. As in *Rhoode*, the applicants do not deny that the respondent may have a claim for enrichment against the deceased estate.

[45] The applicants emphasise that in *Rhoode* the court distinguished *Bonne Fortune Beleggings* (*supra*) on the basis that the aforementioned case was concerned with restitution after breach of contract; and found that it was not applicable to a case where the owner reclaims possession in terms of a void agreement.

[46] The respondent on the other hand argues that although not direct authority, *Rhoode* merely highlights that a claim based on the *res vindicatio* does not require a tender for restitution in order for the cause of action to be complete. The respondent contends that in the present matter, given the existence of the "real agreement" restitution, or at the very least a tender for restitution, is nonetheless required from the applicants; and that until that occurs the respondent is entitled to withhold re-transfer of the farm. The respondent also submits that the fact that the appellant in *Rhoode* had already instituted a separate action for payment was fortuitous since it was then appropriate for the parties' respective monetary claims to be adjudicated upon in that other forum.

Evaluation

[47] To my mind the starting point to the answer to all of this lies in s 28 of the Act itself. That section seems to me to identify two separate and distinct situations

where deeds of alienation of land are void due to non-compliance with s 2(1) of the Act. S 28(2) stipulates that any alienation which does not comply with s 2(1) shall in all respects be valid *ab initio* if the alienee has performed in full and the land has been transferred to the alienee. This makes sense since it is entirely consistent with the abstract theory of transfer of ownership as described in *Legator McKenna* (*supra*).

[48] S 28(1) on the other hand is specifically made subject to s 28(2) and although it refers to both partial or full performance by either party, it does not make mention of the second requirement in s 28(2), namely that transfer has also passed to the alienee.

[49] It is perhaps for this reason that s 28(1) does not provide for re-transfer of the land to be simultaneously linked to repayment or payment of compensation, nor does it – for obvious reasons, given that certain of the parties' claims would be unliquidated – provide for set off of those claims.

[50] Further, I do not understand the abstract theory of transfer of ownership to mean that what the parties in good faith intended to happen in order to achieve the transfer can simply be ignored. Put differently, even though the essential elements of the theory are that there is a mutual intention to pass and receive ownership, and transfer of ownership takes place, I cannot see how the one party to the "real agreement" can nonetheless be relieved of fulfilling his "obligations" in terms thereof. If that were the case then if, by dint of fate, ownership passed without any payment at all by the alienee, he could simply

retain the property and the alienator would be left high and dry provided that the two essential elements referred to above are present. This view is supported by the provisions of s 28(2) of the Act which stipulates that it is only in those instances where an alienee has performed in full that a void deed of alienation will be regarded as valid *ab initio*. Although reference is made to "full" performance by either party in s 28(1), and presumably "full performance" by the alienator should include the passing of transfer to the alienee, the legislature must have intended to draw the aforementioned distinction since otherwise there would have been little, if any, purpose in enacting s 28(2).

[51] S 28(1) furthermore appears to have been designed to give content to the enrichment claims of each party to the void contract. By their nature certain of these claims are illiquid and will have to be determined, whether it be by agreement or an order of court. It is only at that stage that set off can operate and, as submitted by the applicants, it is entirely possible that the alienator's claim may, in any given set of circumstances, exceed that of the alienee's. It could thus not have been the intention of the legislature, when enacting s 28(1), to simultaneously link these claims, and in particular to permit an alienee, where transfer of ownership has passed to him but where he has only partially performed himself, to resist a re-transfer until his enrichment claims are met. This would have all of the absurd consequences to which the applicants have referred and which are set out above.

[52] I am accordingly of the view that the respondent is not entitled to resist the applicants' claim to re-transfer of the farm on the basis of a *'contract'* as

referred to in s 26 of the Estates Act; nor is he entitled to withhold re-transfer until his claims are met. The latter view is consistent with those expressed by the academic authors De Vos and Du Plessis; it is also consistent with the approach adopted by Dlodlo J in *Visser v Hull* (*supra*).

[53] In any event, as I have said, the respondent's argument that the Estates Act does not provide him with protection is misguided since he can avail himself of the procedure set out in s 35(12) thereof if he intends to object to the liquidation and distribution account. So too is his stance that the applicants' refusal to give effect to "restitution" is an attempt on their part to have the first applicant's maintenance claim met in full to his prejudice. S 2(3)(b) of the Maintenance of Surviving Spouses Act No 27 of 1990 provides that a spousal maintenance claim has the same rank in preference as that of a dependent child of the deceased. Boberg The Law of Persons and Family 2nd ed p 278 states that the maintenance claim of a spouse of a deceased person ranks after that of creditors of the estate but before that of heirs and legatees. In LAWSA 2nd ed Vol 16 at para 2.15 it is said that payment of deceased estate debts takes preference over payment of claims for support (i.e. maintenance), the latter in turn taking preference over payment to heirs and legatees. Accordingly the respondent's claim will be met before that of the first applicant's maintenance claim, irrespective of whether her claim is "exorbitant" or not; and to the extent relevant, s 2(3)(c) of the same Act provides that where the interests of the surviving spouse compete with those of dependent children of the deceased the Master may refuse to entertain a claim by the spouse until the matter is resolved by the High Court.

[54] To find in favour of the respondent would have exactly the result contended by the applicants, namely to enable him to hold them to ransom until they treat his claims as preferent. This would not only fly in the face of the Estates Act but also of the Maintenance of Surviving Spouses Act. It would also, as submitted by the applicants, expose them to personal liability in terms of s 50 of the Estates Act. There is nothing to prevent the respondent from instituting his claim against the applicants in the normal course by way of action, as was the case in *Rhoode* (*supra*); and there is similarly nothing to prevent him from lodging his claims against the deceased estate to be dealt with in terms of the Estates Act. Once the liquidation and distribution account has been finalised the applicants will be obliged, in accordance with s 35(12) of the Estates Act, to settle the respondent's claim along with those of the other creditors of the deceased estate. Having regard to the legal position relating to a spousal maintenance claim, and even on the respondent's own version, there is every possibility that his claim – whatever it is ultimately determined to be – will be met in full before any consideration need be given by the applicants to the maintenance claims of the first applicant and any dependent children of the deceased.

Costs

[55] As the applicants have been successful there is no reason why costs should not follow the result. In their notice of motion the applicants sought costs on the scale as between party and party; however in replying heads of argument filed on behalf of the applicants, they sought an order that the respondent pays their

costs on the scale as between attorney and client. Clearly no notice of the punitive costs sought had been furnished to the respondent and he was thus not afforded an opportunity to deal therewith. In any event, and in the exercise of my discretion, I do not believe that a punitive costs order is appropriate.

Conclusion

[56] **In the result I make the following order:**

1. **The main application succeeds and the respondent is ordered, within 90 (ninety) calendar days from date hereof, to take all steps necessary to transfer to the applicants in their capacities as executors in the estate of the late Hendrik Naude Van der Merwe (*'the deceased'*) the immovable property being the Remainder of Farm No. 208, Robertson, Langeberg Municipality, Division Robertson, Western Cape, measuring 181,9564 hectares, previously held by the deceased under title deed no. T2051/1985 and currently held by the respondent under title deed no. T2409/2010.**

2. **In the event of the respondent failing to comply with the provisions of paragraph 1 above, the Sheriff of the High Court, Robertson is hereby authorised and directed to take all such steps as may be necessary on his behalf to give effect to the terms of this order.**

3. The respondent shall effect payment of the applicants' costs in the main application on the scale as between party and party.

4. The counter-application is dismissed with costs on the scale as between party and party.

J I CLOETE